LAW COMMISSION OF INDIA

FIFTY EIGHTH REPORT

ON

STRUCTURE AND JURISDICTION OF THE HIGHER JUDICIARY

JANUARY, 1974

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APPENDICES

P. B. GAJENDRAGADKAR

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LAW COMMISSION,
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12, TUGHLAK ROAD,
NEW DELHI-11,
JANUARY 8, 1974

My dear Minister,

I am forwarding herewith the Fifty-eighth Report of the Law Commission on Structure and Jurisdiction of the Higher Judiciary. The first Chapter of the Report sets out the circumstances under which the Commission took up this matter for its consideration.

After the preliminary discussion of the various issues arising in the inquiry, the Commission issued a Questionnaire and invited the views of all State Governments, High Courts, Bar Associations, and other bodies interested in the problem under inquiry.

The Commission divided itself into three Groups and each Group visited the High Courts assigned to it and held discussions with the Judges of the High Courts and the members of the Bar on the questions covered by the inquiry.

After considering the various suggestions and views received by the Commission and discussing the matter at length, it has finalised its Report.

Before I conclude, I would like to invite your particular attention to the last Chapter of the Report relating to the terms and conditions of service of higher judiciary. The Commission attaches very great importance to the recommendations made in that Chapter and it hopes that the Union Government will consider our recommendations favourably and as early as possible.

So far as the present Commission is concerned, this Report is its fourteenth Report.

With kind regards,

Yours sincerely,

P. B. GAJENDRAGADKAR

Hon'ble Shri H. R. Gokhale,
Minister of Law, Justice & Co. Affairs,
Government of India,
New Delhi.

CHAPTER 1

SCOPE AND GENESIS OF THE REPORT

1.1. At the outset we would like to explain the genesis and scope of the present inquiry. The questionnaire which we issued at the commencement of the inquiry, and the preamble thereto, speak for themselves. We quote below the questionnaire along with the preamble.

"Ever since our Constitution was adopted and the Supreme Court was established, the Supreme Court has, by its verdicts rendered during the last twenty-two years, made the concept of the Rule of law relevant, coherent and stable in this country. It has consistently protected the Fundamental Rights of the citizens against unconstitutional encroachment, examined the validity of legislative and executive actions fairly, impartially and fearlessly, and introduced an element of certainty and uniformity in the interpretation of laws. The service thus rendered by the Supreme Court is of a very significant character and its importance cannot be exaggerated in the context of the federal set-up of the Indian Republic.

2. During the same period, High Courts in our States also have done valuable work in exercising their ordinary civil and criminal jurisdiction and their constitutional jurisdiction under Articles 226 and 227 of the Constitution. Broadly stated, it can be legitimately claimed that the operation of judicial process in our country during the last twenty-two years has, on the whole, fostered and strengthened the best judicial traditions and thereby deserved and commanded confidence from the Indian community in general and the litigating public in particular.

3. However, all sensitive Judges and lawyers have been feeling an increasing concern about the problem of growing arrears in the administration of justice. Delay made in the decision of cases at all stages inevitably leads to accumulation of arrears and these arrears have now assumed a somewhat alarming dimension. In fact, the problem of growing arrears has received the attention of several committees appointed from time to time. The Civil Justice Committee appointed in 1924 examined some aspects of this problem and suggested some remedies. The High Courts Arrears Committee appointed in 1949 by the Government of India under the Chairmanship of S. R. Das, J., as he then was, also examined this problem. The Uttar Pradesh Law Reforms Committee appointed in 1950-51 as well as the Judicial Reforms Committee of the State of West Bengal appointed in 1949, and the Law Commission which began its work in 1955 also considered the same problem along with other relevant matters. In 1967, the Government of India appointed another Committee to review the problem of

arrears in the High Courts and to suggest ways and means for reducing the same. This Committee was later headed by J. C. Shah, former Chief Justice of India, and it has recently submitted its Report. "One of the critical social problems", says the Committee in its Report, "is the acute congestion of cases especially in the High Courts. There is gross delay in the disposal of pending files, leading to serious dissatisfaction in the public mind about the effectiveness of Court process for ventilating the grievances of citizens."

"4. For some time past, the Law Commission has been examining the question of suggesting changes in the Code of Civil Procedure with the object of avoiding delay in the trial of suits, in the disposal of appeals, and of execution proceedings and appeals arising therefrom. Having studied this problem in depth, the Commission proposes to make certain radical recommendations to the Union Government in the belief that, if the said recommendations are implemented, the problem of delay may be solved at least to some extent.

"5. In attacking the problem of delay in judicial administration which inevitably leads to the accumulation of arrears, two factors have to be considered. The first factor is human. Judicial process must be constantly conscious of its obligation to the community to render judicial verdicts, as whatever stages the proceedings may be pending, without delay. This does not mean that judicial verdicts should be hasty or ill-considered and should be based merely on the calculation of time taken up in rendering them. Judicial process must make a consistent and determined effort to combine speed with efficiency. This aspect of the attack on arrears is, as has been just observed, human and no rules of procedure can be of material assistance.

6. The other factor is procedural. It involves the consideration, *inter alia*, of the propriety and necessity of several appeals and revisions which are at present contemplated in litigation which takes different forms and falls in different categories. Even while the Law Commission was examining the question of suggesting necessary changes in the Code of Civil Procedure, it received some suggestions—formal and informal—in relation to the wider question of delay and arrears in the High Courts and the Supreme Court; the study which the Commission now proposes to undertake is based mainly on these suggestions.

7. Before formulating the points arising from these suggestions the Commission deems it necessary to make it absolutely clear that these points do not represent the Commission's views even tentatively or its provisional thinking in the matter. The idea in posting these problems and circulating them to the different Bar Associations in the High Courts and the Supreme Court, to the High Courts and the Supreme Court is to initiate a dialogue on the question posed. It is obvious that the problems posed deserve serious consideration in all

their aspects; and views expressed by the members of the Bar and the higher judiciary and (in relation to industrial relations) by associations of employees and employers would naturally play a major role in guiding the discussion and the ultimate decision of the Commission in that behalf.

8. Let us begin with the Supreme Court. The problem of arrears in the Supreme Court had yet not assumed a significant dimension; but arrears are growing and, in course of time, they may present a real problem.

Two suggestions have been made in regard to the functioning of the Supreme Court. One is that no attempt should be made to affect the jurisdiction of the Supreme Court, wide as it is, and its authority to deal with matters covered by Articles 32, 133, 134 and 136 should not be curtailed. It is urged in support of this view that, as the highest Court in the country, the Supreme Court must continue to exercise its final authority in correcting errors committed by High Courts and other Tribunals whose decisions, orders or awards fall within its appellate purview and, though the burden imposed on the Supreme Court in discharging this vide jurisdiction may be heavy, no attempt should be made to reduce that jurisdiction. The jurisdiction of the Supreme Court under Article 32 must, of course, be maintained, because the right to move the Supreme Court in enforcement of Fundamental Rights is itself a fundamental right and it must remain inviolable.

9. On the other hand, it has been suggested by some that time has come when it should become possible for the Supreme Court to concentrate on substantial questions of law concerning interpretation of statutes and on dealing with constitutional matters involving the breach of individual citizens' fundamental rights. The advocates of this view point out that it is not fair to the Supreme Court that matters concerning dismissal of individual employees or bonus, or other industrial disputes, should be brought to the Supreme Court straight from the decisions of the Labour Courts or Tribunals. Similarly, service matters which involve considerations of an administrative character need not be brought before the Supreme Court—as they are at present.

In support of this view, it is suggested that the Union Government should revive Labour Appellate Tribunals, or set up Industrial Relations Commissions in the States and at the Union level, and these should deal with all industrial disputes, leaving it open to the aggrieved parties to move the Supreme Court under Article 136 on substantial questions of law.

10. In regard to service matters, it is urged that a separate high-powered Tribunal or Commission should be set up to deal with service matters and this Commission should be presided over by a Judge of the status of the Supreme Court Judge assisted by two independent Experts, and the decisions of this Tribunal or Commission should be

final, subject to the right of the public servant to approach the Supreme Court under Article 136 on the ground that his fundamental rights are violated. The terms and conditions of service of members of this Tribunal or Commission should be similar to those of the Judges of the Supreme Court.

11. In regard to tax matters, it is proposed that the Reference to High Courts contemplated by the Income-tax Act which invariably involves considerable delay should be eliminated and the decisions of the Income Tax Appellate Tribunals should become final, subject to the said decisions being reviewed either under Article 226 by the High Courts or under Article 136 of the Constitution by the Supreme Court.

12. Another idea, which has been suggested, is that time has come when we should think of setting up Zonal Courts dealing with appeals against decisions of the High Courts in a particular zone. This scheme would proceed on the basis of dividing the country into four Zones and the Courts would be composed of Chief Justices or Senior Judges of the High Courts in the respective States constituting the Zone. These courts would function like circuit Courts and would hold their sittings in the said respective High Courts from time to time. If this idea is accepted, many appeals, which come to the Supreme Court today, may be filed before the Zonal Courts and their decisions would be regarded as final.

13. Even in regard to Article 136 of the Constitution, it is suggested that Article 136 should be suitably amended so as to exclude from its purview civil and criminal appeals which are not covered by articles 133 and 134. In other words, so far as civil and criminal appeals are concerned, it is only such appeals as satisfy the requirements of Articles 133 and 134 that should reach the Supreme Court and no other. In this connection, attention is invited to the recent amendment of Article 133 and it is proposed that Article 134 should be similarly amended.

14. In regard to Writ Petitions pending in the High Courts, the complaint is that a large number of such petitions are filed mainly to gain time by obtaining stay orders, and ultimately it is found that they do not involve any question which justifies the interference of the High Courts under Article 226. In order to prevent the institution of unsubstantial or frivolous writ petitions, a suggestion is made that the writ Court should not issue interim stay or injunction, unless notice of the proposal to move the court in that behalf is served on the respondent and copies of all documents in support of the plea for stay or injunction are filed in court and served on the opposite party.

15. Another point which has been raised is: Should the High Courts in proceedings under article 226 of the Constitution and the Supreme Court in proceedings under article 32 of the Constitution deal

with disputed questions of fact? If yes, should oral evidence be allowed to be tendered as in ordinary trial proceedings?

16. It is in the light of these suggestions which the Commission has received, that relevant questions have been framed.

The Commission is conscious that the questions thus formulated by way of illustration needs very careful consideration, as they affect the structure of the appellate and writ jurisdictions of the Supreme Court and the High Courts in one respect or another. But the object in framing the Questionnaire is first to invite opinions of the different Bar Associations in the High Courts and the Supreme Court, and of associations of employees and employers, and of the High Courts and the Supreme Court, and then discuss the same with some of the representatives of lawyers, and employees and employers and with Judges.

The Commission would like to add that the present study has been undertaken in the first belief—which the Commission is confident is shared by the Judiciary and the Bar and employees and employers alike—that the strength and glory of our system of judicial administration rests solely on the confidence which it commands from the community, and that it should be the concern of all of us to devise, from time to time, legitimate, fair and effective ways and means of avoiding delays and accumulation of arrears.

QUESTIONNAIRE

ON

STRUCTURE AND JURISDICTION OF THE HIGHER JUDICIARY

(OCTOBER, 1972)

1. (a) Are you in favour of limiting the scope of criminal appeals under article 134 of the Constitution?

(b) If so, do you favour limiting such appeals to cases where a substantial question of law of general importance is involved?

(c) If not, do you suggest any other limitations in this regard?

2. Would you favour any modification as to the scope of appeal under article 136 of the Constitution, against judgments of high Courts?

3. (a) Do you favour the view that in petitions to the Supreme Court under article 32, disputed questions of fact should not be gone into?

(b) If so, what course would you suggest for the trial of issues of facts in such petitions?

(c) If not, do you think that evidence should be recorded in a petition under article 32 in the same manner as in a suit?

4. In relation to the grant of *ad interim* stay by the Supreme Court, in petitions under article 32, do you favour the same limitations as have been suggested below[1] in relation to the High Courts?

High Courts

5. (a) Do you agree with the suggestion that in writ petitions to the High Courts under article 226 of the Constitution, stay should not be granted, save in exceptional cases?

(b) Do you favour an amendment of the Constitution to the effect that unless the Court, for special reasons to be recorded, otherwise orders by reason of exceptional circumstances, no interim order for stay shall be asked for, in a petition under article 226, without filing evidence before the High Court that (a) notice of the intention to move the Court at a specified time and for specified relief has been or shall

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[1] See Question 5, *infra*.

be given to the opposite party; and (b) copies of all documents filed in court and intended to be relied upon in support of the application for interim relief has been or shall be served upon the opposite party?

6. With respect to the jurisdiction of High Courts under article 226 of the Constitution, do you favour the same limitations as to inquiry into disputed facts as have been suggested above[1], in relation to the Supreme Court?

Taxation

7. (a) Do you favour the creation of a National Tax Court for hearing references from the Income-tax Appellate Tribunal (or similar tribunals constituted under taxation laws of the Centre and the States), whose decisions will be final, subject only to appeals[2] as indicated below?

(b) If so, should appeals to the Supreme Court from the decisions of the Tax Court,—

(i) be allowed with special leave, or

(ii) be allowed with special leave but only if a substantial question of law of general importance is involved, or

(iii) be allowed subject to any other limitation?

(c) In the alternative, are you of the view that the decisions of the present Income-tax Appellate Tribunals (or corresponding Tribunals under other Central and State laws relating to taxation) should be final, subject to review by the High Court under article 226 of the Constitution or appeal to the Supreme Court under article 136 of the Constitution?

(d) If yes, what should be the status and terms and conditions of service of Judges of the above Court?

Industrial Disputes

8. (a) Do you favour the creation of a National Appellate Court for industrial disputes, whose decision will be final, subject to appeal as indicated below?

(b) In the alternative, do you favour the creation of a Commission for Industrial Relations as recommended by the National Labour Commission?

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1. Question 3.

2. The Special Courts contemplated in this questionnaire, will, no doubt, be composed of persons having a grounding and experience of general laws, with particular knowledge in their specified field.

(c) or, would you recommend the revival of Labour Appellate Tribunals, as they existed previously?

(d) If you are in favour of any of these alternatives, should appeals to the Supreme Court from the decisions of the proposed National Appellate Court of Labour Appellate Tribunal or National Commission on Industrial Relations—

(i) be allowed with special leave, or,

(ii) be allowed with special leave but only if a substantial question of law of general importance is involved, or

(iii) be allowed subject to any other limitations, or

(iv) not be allowed at all?

(e) What should be the status and terms and conditions of service of Judges appointed to the above court or Commission?

Disputes as to Matters relating to Civil Services

9. (a) Do you favour the creation of a court at the national level exclusively vested with jurisdiction over disputes between the Government and members of the public service in matters relating to service[1] (including, in particular, petitions based on article 311 of the Constitution), whose decisions[2] will be final, subject to appeal to the Supreme Court as indicated below?

(b) Should such a Court be presided over by a person of the status of Supreme Court Judge or High Court Judge, aided by two experts whose independence is guaranteed by their tenure?

(c) Should the experts referred to in (b) above be members of the Court, or should they be only assessors?

(d) If your answer to (a) is in the negative, what other suggestions would you make as to the terms and conditions of service of its members?

(e) Should appeals to the Supreme Court from the above court—

(i) be allowed with special leave, or

(ii) be allowed with special leave but only if a substantial question of law of general importance is involved, or

(iii) be allowed with special leave but only if a question of fundamental right is involved, or

(iv) be allowed subject to any other limitation?

(f) Besides a national Court as suggested in (a) above, do you favour regional courts for the purpose mentioned in (a) above?

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1. These would include terms and conditions of service, promotions, punishment etc
2. Compare tribunals functioning under French Administrative Law.

Zonal Courts

10. (a) Do you favour the creation of Zonal Appellate Courts, dealing with appeals against decisions of the High Courts in particular Zone?

[This scheme would proceed on the basis of dividing the country into four zones, and the Courts would be composed of Chief Justices or Senior Judges of the High Courts in the respective States constituting the Zone. These Courts would function like circuit courts, and would hold their sittings in the said respective High Courts from time to time.]

11. (a) If you are in favour of Zonal Courts of appeal as proposed above, what in your view, should be the method of appointing Judges of those Courts?

(b) Should Judges of the Zonal Courts be chosen by seniority or otherwise?

(c) What arrangements do you suggest as regards the respective jurisdiction of Zonal Courts and High Courts?

(d) Should the decision of Zonal Courts be final, or should those decisions be subject to appeal, under Article 136?

12. If you are not in favour of Zonal Courts of appeal as proposed above, have you any other suggestions for avoiding the possibility of accumulation of arrears in the Supreme Court?

Other Suggestions as to various Courts

13. Have you any alternative suggestions to make as to the status, jurisdiction, composition and personnel of the various Tribunals mentioned above?

Pay and Pension of Judges

14. Do you agree with the suggestion that one of the necessary steps to help the efficient and speedy disposal of cases in the High Courts is to attract experienced, senior and competent lawyers to the Bench, and that this object may be achieved if—

(i) the terms and conditions of service of the High Court Judges are improved;

(ii) their age of retirement is increased to 65 years;

(iii) the salaries of the Supreme Court Judges and the High Court Judges are increased or, in any event, suitable additional fringe benefits are provided for them;

(iv) on retirement, the pension of the Supreme Court Judges and the High Court Judges is made equal to their pay, or, in any case, is materially enhanced?

Miscellaneous

15. Have you any other suggestion to make as to the structure and jurisdiction of the higher judiciary or allied matters, with a view to ensuring that the higher judiciary would continue to command the confidence of the community, and would be able to perform its functions effectively, so that delays and accumulation of arrears would be avoided by legitimate and fair means?

CHAPTER 2

SOME GENERAL OBSERVATIONS

Introductory

2.1. We have already explained the scope and genesis of this Report[1]. Before we preceed to deal with the various questions, we would like to make certain general observations, which will explain in detail the theoretical background of our approach.

Re-evaluation of human institutions needed

2.2. Every human institution needs re-evaluation, and, where necessary, changes or modifications, periodically in order to meet the changing needs of time. The State, being itself a complex of important human institutions, is no exception to this rule. And the limb of the State which deals with the adjudication of disputes and the administration of justice is of very great importance.

Concept of 'law' in ancient times

2.2A. According to ancient Hindu concept, "law" sustains, supports and helps the progress of society. The Upanishads describe 'law' in eloquent words, thus:—

> "Law is the king of kings, far more rigid and powerful than they. There is nothing higher than law; by its prowess as by that of the highest monarch, truth prevails, and the weak succeed against the strong."

The function of maintaining, sustaining or supporting[2] is the essence of the word "Dharma", derived from the root 'dhr', a word corresponding to the Latin 'fir', from which the word 'firmus' (strong and durable) is derived. According to the Mahabharata[3], "law" maintains everything that has been created, "and is thus, that very principle which can maintain the universe".

The concept of justice

2.3. Justice, it has been stated[4], is a concept that has been mooted since the Sumerians, so far as recorded history is concerned. About 2050 B.C., Urnammu, King of Ur, set out a law code intended to

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1. Chapter 1, *supra*.
2. ये धर्मं धारयते प्रजाः ।
3. Mahabharata, Shanti Parva, 109, 59.
4. Earl Murphy, Book Review of Kirchheimer, *Political Justice* (1961-62) in 35 Temp. L.Q. 444.

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insure justice in the land and promote the welfare of its citizens. Because these were pragmatic people not inclined to discourse on a high level abstraction, the laws confined themselves to protection of the weak against the economically strong, the fisc against corruption, the ignorant against the knowledgeable, and to assuring punishment to perpetrators of physical harm. "It is what every law code since has sought to accomplish; and it implicitly contains an absolute concept of justice against which conduct can be measured."[1]

Its sanction

2.4. The legal order, thus, is a regime of adjusting relations and ordering conduct by the systematic application of force of a politically organised society.

The role of the higher Courts

2.5. For the maintenance and enforcement of rights and remedies, the judiciary is the principal instrument of the legal order. In the welfare State, administrative tribunals, not belonging to the traditional judicial hierarchy may be inevitable, but the ultimate check against the wrong exercise of jurisdiction by such tribunals is the judiciary. Judicial justice, therefore, is of supreme importance. Of the judicial hierarchy through which this justice is administered, the courts which constitute the higher judiciary in India, the Supreme Court and the High Courts—can be said to occupy a position of importance, not only because of the fact that they are at the apex but also because of the wide and comprehensive jurisdiction which they possess.

High Courts

2.6. Although the High Courts in India—unlike the High Court of Justice in England or the Supreme Courts of the States in Australia—do not (with a few exceptions) possess original civil jurisdiction of the ordinary character; yet, their all-pervading influence over the judicial system of the State is undisputed.

High Courts as the highest Courts of civil and criminal appeal

2.7. The High Courts are the highest courts of civil and criminal appeal, reference and revision, by virtue of the provisions in the Civil Courts Act of each State and the Cr.P.C. They have, under the Constitution, powers to issue certain orders and directions for the enforcement of fundamental rights and for other purposes. They also possess certain special jurisdictions, conferred by statutes relating to various subjects. Therefore, the uniformity of the course of judicial decisions is, in a large measure, secured by the effective exercise of the powers of High Courts. This proposition may sound elementary; but it is fundamental.

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[1]. Earl Murphy, Book review of Kirchheimer, *Political Justice*, (1961-62) in 35 Temp. L.Q. 444.

The Supreme Court

2.8. The Supreme Court, in our Constitution, also performs a multiple role, and has jurisdiction much wider than the highest Court of any other country. It is a federal court, in the sense that it is the exclusive arbiter of disputes between the Union and the States or between one State and another. It is the highest constitutional court of the country, not only in its capacity as the protector of fundamental rights as a court of original jurisdiction, but also in its capacity as the final court of appeal in matters involving substantial questions of law as to the interpretation of the Constitution. It is a national court, in the sense that, subject to certain restrictions, appeals lie to it from the judgments of the High Courts on questions pertaining to ordinary law, that is to say, even where the question is not one of constitutional law.

The Supreme Court has also certain important varieties of special jurisdictions: in particular, it has an over-riding power 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 any court or tribunal constituted by or under any law relating to the armed forces. The Supreme Court occupies such an important place in the structure of our Constitution that the Constitution expressly provides that the law declared by the Supreme Court shall be binding on all courts and authorities in India, and that all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.

The need for review

2.9. Moreover, in India, the organisation of the Courts has not just evolved, as has happened in some other countries. The judicial hierarchy has been deliberately created by statute, and the whole organisation of the courts is based on a rational plan. In order that the machinery of justice so created may concentrate upon its legitimate task, and meet speedily and efficiently the constantly varying demands made upon it, it is desirable, as we have already stated[1], that the machinery should be subjected to periodical review. Social and economic conditions undergo changes and pose new problems, and the judicial system should, therefore, be re-examined from time to time in order to ensure that it adapts itself to perform, in an efficient manner, the functions entrusted to it by the Constitution and the laws. In this process, some of the assumptions with which we have been familiar, might require re-examination.

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1. Para 2·2, *supra*.

Task of law reform

2.10. It is the task of law reform to adapt the law to "the ever shifting phases which human affairs assume."[1] The time has now come when it is necessary to examine how far our method of adjudication of disputes is adequate to meet the requirements of the general welfare. There need not be any undue conservatism in this regard.

Frankfurter has noted[2]:—

> ".....framers of judiciary Acts are not required to be seers, and great judiciary Acts, unlike great poems, are not written for all times."

No reason to be complacent

2.10.A. Some years ago, Chief Justice McRuer (of Ontario, Canada) said,[3] that—

> "In Canada, we have some reason to be proud of our judicial process, but we have no right to be smug."

This applies to India also. We have sound judicial traditions; a coherent pattern developed for the organisation of the judiciary; and a rational and systematic judicial process. There is no doubt that these factors have conferred great advantages on the country. An independent and efficient judiciary, a unified judicial system, and a modernised procedure—though legacies of the pre-independence year,—have been cherished by us. The judicial system has earned the respect of the people, and the respect so earned is well deserved.

Feeling that system has not proved beneficial

2.11. Nevertheless, "we have no right to be smug". In certain quarters, there is a growing feeling that the present system has not worked to the benefit of the common man. We have to take note of this feeling, and seriously consider the question whether the system has any short-comings that could be remedied. Society can only stand to gain from such an inquiry. It is, thus, the object of this enquiry to consider how best the higher judiciary—the Supreme Court and the High Courts—can discharge their functions in the most satisfactory manner.

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1. A phrase used by Goodhart in English Contributions to the Philosophy of Law (1948), pages 27-34.

2. Frankfurter, Business of the Supreme Court.

3. McRuer C.J., Lectures on the Evolution of the Judicial Process, page 73 (the W. M. Martin Lectures delivered at the University of Saskatchewan in 1956) (published in 1957 by Clarke, Irwin-Co. Ltd.), quoted by Horace Read, "The Judicial Process in Common Law Canada", (1959) 37 Canadian Bar Review 263, 265.

Earlier inquiries

2.12. The inquiry which we have undertaken is not the first of its kind. In previous Reports of the Law Commission, procedure in Civil[1] and criminal[2] matters has been dealt with comprehensively. The jurisdiction of the Supreme Court on the civil appellate side, has been the subject-matter of the Law Commission's Reports[3]. The main objectives, in the previous Reports of the Law Commission[4], have been to reduce delay and expense in the judicial process, to simplify the procedure, and generally to advance the interests of justice. In a sense, the present inquiry is a logical continuation of the work already undertaken.

The present context

2.13. During the last 25 years, not only has the volume of business brought to the various courts increased, but the nature of litigation has also assumed a new shape. This enlarged volume of business and its ever-changing nature have naturally created serious problems in the working of the higher judiciary. Any attempt to improve the system must devote attention to the factors relevant to the efficiency of those who work the system, and to the procedure by which the system is worked day-to-day.

Questions selected for consideration

2.14. Bearing in mind the above considerations, we have selected, for examination, such questions concerning the jurisdiction and structure of the higher judiciary as require urgent attention. As we have pointed out[5], this selection was not made on any theoretical basis, but on pragmatic considerations and keeping in view the gravity and nature of the problems, as disclosed by our experience in this field.

Appellate jurisdiction of the Supreme Court

2.15. We shall now briefly refer to the principal questions dealt with in this Report.[6] With reference to the appellate jurisdiction of the Supreme Court, it appeared to us that it might be convenient to deal with its jurisdiction in criminal appeals under article 134, since we have already recommended an amendment of the corresponding

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1. 27th and 54th Reports.
2. 37th and 41st Reports.
3. 44th and 45th Reports.
4. Including the 14th Report.
5. See Chapter I.
6. For the questionnaire, see Chapter I, *supra*.

article relating to civil appellate jurisdiction[1], and our recommendation has been accepted[2] by the Government and has already become law. The basic approach which we have emphasised is that the docket of the Supreme Court should not be burdened with questions of fact or minor questions of law, and its main role as far as appellate jurisdiction is concerned, is that of dealing with such substantial questions of law of general importance as need to be decided by the Supreme Court.

Conditions essential for creative task

2.16. Felix Frankfurter once spoke[3] of "the conditions essential for the kind of creative tasks which are involved in the effective exercise of the Court's jurisdiction, which means essentially a feeling of serenity of mind and an absence of jostling", and he referred especially to jostling due to too many problems occupying the attention of the court. The relevance of these weighty comments to our system is obvious.

Question of proper role of the Supreme Court

2.17. There is another aspect relevant exclusively to the Supreme Court, which requires consideration[4]. The basic question that has presented itself is this—what ought to be the proper role of the Supreme Court? Should its role be conceived as primarily one of upholding the Constitution and interpreting the supreme law of the country, thereby constituting it, in the proper sense, the "Supreme" Court of the country? Or, should that Court be required also to deal with ordinary judicial business, the determination of questions of ordinary civil and criminal liability, questions concerned with the fortunes of individuals and the fate of particular criminals? As we will point out later[5], two views are possible on this issue. But, for the purpose of making the present Report, we have not thought it necessary to record a formal or final decision in that behalf.

Instinct for appeal

2.18. In this context, we may examine the structure of appeals.

The instinct for appeal is human. St. Paul's famous cry—"I appeal unto Caesar", expresses a fundamental instinct in humanity, as has

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1. 45th Report of the Law Commission.

2. Constitution (30th Amendment) Act.

3. John H. Manfield (Professor of Law, Harvard Law School, formerly Law Clerk to Mr. Justice Frankfurter) in (1955) 78 Harv. L. Rev. 1529, 1531.

4. See para 8 of the Prefatory note to the Questionnaire (quoted in Chapter 1).

5. See Chapter 3, *infra*.

been pointed out[1]. Nevertheless, it is also recognised that there must be an end to litigation. Though provisions for appeals are essential as providing checks and counter-checks for arriving at a correct decision, some reasonable limits have to be set to the search for a true and correct decision.

The U.S. Supreme Court compared

2.19. A comparison with the U.S. Supreme Court is worthwhile in this connection. It is well-known that, as a matter of working practice, the Supreme Court of the U.S.A. by exercising discretionary control over its own jurisdiction, has become essentially a 'public law tribunal'[2]. The workload of the court places a premium on the time of the Justices, which is, as Justice Frankfurter noted, directly related to the quality of their judicial work-product.

"The judgments of this Court are collective judgments. They presuppose ample time and freshness of mind for private study and reflection in preparation for discussion at Conference." "Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; 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."[3]

Courts of appeal in the U.S.A.

2.20. In the U.S.A.[4], the courts of appeals are the vital centre of the federal judicial system, in two respects. With few exceptions, federal litigation ends in the courts of appeals; less than three per cent of the cases decided are considered by the Supreme Court. Although the filing of cases in the district courts increased only sixteen per cent in the past seven years, filing in the courts of appeals increased one hundred per cent during that time. During the same period, the Supreme Court has kept its review of cases at a fairly constant numerical level.

In West Germany

2.21. It may also be noted that the Constitutional Court of West Germany is, by constitution, statute and practice, a specialist tribunal, which has jurisdiction only over constitutional issues.[5]

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1. Lord Evershed (formerly, Sir Raymond Evershed).

2. See Frankfurter and Landis, "The Supreme Court under the Judiciary Act of 1925", (1925) 42 Harv. L. Rev. 1, 18.

3. *Dick v. New York Life Ins. Co.* (1959) 359 U.S. 437, 458-459 (dissenting opinion).

4. J.W. Lumbard (Chief Judge of one of the U.S. Court of Appeals) "Courts of Appeal" (1968) 54 Cornell Law Rev. 29.

5. Mc. Whinney, "Judicial Restraint and the West German Constitutional Court", 1961) 75 Harvard Law Review 5, 6.

The tradition in Commonwealth countries

2.22. It would, we think, not be inappropriate to refer to the remark that "It has been something of a fetish in Commonwealth nations that final appellate tribunals should be courts of comprehensive jurisdiction, embracing both private and public law with the bulk of their business normally being private law."[1]

Appellate jurisdiction of the Supreme Court

2.23. The essence of the matter is that it is desirable that the highest Court in the country should concentrate on questions of national importance. If this be the approach, it may be desirable to have a fresh look at the appellate jurisdiction of the Supreme Court, and to consider how far that jurisdiction should be restricted in harmony with this approach, and to maintain uniformity with the amendments which have been already made in regard to appeals to the Supreme Court in ordinary civil proceedings.[2]

Writ jurisdiction of the High Courts

2.24. The next topic to be mentioned concerns what is usually referred to as "Writ jurisdiction". Under article 226 of the Constitution, the High Courts have been vested with jurisdiction to issue directions, orders and writs for the enforcement of fundamental rights and for other purposes. These include writs in the nature of the five "prerogative writs", as usually known to students of constitutional and administrative law, but the orders and directions which can be issued by the High Courts are not necessarily confined to them. The jurisdiction to issue such writs was, before the Constitution, possessed by only a few High Courts. The constitutional jurisdiction is now exercisable by every High Court, and its popularity is now well-known.

Two important procedural aspects

2.25. We are not, at the moment, concerned with a consideration of the scope of this jurisdiction. But, in order that this jurisdiction of the High Court may be exercised in the true spirit in which it is intended to be exercised and also in order that justice may be done to all parties concerned who are likely to be affected by the exercise of this jurisdiction, it appeared desirable to examine a few aspects of the jurisdiction. This was not an academic exercise, because the very large

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1. Mc. Whinney, "Judicial Restraint and the West German Constitutional Court", (1961) 75 Harvard Law Review 5,6.

2. See Constitution (30th Amendment) Act, Amendment of article 133.

number of petitions under article 226 which are filed and disposed of in almost every High Court, justified a look at some of the procedural aspects, not with the object of any unnecessary tampering with the present rules, but with the object of ensuring that the power of the High Court is exercised in the best interests of justice. Two matters appeared to require attention; first, the question of interim orders issued on such petitions for the duration of the main proceedings, and secondly, the trial of disputed questions of fact in such proceedings. These questions are also relevant to the similar jurisdiction of the Supreme Court exercisable under article 32 of the Constitution.

Certain special types of matters brought before the Supreme Court and High Courts

2.26. Apart from ordinary civil and criminal litigation, and petitions for writs, certain special types of matters are often taken to the Supreme Court under its special appellate jurisdiction or under its writ jurisdiction. Similarly, such matters are often agitated before the High Court, by invoking the jurisdiction to issue orders and directions in the nature of writs. These attempts naturally increase the judicial business of the Supreme Court and the High Courts, and, in consequence, the decision of really important constitutional matters as well as of ordinary civil and criminal appeals may sometimes get delayed. This is one aspect of the matter which we have to examine. We indicate below in brief the special types of matters which we have in mind.

Challenges against quasi-judicial decisions

2.27. As the position stands at present, the Constitution leaves it open to a party aggrieved by a decision of a judicial or quasi-judicial authority on many matters to approach the Supreme Court[1] and seek special leave to appeal from the decision of the authority, or to challenge certain action of a judicial or a quasi-judicial authority before the High Court in its writ jurisdiction. The parties cannot be blamed for invoking the constitutional jurisdiction. But, in respect of certain matters, which are of a very specialised character, the question to be considered was whether a specialised judicial machinery could be set up or certain changes could be made in the existing procedure so that justice could be done better and more speedily.

Number of service cases and labour disputes and taxation matters

2.28. It is common knowledge that a substantial percentage of the petitions filed before the High Courts invoking its writ jurisdiction under article 226 of the Constitution relate to the terms and conditions

1. See para 9 to 11 of the prefatory note to the Questionnaire (quoted in Chapter 1).

of service and promotion and punishment of Government servants. It appeared to us that an improvement in the disposal of disputes relating to these matters would benefit the private litigants as well as the Government. Determination of these disputes require special knowledge and experience.

There was also a feeling that the Supreme Court and the High Courts were unnecessarily burdened with industrial disputes and matters relating to taxation. Industrial disputes should be settled promptly and it cannot also be denied that their decision requires knowledge and approach of a specialised character. It is not appropriate that they should congest the calendar of the highest Court in the land. Matters relating to taxation, again, should be disposed of promptly. In both these cases, considerations of national economy are at stake.

Three types of cases

2.29. Adopting these criteria, we applied ourselves to the task of enquiring how, in respect of three selected matters, the present judicial machinery could be amended, or the procedure could be revised, as stated above. These three matters were—disputes relating to direct taxes, disputes concerning industrial relations, and disputes arising out of service under the Union or a State. Here again, the selection of topics was made not on any theoretical basis, but on the basis of the practical importance of the subjects in question.

Suggestions for 'Zonal' Courts

2.30. There fell also[1] to be considered a suggestion for an intermediate Court between the High Court and the Supreme Court for the disposal of appeals. This idea took the shape of "Zonal Courts", which would take over from the High Court such appellate jurisdiction as is exercised by the Division Benches of the High Court: there would be Zonal Courts for 5 or more zones into which the country could be divided. The main objective was not the reduction of arrears in the High Courts, but the bringing into being of a Court which would be removed from local influences and which would facilitate the mobility of the Bench and the Bar. In other words, the process of national integration on the judicial side would be furthered by the creation of such courts.

Some other connected questions

2.31. In order to secure a better functioning of the higher judiciary, it also become necessary to consider the possibility of improvements in salaries and conditions of service of its personnel.

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1. See para 12, prefatory note to the questionnaire (quoted in Chapter 1).

Questionnaire

2.32. Having selected the problems, we gave some thought to these matters and issued a Questionnaire. The Commission had not then formed any conclusions (even provisional) on any of these issues. But these issues required serious consideration, and, in order that there may be a public debate on the subject, in which knowledgeable persons and bodies can participate, and in order to ensure that those participating in such debate make a useful constribution, the Commission considered it desirable to define the broad issues to be considered and to elicit opinion thereon.

2.33. It was with the above object in view that the Commission prepared a short Questionnaire. The Questionnaire was not to be taken as representing the views of the Commission, tentative or otherwise. As stated above, the object was to put the issues before the public, and to invite well-informed opinion thereon, thereby facilitating a dispassionate, careful and constructive consideration of the problem in all its aspects. The Commission is grateful to all those who co-operated with it by answering the Questionnaire and by participating in oral discussions.

The problem of arrears

2.34. We are fully conscious of the difficulty of devising satisfactory solutions for the problems that will come up for consideration in the present inquiry. In particular, the problem of delay and arrears is a difficult one to solve.

The causes of arrears

2.35. As has been observed in the U.S.A.,[1]—

> "There is no simplistic solution to a pattern of delay such as these cases illustrate; if there were, we would not have the problem. The causes are numerous. They vary from case to case and from place to place. The delay is more pronounced in urban centres where the caseloads are heaviest. Causes include inadequate court personnel (both in number and in training), outdated procedures, the multiplicity of pleadings and appeals and, frequently, delay in preparation of transcripts. The historical resistance of legislatures and the Congress to providing a court with the money, personnel and facilities they need to meet increased caseloads may be an important factor."

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1. Robert W. Meserve (President, American Bar Association) in (1972) American Bar Association Journal, 1129, 1132.

Litigation not an evil

2.36. We should make it clear that we do not regard litigation as an evil. Thurman Arnold has analysed the source of judicial prestige in terms of the dichotomy between substantive law and procedure. He has pointed out that many institutions other than courts settle disputes. Yet, of all the institutions engaged in the settlement of disputes, courts alone had "found a way of doing it which has brought them overwhelming prestige and respect"[1]. Courts are bound by precedent", Arnold noted, while "bureaus are bound by red tape". Arnold added: "It is obvious that our belief that courts are the chief guardians of the supremacy of law is the reason why we adopt such a respectful attitude toward them."

Increase in case-load to be anticipated

2.37. What should, however, receive attention is that appellate case load will, in future, increase and not decrease. This work-load may eventually pose a challenge. We have to visualise the financial and human needs of an appellate system competent to carry what has been described as the "burdens that will be thrust upon it in the coming generation of conflict and change."[2]

Effective response to this challenge demands initiative and planning by all concerned with the state of the appellate process,—a process which has been described as "inter-dependent phases of a single system performing a vital social task."[3]

Problems considered

2.38. It is in the light of these considerations that we proceed to consider, in detail, the problems relating to the structure and jurisdiction of the higher judiciary that seemed us to need solution.

Arrears not the major consideration

2.39. At this stage, we ought to make it clear that the question of growing arrears is not the sole or major consideration which weighed with us. Our object has been to review the judicial system, in so far as it relates to the topics mentioned above, and to suggest reforms

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1. See Arnold, "The Role of Substantive Law and Procedure in the Legal Process" (1932) 45 Harv. L. Review 617, 627. 630.

2. Winslow Charistian (Justice of the California Court of Appeals), "Delay in Criminal Appeals". (1971), Stanford Law Review. 676, 702.

3. Winslow Christian (Justice of the California Court of Appeal), "Delay in Criminal Appeals" (1971), Stanford Law Review, 676, 702.

wherever they appeared to be reasonable and necessary. It is hardly necessary to add that the ultimate beneficiaries of these reforms are the citizens of the nation, and not this or that branch of the State.

Object of Reforms

2.40. We may refer, in this connection, to what the Lord Chancellor said,[1] in England, in the Debate on the "Administration of Justice Bill," in 1934—

> "Some reforms are designed both in the interests of the State and of the individual, to ensure economy and expedition in the administration of the law; others are intended in the interests of the litigant himself."

Principal questions dealt with

2.41. The principal questions which we propose to deal with in the following Chapters are as follows:—

(a) **Supreme Court**

Criminal appeals to the Supreme Court.

Appeals to the Supreme Court by Special Leave.

Petitions for writs before the Supreme Court—Questions of fact.

Petitions for writs before the Supreme Court—Grant of Interim stay.

(b) **High Courts**

Petitions for writs before the High Courts—Grant of Interim stay.

Petitions for writs before the High Courts—Questions of fact.

(c) **Specialised matters**

Matters relating to taxation.

Disputes concerning Industrial Relations.

Disputes concerning matters arising out of service under the State.

(d) **Zonal Courts**

Other suggestions concerning various Tribunals.

(e) **Other suggestions**

Other questions concerning the higher judiciary, including conditions of services.

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1. H.L. Debates (Administration of Justice Bill), 5th June, 1934, Col. 789.

CHAPTER 3

APPEALS TO THE SUPREME COURT

Criminal appeals

Questions dealt with serially

3.1. Of the questions included in our Questionnaire, which we now proceed to discuss serially, the first two questions relate to the appellate jurisdiction of the Supreme Court. We shall first take up the criminal appellate jurisdiction of the Supreme Court. Article 134 of the Constitution reads thus—

> "134. Appellate jurisdiction of the Supreme Court in regard to criminal matters.—(1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court—
>
> (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or
>
> (b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or
>
> (c) certifies that the case is a fit one for appeal to the Supreme Court;
>
> Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of article 145 and to such conditions as the High Court may establish or require.
>
> "(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law."

Act of 1970

3.2. It may be stated with reference to clause (2) of article 134 that Parliament has passed legislation[1] enlarging the scope of the appellate jurisdiction of the Supreme Court.

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1. Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 (28 of 1970.)

Criminal appeals to the Supreme Court.

3.3. Question 1 in our Questionnaire deals with the criminal appellate jurisdiction of the Supreme Court. The question is as follows:—

"1. (a) Are you in favour of limiting the scope of criminal appeals under article 134 of the Constitution?"

"(b) If so, do you favour limiting such appeals to cases where a substantial question of law of general importance is involved?

"(c) If not, do you suggest any other limitations in this regard?"

Article 134(1) (a) and (b) and 1970 Act not dealt with

3.4. We may make it clear that our enquiry is not concerned with sub-clauses (a) and (b) of clause (1) of article 134 of the Constitution[1]. The appeal under those two sub-clauses is a matter of right, and there is no question of disturbing that provision. Similarly, we do not in this Report propose to suggest any modification in the Act of 1970[2]. In order to deal with the provisions of Article 134 as a whole, or in order to make comparisons where necessary, we have, in the ensuing discussion, naturally referred to the position under those two sub-clauses and under the Act of 1970. But the discussion should not be construed as suggesting any amendment of those sub-clauses or of the Act of 1970.

Gist of replies

3.5. The replies on our question[3] are evenly balanced in favour of and against the amendment put forth in the query.

Some Judges[4] of the Supreme Court, who have responded to our Questionnaire, have in their reply favoured limiting the scope of criminal appeals by deleting sub-clauses (a) and (b) of article 134(1). They suggest that the scope of criminal appeals under article 134 of the Constitution should be limited to cases where a certificate that it is a fit case for appeal to the Supreme Court is obtained under article 134(1) (c). The replies of High Courts and High Court Judges on this question are almost evenly balanced.

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1. Paragraph 3·1 *supra*.
2. Paragraph 3·8, *infra*.
3. Para 3·3, *supra*.
4. S. No. 50.

Views favouring limitation in a modified form

3.6. Limitation of the scope of appeals under article 134 but in a modified form has been favoured in some of the replies received by us. For example, there is a suggestion[1] that in every case where the sentence of death is awarded, there should be a right of appeal, besides cases where a substantial question of law of general importance is involved. Another suggestion[2] is that in every case of life imprisonment, appeal be allowed.

Then, there is a suggestion[3] that clause (c) of Article 134 (1), should be totally deleted, since Article 136 serves well the purposes intended to be achieved by article 134(1)(c).

Some of the replies,[4] while not favouring a change in Article 134, express the view that the parliamentary legislation[5] passed under Article 134 (2) should be repealed.

In addition, several Judges and members of the bar have, in oral discussions, expressed their views on various aspects of the question.

We now proceed to deal with the present position, and the question whether an amendment is needed.

Present Position

3.7. The legal framework as to the right of appeal in criminal cases in India, appears to rest upon one broad principle, namely, the desirability of allowing one appeal as of right, both on facts and on law, in respect of a conviction for the first time in a case. Appeals from such judgments of courts other than the High Court are allowed in all cases (barring certain minor cases[6] in which the sentence does not exceed a specified period of imprisonment or a specified amount of fine, or where a plea of guilty is accepted.) Appeals from judgments of the High Court, before which a conviction is ordered for the first time, are limited to serious offences,[7] obviously to prevent the Supreme Court from being troubled with less important cases.

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1. S. No. 19.
2. Oral discussions (Madras Bar).
3. S. No. 41 (a High Court Judge.)
4. S. No. 36 (four Judges of a High Court.)
5. The Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970.
6. Section 413 and 414, Cr. P.C. 1898.
7. The exceptional provision in section 411A (4), Cr. P.C. 1898, is now almost obsolete.

3.8. Reading together article 134 (1) (a) and (b) and the recent Act[2] of 1970, broadly speaking, an appeal against such conviction lies to the Supreme Court, if the High Court has reversed an acquittal or withdrawn a case and tried it itself, and passed a sentence of death,[3] imprisonment for life or imprisonment for not less than 10 years.[4]

3.9. In other cases, there is no unqualified right of appeal, and, as is evident from article 134 (1) (c) of the Constitution, an appeal lies only if the High Court certifies the case to be a fit one for appeal to the Supreme Court.

3.10. This can be illustrated with reference to article 134 (1) (a) and (b) of the Constitution. Thus, by virtue of article 134(1)(a), where a person acquitted by the Court of Session is, on an appeal against acquittal, convicted by the Appellate Bench and sentenced to death, he has a right of appeal to the Supreme Court, because as Dr. Ambedkar observed, the initial presumption of innocence is, in this case, further strengthened by the fact that the trial Judge had found him innocent.[5] If, in such cases, the Appellate Bench finds him guilty and sentences him to death, it is certainly a matter which requires further investigation.[6] Similarly, article 134 (1) (b) provides a right of appeal to a person who, having been tried after withdrawal of the case by the High Court is convicted and sentenced to death; here the right of appeal is based on the principle that a person who has been convicted for the first time and condemned to death, ought to have at least one appeal.[7] The Act of 1970 has extended this right to cases where the High Court setting aside an acquittal passes a sentence of life imprisonment or imprisonment for ten years.[8] As already stated, the appeal to the highest Court is, of course, limited to serious cases. Chief Justice Pratt observed long ago, that "it is the glory and happiness of our excellent Constitution that, to prevent any injustice, no man is to be concluded by the first judgement; but that, if he apprehends himself to be aggrieved, he had another court to which he can resort for relief".

In the present inquiry, we have no intention to consider any changes in article 134(1) (a) and (b) of the Constitution. We are concerned

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2. Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970.
3. Article 134(1)(a) and (b).
4. Act of 1970.
5. See Dr. Ambedkar's Speech, Vol. 8, Constituent Assembly Debates 853 (14th June, 1949).
6. Dr. Bakshi Tek Chand's Speech, Vol. 8, Constituent Assembly Debates, page 851 (14th June, 1949).
7. See Dr. Ambedkar's Speech, Vol. 8, Constituent Assembly Debates, page 853. (14th June, 1949).
8. The Supreme Court (Englargement of Appellate Criminal Jurisdiction) Act 1970.

with cases outside them and outside the Act of 1970 where redress is still sought from a superior tribunal.

Rational and sound guideline desirable

3.11. The grounds on which a certificate can be granted under article 134 (1) (c) are not stated in the article. Judicial decisions have laid down broad guidelines,[1] but, in the interest of uniformity and certainty, it is desirable that the test should be indicated in the Constitution. Our primary concern, therefore, in dealing with this aspect of the problem has been to devise a rational and sound formula, which would be objective and would furnish clear guidelines to the High Courts in considering applications for certificate under article 134 (1) (c).

Special aspect of Criminal cases as involving liberty considered

3.12. We ought to state that while we considered the question of amending article 134 (1) (c) of the Constitution, we gave anxious consideration to the fact that, unlike civil cases, criminal cases involve a question of life and liberty of the citizen. After elaborate consideration, however, we came to the conclusion that amending article 134 (1) (c), on lines similar to those on which article 133 (1) (c) has recently been amended by Parliament in pursuance of out recommendation, would cause no hardship or injustice. In our view, cases of grave miscarriage of justice can be easily saved and covered under article 136 of the Constitution. Whenever the Supreme Court is satisfied that in criminal proceedings, the ultimate verdict of the High Court has caused grave miscarriage of justice, its jurisdiction to grant special leave to the litigant, aggrieved by such a verdict, is unlimited; and so, amending article 134 (1) (c) would cause no real hardship.

Effect of the recommended change

3.13. It is true that if article 134(1) (c) is amended in accordance with our recommendation, it will not be possible for a party aggrieved by the appellate judgement of the High sourt in a criminal proceeding to ask for a certificate for appeal to the Supreme Court unless the case falls within one or the other of the sub-clauses of article 134(1). But, this position is subject to the right of the party aggrieved to move the Supreme Court for special leave to appeal against the judgement of the High Court under Article 136, even though the requirements of article 134(1) are not satisfied.

Embarrassment likely to be caused to High Court as to certificate on questions of fact

3.14. Besides, the amendment which we are going to propose would, in substance, give the intending appellant a right to claim a certificate where he is able to satisfy the High Court that a substantial question of law of general importance has arisen which, in the opinion of the High Court, needs to be decided by the Supreme Court.

[1] See: Paragraph 3·24, *infra*, for the present guide lines.

Incidentally, it is not difficult to appreciate that in cases of alleged grave miscarriage of justice, the High Court may feel embarrassed to grant the certificate under the existing clause (1)(c) of article 134 on the ground that its verdicts has, **prima facie**, causes grave miscarriage of justice; whereas the Supreme Court will feel no such embarrassment in dealing with the same question under article 136. It is, therefore, logical not to keep the jurisdiction of the High Court too wide and indefinite. That is why we have decided to recommend a suitable amendment in article 134(1)(c) which will make it similar to the amended article 133(1)(c).

Findings of High Court to be final on facts

3.15. One of the reasons which have weighed with us in recommending the amendment of article 134(1)(c), is that, ordinarily, findings of fact, recorded by the High Court should be final. Similarly, ordinarily, the conclusions recorded by the High Courts on questions of law should also be final unless there is a divergence of judicial opinion or the question of law is otherwise of general importance. The formula which we have decided to adopt is that certificate should be granted if the intended appeal involves a substantial question of law of general importance, which in the opinion of the High Court needs to be decided by the Supreme Court. The same expression has been used by us in our Report dealing with the amendment of article 133(1)(c) of the Constitution.

Implications of proposed amendment

3.16. In that Report, we had elaborately explained the implications of the amendment which we had then recommended. Shortly stated, the adoption of this formula means that if the appeal in question of law on which there is a divergence of opinion amongst different High Court or the point of law is important, because it is one of first impression and is of general significance, the appellant is entitled to a certificate because it is the primary function of the Supreme Court to resolve such divergence on important questions of law. It is the privilege and duty of the Supreme Court to introduce uniformity in the interpretation of laws and where a divergence of opinion is expressed by the High Courts, the party is justified in seeking a verdict of the Supreme Court on such a question of law of general importance.

Well settled questions of law not to be certified

3.17. If, on the other hand, the appeal involves a question of law on which there is no divergence of opinion, in the view expressed by other High Courts, then, such well-settled points of law need not be brought to the Supreme Court. That is one implication of the formula which have adopted.

3.18. The other implication of the formula is that findings of fact recorded by the High Court while exercising its appellate jurisdiction

should, except in cases covered by article 134(1)(a) and (b), or the Act of 1970, ordinarily be treated as final, and their propriety or correctness should not be liable to be challenged by way of appeal unless the Supreme Court is persuaded to grant special leave in such matters. It is well-known that there are no uniform or mathematical yardsticks which judicial approach can adopt mechanically in appreciating oral evidence, and it is generally on oral evidence that the decision in the criminal trials depends. Experience shows that two judicial minds, appreciating the same evidence, may not always reach the same conclusion. But that is no reason why the test of finality should not be applied in dealing with criminal matters at the stage where the High Court, in exercise of its appellate jurisdiction, has considered the evidence, weighed the pros and cons urged in respect of it, and pronounced its verdict. From this point of view, the fact that the verdict of the High Court affirms the decision of the trial court, or reverses it is not, in itself, material. We thought it necessary to explain briefly the implications of the formula because, as we have already indicated, the conclusion is that the scope of article 134(1)(c) should be placed on the same basis as that of article 133(1)(c), as amended in accordance with our recommendation.

Article 136

3.19. In conclusion, we must re-emphasise that, notwithstanding the limitations sought to be imposed by amending article 134(1)(c), the jurisdiction of the Supreme Court under article 136 remains totally unaffected.

Effect of proposed amendment on work-load of Supreme Court

3.20. Before we part with this aspect of the matter, we may incidentally refer to another consideration. In the absence of proper and definite guidelines, which would assist the High Court in disposing of applications for certificates made article 134(1)(c), certificates are on some occasions granted when it is ultimately found that such grant of certificates was really not justified, and the granting of certificates in such cases tends to add to the load on the docket of the Supreme Court. If the formula which we are recommending is accepted, it is not unlikely that this unjustified addition to the work-load on the calendar of the Supreme Court may be reduced, if not altogether eliminated. When we refer to the work-load on the calendar of the Supreme Court, we are indirectly referring to the problem of growing arrears which the Supreme Court has to face. Accumulation of large arrears must be regarded as a relevant consideration in revising the structure of the higher judiciary. Our approach is that the significance of this consideration should not be unduly exaggerated. Nor can this consideration be treated as decisive in devising a mechanical formula, which is otherwise not rational, reasonable or fair.

Some figures

3.21. Considered from this point of view, it may be relevant to indicate the position in regard to the number of criminal appeals in the Supreme Court during the last 3 years.

3.22. We may refer to a few figures at this stage. The number of criminal appeals to the Supreme Court during the last three years was as follows[1]:—

	1969	1970	1971
(*a*) Number of appeals at the opening of the year.	563	505	538
(*b*) Number of appeals instituted during the year.	262	234	338
(*c*) Number of appeals disposed of during the year	220	201	289

NOTE:—These figures are both under article 134 and Article 136 of the Constitution.
Separate figures are not available.

These figures show, a slow but steady increase.

Amendment will only codify existing interpretation

3.23. We may also point out that our recommendation does not really constitute a new or radical change. Even at present, the usual practice followed by the High Courts is to grant a certificate under article 134(1)(c) only in cases where questions of law of general importance are involved. This is clear from many pronouncements of the Supreme Court. Though clause (1)(c) of article 134 does not expressly say so, it has been judicially interpreted by the Supreme Court as confined to such cases. The proposed amendment will, thus, give legislative recognition to the judicial interpretation of the existing clause. In support of this statement, we shall refer to some decisions of the Supreme Court by way of illustration.[2]

Decisions

3.24. In referring to these decisions here, our object is to draw attention to the fact that not only the Supreme Court, but the High Courts that have had occasion to consider applications for the grant of certificate, have, broadly speaking, taken the view that the certificate is to be granted only where certain important questions are at issue. This unwritten limitation—we do not use the word "limitation" in any rigid sense—sometimes finds expression, while sometimes it is the implicit basis for the grant or refusal of a certificate. Proceedings for the grant or refusal of the certificate are not usually reported. But, on a perusal of those cases in which judicial pronouncements fell to

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[1] Statement No. S-4.

[2] Para 3·26, *infra*.

be made, as also from oral discussions with the judiciary and the bar at various places, we have no doubt that such is the position.

3.25. The jurisdiction of the High Court to certify a case as a fit one for further appeal is, to a certain extent discretionary, and, like the jurisdiction of the Judges of the Divisional Court in England to give or to refuse leave to appeal to the Court of Appeal from their own decisions is, (to use the epithet employed[1] by Lord Esher M.R. in relation to that jurisdiction), a "very declicate one."

Jurisdiction unlike an ordinary Court of criminal appeal

3.26. Though the discretion of the High Court is not expressly limited, it is well recognised that the jurisdiction under article 134(1)(c) is not that of an ordinary court of criminal appeal, and the High Court, before it certificates the case, must be satisfied that it involves some substantial question of law of principle and not merely a question of law of principle and not merely a question of appreciation of evidence.[2] No doubt, the fact that this article deals with criminal cases, will be borne in mind while granting the certificate. But, at the same time, a certificate granted on questions of fact without disclosing any substantial question of law or principles, may not be acted upon by the Supreme Court.[3] If the appeal is under Clause (a) or clause (b) of article 134(1), it is as of right;[4] same is the position where the appeal is under the recent Act of 1970.[5] But the appeal under clause (c) lies only on a certificate and the requirement of a certificate itself implies that there should be something more than what is required for an ordinary appeal under the Code of Criminal Procedure. In considering the question of granting or refusing the certificate, the High Court must take note of the fact that except in cases falling under the Act of 1970—the Constitution intends that in all criminal matters, the High Court in the respective States should normally and ordinarily be the final court of appeal, which means that the certificate should be granted only in special and exceptional cases.[6]

Some cases

3.27 In a very early case,[7] the State Government had provided, to displaced persons, some 'abadi' land and agricultural land in a

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1. *Ex Parte Gilchrist; In Re Armstrong*, (1886) 17 Q.B.D. 521, 528.

2. *State of Assam* v. *Abdul Noor*, A.I.R. 1970 S.C. 1365, 1336 (1970) Criminal Law Journal 1264.

3. *Sushil Kumar* v. *Joy Shanker*, A.I.R. 1970 S.C. 1543, 1547; (1970) 3 S.C.R. 770.

4. *Tara Chand* v. *State of Maharashtra*, A.I.R. 1962. S.C. 130, 132; (1962) 2 S.C.R. 775.

5. See (1971) Kerala Law Times 514, referred to in the Yearly Digest.

6. *Babu* v. *The State*, A.I.R. 1965 S.C. 1467, 1470, 1471; (1965) 2 S.C.R. 771.

7. *Baloodin and others* v. *State of U.P.*, A.I.R. 1956 S.C. 181 (Bose, Jagannadhadas and Sinha JJ.).

village Goran to the new-comers (refugees), who were not welcome to the old residents. This created some tension and hatred between the two groups. There were many complaints made to the district authorities. But they did not take any interest in settling the matter.

3.28. On 7th February, 1954, the group of old residents attacked the new-comers at Mangal Singh's house armed with axes, spear and guns, etc. and shot down six male members of the refugees. The High Court convicted the appellants, but granted a certificate of appeal to the Supreme Court.

3.29. The Supreme Court held that the High Court should not grant a certificate as a matter of course, but it must exercise its discretion judicially under Article 134(1)(c) of the Constitution. The High Court must apply its mind and give reasons for the order. The important question of law must also be apparent on the face of the order.

3.30. In this case, the High Court had granted a certificate by simply stating in the last line of the judgment "leave to appeal to Supreme Court is granted." On the course adopted by the High Court, the Supreme Court commented: "We have seen that neither it has shown any important question of law, nor certified the case as a fit case for appeal. Therefore, it has exercised its power mechanically and not judicially."

3.31. In another case[1] the Supreme Court has said, "It is manifest that before granting a certificate under sub-clause (c), the High Court must be satisfied that it involves some substantial question of law or principle."

Earlier decisions

3.32. Some of the earlier decisions which take the same view are given in the footnote.[2]

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1. *State of Assam* v. *Abdul Noor*, A.I.R. 1970 S.C. 1365, para 7.
2. (*a*) *Narsingh* v. *The State of U.P.* (1955) 1 S.C.R. 238—Article 134 (1) (*c*).
   (*b*) *Baladin* v. *The State of U.P.* A.I.R. 1956 S.C. 181—(Article 134(1) (*c*).
   (*c*) *Banarasi Prasad* v. *Keshi Krishan*, 28, I.A. 11, 13, 18, (P.C.)
   (*d*) *Vaithianath Pillai* v. *King Emperor*, 40 I.A. 193, L.R. 36 Mad., 501; 14 Cr. L.J 577 (P.C.).
   (*e*) *Haripada Dey.* v. *State of West Bengal* (1956) S.C.R. 639—Article 134(1) (*c*) and Article 136.
   (*f*) *Sidheshwar Ganguly* v. *State of West Bengal.* (1968) S.C.R. 749, 754—Articles 134 and 136.
   (*g*) *Khushal Rao* v. *State of Bombay* (1958) A.I.R. 1958 S.C. 22—Articles 134 and 136.

Recent cases

3.33. In a recent case, decided by the Supreme Court,[1] it has expressed the same view, and has clearly indicated that the word "certify" is a strong word, and it requires the High Court to exercise its discretion carefully and grant a certificate only if an important question of general importance is involved.

Article 136 considered

3.34. At this stage, we may state that we shall later[2] consider the question whether article 136 should be suitably amended so as to exclude, from its purview, ordinary civil and criminal apeals covered by articles 133 and 134. We may anticipate our conclusion and state that we propose to recommend no such change in article 136. It is on that basis that our recommendation to amend article 134(1)(c) is founded.

Functioning of the Supreme Court under a Federal Constitution

3.35. While discussing these questions, one of the points which we carefully considered was the nature of the functioning of the Supreme Court under a Federal Constitution. Two views were expressed in the course of the discussion. One view was that, ultimately, by suitable constitutional amendments made from time to time in the light of the experience gained, the position of the Supreme Court in our country should become similar to that of the Supreme Court in the United States of America in certain respects. In other words, according to this view, our Supreme Court should be called upon to consider and decide only important public issues of constitutional significance as well as important points of law on which there is divergence of opinion in the High Court, and its calendar should not be burdened with multifarious less important matters. If that be the goal to be achieved, —may be by suitable stages,—it is visualised that, ultimately, a much smaller number of really important matters would be brought before the Supreme Court, and it may then become possible for the Court to deal with such matters, not by sitting in different Benches but by the whole Court sitting as one Bench. In that case, the present strength of the Court may have to be reduced, say, to seven or nine Judges.

Hearing by whole Court considered

3.36. According to this view, we ought to recognise that hereafter when the Indian Legislature attempts to implement, by appropriate legislation, the Directive Principles which are fundamental to the

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1. *State of Bihar* v. *Bhagirath Sharma*, (1973) 1 S.C.W.R. 655 (3 May 1973), (on appeal from Patna).
2. Para 3·54, *infra*.

governance of the country, the constitutional problems which may arise before the Supreme Court may need a close examination in depth not only of the provisions of the Constitution, but also of complex socio-economic considerations; and, in discharging this onerous task, both the Bar and the Bench will have to make research on the several issues involved and devote more time for debate and discussion of those issues. If the whole court hears such matters, it would be a collective decision of the Court, though, it is inevitable that, on occasions, the minority and the majority views may be expressed. Besides, if the whole court sits together to hear matters, the possibility of conflicting judgments, delivered by different Benches, will be eliminated. That is why, according to this view, the ultimate goal to be reached, not immediately, but in future by stages, should be to leave freedom to the Supreme Court to concentrate on really important issues and lay down the law on those issues authoritatively.

Number of Judges

3.37. Incidentally, if the load of the calendar of the Supreme Court is rationally reduced and is confined to really important issues, the problem of growing arrears, which is disturbing the mind of the Supreme Court, may also be solved; and in the long run the number of the Supreme Court Judges may have to be conveniently and proportionately reduced.

Two views on to role of highest court

3.38. It may be recalled that in an earlier Chapter,[1] reference was made to the view expressed by Justice Frankfurter that, if the highest Court under a federal Constitution is to lay down laws, constitutionally or otherwise, to bind all the federating units, its calendar should not be over-burdened and sufficient time should be allowed to the Judges of the Court to think about the complex problems brought before them and pronounce verdicts which may enrich the legal literature of the country. These observations support the view which three of us—the Chairman, Dr. Tripathi and Mr. Bakshi—took in this debate.

3.39. On the other hand, two of us—Mr. Dhavan and Mr. Sen Varma—strongly expressed the view that the analogy of the United States and Western Germany cannot be regarded as relevant to the conditions of our country for several reasons. They thought that the conferment of the comprehensive and wide jurisdiction on the Supreme Court was intended to serve the primary purpose of sustaining the unity of the country. Besides, the history of judicial administration

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1. Chapter 2, *supra*.

in our country, the nature of our Constitution, which is not federal in the traditional technical sense, the hopes and expectations of litigants to have final verdict from the Supreme Court, at least in important matters, and other relevant facts, which are special to the administration of justice in India, would make it unreasonable and certainly unfeasible to invoke the analogy of the United States in considering this point. Therefore, according to them, in its broad features the functioning of the Supreme Court must continue, as at present. In regard to the problem of growing arrears, the view of these two members is that the proper solution to the problem is to appoint large number of Judges in the Supreme Court.

Basis of our conclusion

3.40. We ought to add that, in our present Report, in dealing with the issues pertaining to the scope and extent of the jurisdiction of the Supreme Court, we have not based our recommendations on either of the two views which were expressed in our discussion. We thought that the conclusions, to which we ultimately arrived unanimously and which are the basis of our relevant recommendations, do not need a final decision on this issue. That is why, two members of the Commission, who did not agree with the majority view in this matter, did not think it necessary to elaborate their point of view by writing a minute of dissent, or by suggesting that the theoretical basis of their point of view should be expressly stated in the introductory observations.

3.41. Our conclusion, therefore, is that article 134(1)(c) of the Constitution should be revised as follows:—

Conclusions

"(1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in criminal proceeding of a High Court in the territory of India if the High Court—

[(a) and (b) as at present]

(c) certifies—

(i) that the case *involves a substantial question of law of general importance;* and

(ii) *that in the opinion of the High Court, the said question needs to be decided by the Supreme Court.*

"Provided that an appeal under sub-clause (c) shall be subject to such provisions as may be made in that behalf under clause (1) of article 145 and subject to such conditions as the High Court may establish or require."

Appeals to the Supreme Court on special leave

Appeals by special leave under article 136

3.42. We now proceed to consider whether it is necessary to modify article 136 in view of articles 133(1)(c) (as amended) and 134(1)(c) as proposed to be amended in this Report. Article 136 of the Constitution reads as follows:—

Special leave to appeal by the Supreme Court

"136. (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, 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.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."

The wide scope of article 136

3.43. The plenary nature of the jurisdiction[1] under article 136 is well recognised. The language of the article is very wide.

The width of the jurisdiction is brought out by several words used in the article. The appeal could be against the decision of *any court or tribunal*. It could be in respect of *any species* of judicial determination, i.e., against a judgment, decree, determination, sentence, or order. And the order sought to be appealed from could be in any cause or matter. Nevertheless, the possibility that undue advantage may be sought to be taken by litigants of this extensive and all-embracing jurisdiction could not be ruled out; litigants may attempt to circumvent the restrictions under articles 133 and 134 by resorting to article 136. In this background, it appeared to us appropriate to elicit opinion as to whether the scope of article 136 should be restricted from the point of view mentioned above.

The question posed

3.44. Accordingly, Question 2 in our Questionnaire reads as follows:—

Q.2. Would you favour any modification as to the scope of appeal under article 136 of the Constitution, against judgments of High Courts?

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1. Para 3·42, *supra*.

Recent amendment of article 133

3.45. The main point to be considered in regard to this article is if the article should be suitably amended so as to exclude from its purview, ordinary civil and criminal appeals. In this connection, attention is invited to the recent amendment[1] of article 133 (It is proposed that article 134 should similarly be amended[2]). The suggestion was that so far as civil and criminal appeals are concerned, it is only those appeals which satisfy the requirements of article 133 (as amended) and article 134 (as proposed to be amended)[3] that should reach the Supreme Court, and no other.

Figures of appeals pending in the Supreme Court

3.46. It may be relevant, in this connection, to note the number of appeals by special leave (in the Supreme Court). At the close of the last three years, the figures of appeals in the Supreme Court under articles 132, 133 and 136 were as follows[4]:—

	1969	1970	1971
(*a*) Number of Appeals at the opening of the year.	4,200	4,875	5,430
(*b*) Number of appeals instituted during the year	2,712	2,313	2,175
(*c*) Number of appeals disposed of during the year	2,046	1,752	1,437
(*d*) Number of appeals pending at the end of the year	4,875	5,436	6,074

NOTE: These figures are under article 132, 133 and 136 of the Constitution. Separate figures under each article are not available.

3.47. It was apprehended that a desire to circumvent articles 133 and 134 might result in an appreciable increase in the number of applications for leave to appeal under article 136.

The scope of article 136

3.48. We have already referred[5] to the fact that the jurisdiction under article 136 is plenary. The relationship of Article 136 of the

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1. Constitution (30th Amendment) Act, 1973.
2. See discussion as to Question 1.
3. See discussion as to Question 1.
4. Statement No. S—5.
5. Para 3·43, *supra*.

Constitution with the other articles can be illustrated by referring to a few situations where the article has been resorted to:—

(1) Article 136 has been utilized even where an appeal is *barred* by a specific constitutional provision, such as article 133(3), quoted below:—

> "(3) Notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one judge of a High Court."

(2) Article 136 has been applied where a certificate under article 133 or 134 was *wrongly granted*, but the case was one in which special leave could appropriately have been sought under article 136.

(3) Similarly, resort to article 136 has been regarded as permissible where a certificate under article 133 or 134 was *wrongly refused*.

(4) Leave has been granted under article 136 even where the *case could have been dealt* with, and an appeal as a matter of right would have been competent, under another article, e.g. article 132(2), which reads as follows:—

> "(2) Where the High Court has refused to give such a certificate, the Supreme Court may, if it is satisfied that the case involves a substantial question of law as to the interpretation of this Constitution, grant special leave to appeal from such judgment, decree, or final order."

Gist of the replies

3.49. Opinion received by us on this question reveals strong opposition to curtailment of this jurisdiction of the Supreme Court. It has been stated that it is almost impossible to anticipate all possible situations in which the discretion under article 136 should be exercised. Many of the replies stress the desirability of preserving the existing wide discretion of the Supreme Court, and point out that it may be assumed that the discretion is exercised sparingly and only in cases of exceptional nature. The overwhelming majority of the replies on the Question are against the imposition of limitations suggested in the query.

In particular, it may be stated that some Judges[1] of the Supreme Court, in a written reply on our Questionnaire, do not favour any modification in the scope of appeal under article 136 of the Constitution against judgements of High Court.

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1. S.No. 50.

Other important suggestions on question 2

3.50. Some of the other important suggestions with reference to this question are as follows:—

One Labour Department[1] of a State Government favour modification in article 136 to the effect that appeals should be allowed only in cases where substantial points of law are involved.

3.51. Four Judges[2] of a High Court have expressed the view that the scope of appeals by special leave under article 136 should be limited to cases where a substantial question of law relating to interpretation of the Constitution or a substantial question of law of general importance is involved, or where the High Court has improperly refused leave under articles 133 and 134 of the Constitution.

3.52. There is a suggestion[3] that appeals under article 136 should be limited to cases where substantial questions of law of general importance or questions of constitutional law of general importance arise.

Object of the Question

3.53. We may state here that our object in putting the question was to elicit views from those who have practical experience of the ways of litigants on an important aspect, namely, whether, after the limitation enacted or proposed with reference to the scope of appeals under articles 133 and 134, there was a possibility that those limitations may be circumvented by parties ingeniously resorting to article 136.

No Amendment suggested

3.54. It appears, however, that any such restriction has been regarded as inadvisable by most Judges and most Judges and Members of the Bar.[4] But, apart from this opinion evidence to which we, no doubt, attach considerable importance, on principle, it seems to us that, having regard to the history of judicial administration in our country and the nature of our constitutional and judicial set-up, conferment of comprehensive powers on the highest court in the country is justified. We feel that the very existence of this power may be expected to exercise a salutary check on all judicial and other bodies where decisions are subject to the jurisdiction in question.

Leave granted sparingly

3.55. Having reached this conclusion, we ought to add that we have no doubt that the very width and comprehensive character of the

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1. S. No. 33 (Assistant Secretary, Labour Department, Government of West Bengal.
2. S. No. 50
3. S. Nos. 21 and 19.
4. Para 3·49, *supra*.

power conferred on the Supreme Court by Article 136 will naturally make the approach of the Court very circumspect, cautious and careful in dealing with the applications for special leave under the said article. In fact, that is the view which has frequently been expressed by the Court itself.

3.56. It is well established that grant of special leave under article 136 is a matter of discreaion, and not of right[1]. Being a constitutional power, the power of the Supreme Court under article 136 is beyond the reach of legislation[2]; and the over-riding power is wider than the prerogative right exercised by the Privy Council[3]. But the Supreme Court will grant leave only in special and exceptional cases, where it is manifest that by the disregard of the forms of legal process or by violation of the principles of natural justice or otherwise, substantial and grave injustice has been done[4].

Lord Simon's L. C. observations

3.57. In 1941, a statement[5] was made by Lord Simon, L. C. presiding in the Judicial Committee, in which he first enunciated the practice in general terms; "Broadly speaking, the Judicial Committee will only interfere where there has been an infringement of the essential principles of justice."

Though the Supreme Court's jurisdiction under article 136 need not be equated to that of the Privy Council, the above statement, gives an idea of the broad considerations on which leave will be granted in criminal cases.

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[1] *Mirza v. The State*, A.I.R. 1971 S.C. 1050, 1053.

[2] *Lakshmiswar v. Bateshwar Prasad*, A.I.R. 1966 S.C. 590, 595; (1966) 2 S.C.R. 241.

[3] *Durga Shanker v. Thakur Rajuraj Singh* A. I.R. 1943 S.C. 520, 522; (1955) S.C.R. 267.

[4] *State of Andhra Pradesh v. I.S.S. Prasad Rao*, A.I.R. 1970 S.C. 648, 651

[5] *Muhammad Nawaz v. R.* (1941) L.R. 68 I.A. 126.

CHAPTER 4

PETITIONS FOR WRITS BEFORE THE SUPREME COURT

Introductory

4.1. We propose to deal in this Chapter with two questions concerning petitions for writs before the Supreme Court.

Disputed questions of fact

Petitions under article 32

4.1A. Article 32 of the Constitution reads as follows:—

"32. Remedies for enforcement of rights conferred by this Part.—

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, mandamus, prohibition, quo-warranto and *certiorari*, whichever may be appropriate, for the enforcement of any rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

"(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

4.2 & 4.3. Question 3 in our Questionnaire reads thus—

Question 3

"3. (a) Do you favour the view that in petitions to the Supreme Court under article 32, disputed questions of fact should not be gone into?

(b) If so, what course would you suggest for the trial of issues of fact in such petitions?

(c) If not, do you think that evidence should be recorded in a petition under article 32 in the same manner as in a suit?"

Gist of the replies

4.4. With reference to this question, a very large number of replies are for maintaining the *status quo* and are opposed to any amendment. This constitutes, by far, the largest majority. A very small number consists of replies which favour restricting the trial of facts to affidavits, without oral evidence.

There are a few other suggestions also.

Views of some Judges of the Supreme Court

4.5. Some Judges[1] of the Supreme Court state in their reply that, as a matter of practice, the Supreme Court does not go into questions of fact in petitions under article 32 of the Constitution. Hence, there is no need to make any change in the law.

Nature of the remedy under article 32

4.6. The present position is that if a petitioner makes out a case of violation of his fundamental rights, the grant of the appropriate writ by the Supreme Court under article 32 is not discretionary, *but is a matter of right*. In one of the leading cases[2] on the subject, Das, C. J., said that neither the existence of an adequate alternative remedy, nor the fact that the petition raised disputed questions of fact, justified the rejection of a petition under article 32, if it established a *prima facie* case of actual or threatened violation of fundamental rights. The Chief Justice said that ordinarily, disputed question of fact could be decided on affidavits. In some cases, the court may consider it desirable to allow the parties to put in further affidavits, or may issue a commission, or set down the petition for trial on the evidence, and this had been frequently done on the Original Side of the Calcutta and Bombay High Courts.

Remedy—a fundamental right

4.7. This liberal view is largely attributable to the fact that article 32 itself confers a fundamental right[3]. It is often stated that a special responsibility is laid on the Supreme Court in this matter.

Duty of Supreme Court in petitions under art. 32

4.8. The Supreme Court has pointed out[4] that "article 32 does not merely confer power on the Supreme Court (as article 226 does on the High Courts) to issue certain writs for the enforcement of the

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1. S.No. 50.

2. *K.K. Kochunni* v. *State of Madras*, (1956) Supp. (2) S.C.R. 316, 326; A.I.R. 1959 S.C.334, 336.

3. See para. 4·8, *infra*.

4. *Romesh Thapper* v. *State of Madras*, (1950) S.C.R. 594, A.I.R. 1950 S.C. 124 (Patanjali Sastri J. delivering the majority judgment).

rights conferred by Part III, or for any other purpose, as part of the general jurisdiction." Article 32 provides a 'guaranteed' remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right by being included in Part III. "This Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights."

Nature of jurisdiction under articles 32 and 226

4.9. In one sense, the jurisdiction conferred on the Supreme Court under article 32 is narrower than that conferred on the High Courts by article 226. As is often pointed out, under article 226, the High Courts are empowered to issue certain writs or orders for the enforcement of the fundamental rights as well as "for any other purpose"; whereas, article 32 is limited to the enforcement of fundamental rights. But[1] the right to move the Supreme Court under article 32 to enforce the fundamental rights is itself a fundamental right, and the authority conferred on the Supreme Court by this article is coupled with a duty to exercise that authority. Exercise of authority under article 226, is discretionary, but not the authority under article 32. That is a point which has to be borne in mind in considering the question which we are discussing in this Chapter.

Relevance of statistics

4.10. For a consideration of the question whether an amendment of the Constitution is needed in respect of trial of questions of fact, a study of the number of petitions disposed of by, or pending in, the Supreme Court is desirable.

Petitions disposed of during 1969-70

4.11. It appears that the petitions for writs disposed of by the Supreme Court[2] during 1969, 1970 and 1971 were 471, 616, 396 respectively, and even out of these, many were decided *in limine*.

Statistics regarding institution and disposal of petitions

4.12. The number of petitions[3] pertaining to writ jurisdiction of the Supreme Court, pending at the close of three years (1969, 1970 and 1971) was as follows:—

(a) Number of petitions at the opening of the year	181	248	288
(b) Number of petitions instituted during the year	538	656	469

1. Para. 4·8, *supra*.
2. Statement No. S–5.
3. Statement No. S–5.

(c) Number of petitionsd disposed of during the year	471	616	396
(d) Number of petitions pending at the end of the year	248	288	361
(e) Petitions dismissed *in limine* during the year	192	302	219

NOTE:—Figures of column (e) are also included in the figures of column (c).

No change recommended

4.13. Having regard to the very significant role which article 32 is intended to play in the enforcement of fundamental rights conferred on citizens by Part III, it would, we think, be inappropriate to seek to introduce any limitation in the exercise of the Court's jurisdiction under this article in respect of disputed questions of fact. It is true that sometimes, the Court may find it inexpedient to decide disputed questions of fact on affidavits. In such cases, the Court may adopt any of the alternative courses to which the Chief Justice has referred in *K. K. Kochini* v. *State of Madras*.[1] In any case, this is a matter which must be left to the discretion of the Court, and it would be unwise and unreasonable to seek to introduce any limitation on the exercise of citizen's right to move the Supreme Court under article 32 even though the decision of the petition may raise a *disputed question of fact.*

Grant of Interim Stay

Interim relief in petitions under article 32

4.14. In connection with the jurisdiction of the Supreme Court to issue writs[2] under article 32 of the Constitution, there is another question to be considered. This question applies to the High Courts also, since the High Courts also have jurisdiction to issue writs. The complaint in regard to such writ petitions is that sometimes such petitions are filed mainly to gain time by obtaining stay orders, and ultimately it is found that the petitions do not involve any question which justifies the interference of the court. In order to prevent the institution of unsubstantial or frivolous writ petitions, a suggestion which we had to consider was, that in exercise of the jurisdiction to issue writs, an interim stay or injunction should not be issued, unless notice of the proposal to move the court in that behalf is served on the respondent and copies of all documents in support of the plea for stay or injunction are filed in court and served on the opposite party.

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1. Para 4·6, *supra*.
2. See queation 5.

Question 4

4.15. This point is, we have stated[1], common to the writ jurisdiction of the Supreme Court and the High Court. In so far as the Supreme Court is concerned, Question 4 in our Questionnaire was as follows:—

> "In relation to the grant of *ad interim* stay by the Supreme Court, in petitions under article 32, do you favour the same limitations as have been suggested below[2] in relation to the High Courts?"

Interim stay often prayed

4.16. Figures relating to stay granted by the Supreme Court in petitions under article 32 are not available.[3] But it is very likely that writ petitions are sometimes filed before the Supreme Court, mainly for obtaining interim stay.

Recommendation in Report on C.P.C.

4.17. It may, at this stage, be useful to mention that, in our Report[4] on the Code of Civil Procedure, the following recommendations were made for amendment of the provisions of that Code as to the issue of temporary injunctions—provisions mainly contained in Order 39 of the First Schedule to that Code:—

(i) The following proviso should be inserted below Order 39, rule 3—

"Provided that where an injunction has been granted without notice to the opposite party—

(a) the period for which it shall be in force as initially fixed shall not exceed one month;

(b) hearing of the application for injunction shall, as far as practicable, be finished within one month; and

(c) if it becomes absolutely necessary to extend the period for which the injunction is to remain in force, the extension shall not exceed fifteen days, except with the consent of the opposite party.

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1. Para 4·14, *supra*.

2. See Question 5.

3. A proforma (Statement No. 6·2) had been prepared for the purpose, but the figures were not readily available.

4. 54th Report (Code of Civil Procedure), para 39-18.

"Provided further that where an injunction is granted on the plaintiff's application without notice to the opposite party," the court shall, before granting it, require the plaintiff to file an affidavit stating that a copy of each of the following documents has been served on the opposite party by delivery to him, or where such service is not practicable, by sending it to him by registered post—

(a) the plaint,

(b) the documents on which the plaintiff relies,

(c) the application for injunction, and

(d) the affidavit or other documents on which the applicant relies:

"Provided further that if a party, in an application for temporary injunction or in the supporting affidavit, has knowingly made a false or misleading statement on a material particular, and the injunction was granted without notice, the court shall vacate the injunction unless, for reasons to be recorded, it considers it just not to do so":

"Provided further that where an order for injunction has been passed after giving a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party, unless there has been a change of circumstances, or, unless the court is satisfied that the order has caused undue hardship to that party."

Reasons for above safeguards

4.18. We may state here that so far as the issue of temporary injunctions under the Code of Civil Procedure is concerned, these safeguards had to be thought of in view of the widespread feeling that many suits were delayed because of the grant of temporary injunctions *ex parte*, and injustice was often done to the opposite party (i.e., the party against whom the injunction is issued). The restrictions suggested are self-explanatory. It appeared to us desirable to consider the question whether somewhat similar conditions should apply in relation to the grant of stay in writ cases also.

Gist of the replies

4.19. A large majority of the replies to question 4 both from Bench and the Bar are opposed to any amendment on the lines putforth in the question, and only a small number favours it.

4.20. Some Judges[1] of the Supreme Court, who have favoured us with their written views, are also against any provision in the Constitution to limit the power of the Supreme Court in the matter of granting *ad interim* stay in petitions under article 32. The object, they say, could be achieved by making suitable rules under article 145 of the Constitution.

4.21. One of the other comments states that the prevailing situations in the country are such that the aggrieved citizens are filing large number of writ petitions, a good number of which ends in success. If the power of granting stay under article 32 or article 226 is restricted, the purpose for which those articles are intended would be frustrated to a great extent.

Trend of opinion

4.22. It appears, thus[2] from the views received, that judicial and professional opinion generally does not consider it necessary to introduce such elaborate limitations. Our principal object in putting a question on the subject was to elicit views as to the machinery to be devised for saving the time of the Supreme Court, often taken by an application for interim stay filed without adequate material and also avoiding injustice to the respondent by obtaining interim stay. The trend of opinion, however, seems to suggest that no serious problem of abuse of jurisdiction exists.

Rules of Court

4.23. We should also refer to the rules made by the Supreme Court on the subject of notice of motion. The practical result of these rules is the imposition of limitations substantially of the same nature as those recommended by us in relation to the grant of interim injunctions under the Code of Civil Procedure.

The relevant rules as to notice of motion are as follows[4] :—

"1. Except where otherwise provided by any statute or prescribed by these rules, all applications which in accordance with these rules cannot be made in Chambers shall be made on motion after notice to the parties affected thereby.

2. Where the delay caused by notice would or might entail serious hardship, the applicant may pray for an *ad interim ex parte* order in the notice of motion, and the court, if satisfied upon affidavit or otherwise that the delay caused by notice would

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1. S. No. 5 .
2. Para 4·19, *supra*.
3. *Para 4·17, supra*.
4. Supreme Court Rules, 1966—Order 8, Rules 1 and 2.

entail serious hardship, may make an order *ex parte* upon such terms as to costs or otherwise, and subject to such undertaking being given, if any, as the Court may think just, pending orders on the motion after notice to the parties affected thereby.

3. Where an *ex parte* order is made by the Court, unless the Court has fixed a date for the return of the notice, or otherwise directs, the Registrar shall fix a date for the return of the notice and the application by notice of motion shall be posted before the Court for final orders on the returnable date".

No change recommended

4.24. In our opinion, these rules are, on the whole, satisfactory. Orders passed in accordance not with them are not likely to cause injustice. We do not, therefore, recommend any amendment in this regard.

CHAPTER 5

PETITIONS FOR WRITS BEFORE HIGH COURTS

Interim Stay

Jurisdiction of High Courts to issue writs

5.1. A similar question relating to the jurisdiction of the High Courts to issue writs needs consideration. The Constitution has declared certain rights to be fundamental. For the purpose of the speedy enforcement of the rights—as we have already pointed out[1],—the Constitution has conferred on the Supreme Court[2] and the High Courts[2a] powers to issue "directions, orders and writs". Besides, the Constitution has also conferred on the High Courts power to issue such directions, orders and writs "for any other purpose[3]". It has been stated,[4] that presumably the object of giving this power was to put the High Courts substantially in the same position as the Court of the Queen's Bench in England.

Article 226 of the Constitution reads as follows:—

"226. Power of High Courts to issue certain writs.—(1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, mandamus, prohibition, *quo warranto* and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(1A) The power conferred by clause (i) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise if such Government or authority or the residence of such person is not within those territories.

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1. See chapter 4, *supra*.

2. Article 32.

2a. Article 226.

3. Article 226.

4. *Election Commissioner* v. *Saka Venkata Suba Rao*. (1953) S.C.R. 1144, 1150.

(2) The power conferred on a High Court by clause (1) or clause (1A) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32".

Use of writ jurisdiction

5.2. It is common knowledge that extensive use has been made of this jurisdiction of the High Courts, not only by setting aside invalid laws and subordinate legislation, but also by nullifying administrative orders which infringe fundamental or other rights and by supervision over quasi-judicial authorities.

If, for example, a High Court holds a law to be invalid, it will ordinarily issue a mandamus or give a direction commanding the person enforcing or seeking to enforce the law to refrain from doing so.[1]

Writs and Subordinate legislation

5.3. When a writ petition challenging the validity of subordinate legislation is filed and is successful, the High Court usually issues a writ in the nature of mandamus, requiring the authority concerned to forbear from enforcing it.

Writ jurisdiction and administrative orders

5.4. The writ jurisdiction has been most frequently invoked to challenge administrative orders. It is not intended to enter here into a discussion of the possible grounds of such challenge. It is sufficient to refer to a few of the important grounds, such as, *mala fide* bias, non-observance of rules of natural justice or non-compliance with the Constitution, the law or rules or other subordinate legislation.

Supervisory jurisdiction of High Courts

5.5. Another important aspect of the writ jurisdiction is its use as a means of ensuring the supervision of the High Courts over the actions of quasi-judicial and administrative tribunals.

Scope of the jurisdiction

5.6. It is thus clear that the scope of article 226 is very wide and its provisions are intended to afford to the citizens a speedy remedy against illegal executive or administrative actions as well as illegal invasion of their Fundamental Rights. On the whole, this article has served a very useful purpose and thereby sustained the doctrine of the rule of law, on which our democratic way of life is founded.

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[1]. *Mohd. Hanif Qureshi* v. *State of Bihar*, (1959) S.C.R. 629.

We are aware that, in some cases, in their zeal to do justice as between citizens and the State, some High Courts have occasionally entertained petitions which strictly do not satisfy the requirement of article 226 and have granted relief, overlooking the limitations obviously involved in the exercise of the power conferred by the article. But, such unjustified exercise of the power in a small number of cases does not detract from the significance and usefulness of the conferment of the power itself.

Interim relief in writs

5.7. However, our point in emphasising the wide scope of the jurisdiction is this. When the court issues an interim order, pending the determination of the petition, should not the party seeking interim relief be required to give notice to the opposite party of the application for interim relief? Such a course could be regarded as desirable, having regard to the wide range of activities[1] likely to be affected by petitions filed under article 226. The matters with which such activities have to deal, affect governments, local authorities and citizens; and, for the effective functioning of the administration at its various levels, it is often essential that the authoritative determination of questions should be obtained with the minimum of delay.

Complaint about frivolous petitions

5.8. In regard to Writ Petitions pending in the High Courts, the complaint is that a large number of such petitions are filed mainly to gain time by obtaining stay orders, and ultimately it is found that they do not involve any question which justified the interference of the High Courts under article 226. In order to prevent the institution of unsubstantial or frivolous writ petitions, a suggestion is made that court empowered to issue a writ should not issue interim stay or injunction, unless notice of the proposal to move the court in that behalf is served on the respondent and copies of all documents in support of the plea for stay or injunction are filed in court and served on the opposite party.

Statistics indicating the grant of ad interim stay in petitions

5.9. We have collected statistics relating to *ad interim* stay granted by the High Courts in petitions under article 226. These show[1] that the proportion of cases in which such stay is granted is not negligible. The figures are as follows:

ALLAHABAD

(*a*) No. of cases in which stay was granted during the year (1971), in petitions under Article 226	3,419
(*b*) No. of cases in which stay was granted during the year after notice, in such petitions	867

1. See Paras 5·2 to 5·6, *supra*.

BOMBAY

(a) No. of cases in which stay was granted during the year (1971), in petitions under Article 226	598
(b) No. of cases in which stay was granted during the year after notice, in such petitions	154

CALCUTTA

(a) No. of cases in which stay was granted during the year (1971), in petitions under Article 226	177
(b) No. of cases in which stay was granted during the year after notice, in such petitions	14

GUJARAT

(a) No. of cases in which stay was granted during the year (1971), in petitions under Article 226	415
(b) No. of cases in which stay was granted during the year after notice, in such petitions	163

KERALA

(a) No. of cases in which stay was granted during the year (1971), in petitions under Article 226	5,032
(b) No. of cases in which stay was granted during the year after notice in such petitions	864

MADHYA PRADESH

(a) No. of cases in which stay was granted during the year (1971) ..	260
(b) No. of cases in which stay was granted during the year after notice, in each petition	48

MYSORE

(a) No. of cases in which stay was granted during the year (1971), in petitions under Article 226	1,143
(b) No. of cases in which stay was granted during the year after notice, in such petitions	Information is not available.

PATNA

(a) No. of cases in which stay was granted during the year (1971), in petitions under Article 226	201
(b) No. of cases in which stay was granted during the year after notice, in such petitions	150

PUNJAB AND HARYANA

(a) No. of cases in which stay was granted during the year (1971), in petitions under Article 226 2,315

(b) No. of cases in which stay was granted during the year after noticed, in such petitions 73

RAJASTHAN

(a) No. of cases in which stay was granted during the year after notice, in such petitions 126

5.10 The percentage of stay granted during the years 1969, 1970 and 1971, without notice in writs under article 226 by High Courts with reference to the total number of writs disposed of during those three years works out as follows [1—2]:

High Courts	Percentage
1. Allahabad High Court	23%
2. Bombay High Court	49%
3. Calcutta High Court	42%
4. Gujarat High Court	23%
5. Kerala High Court	67%
6. Madhya Pradesh High Court	11%
7. Madras High Court	19%
8. Orissa High Court	18%
9. Punjab & Haryana High Court	47%
10. Patna High Court[3]	7%
11. Rajasthan High Court	51%
Total percentage ..	32% appx.

1. Calculation based on figures of disposal given in statement No. H—1 and figures of interim stay in Statement H—2. These were collected by the Law Commission from the High Courts for the year concerned.

2. Arranged alphabetically.

3. This percentage for the Patna High Court is based on the figures for the year 1970 and 1971.

Figures for 1969 have not been received.

Question 5

5.11. In order to solicit views on the subject, Question 5 was put in our Questionnaire as follows:—

"Q.5(a). Do you agree with the suggestion that in writ petitions to the High Courts under article 226 of the Constitution, stay should not be granted, save in exceptional cases?

(b) Do you favour an amendment of the Constitution to the effect that unless the Court, for special reasons to be recorded, otherwise orders by reason of exceptional circumstances, no interim order for stay shall be asked for, in a petition under article 226, without filing evidence before the High Court that (i) notice of the intention to move the Court at a specified time and for specified relief has been or shall be given to the opposite party; and (ii) copies of all documents filed in Court and intended to be relied upon in support of the application for interim relief have been, or shall be served upon the opposite party?"

Gist of copies

5.12. A very large majority of the replies to question 5 are opposed to an amendment of the Constitution on the lines suggested in the query. This includes a very large majority of the High Courts and High Court Judges that have sent replies. They do agree that stay should not be granted except in exceptional cases. But they are not all in favour of any constitutional amendment in this regard. Some of them state that the necessary provision can be made in the rules, but most do not go even so far. A very small minority[1] favour an amendment, as suggested in the query.

Views of some Judges of the Supreme Court

5.13. Some Judges of the Supreme Court agree[2] with the spirit of the suggestion that in writ petitions under article 226 of the Constitution interim stay should not be granted unless the Court. for special reasons to be recorded, otherwise orders by reason of exceptional circumstances, They, however, feel that the provisions regarding notice to be given to the opposite party and copies of all documents may be done by making appropriate rules by the High Court, and they are not in favour of amending the Constitution for this purpose.

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1. E.G.S. No. 8; S. No. 19; S. No. 21; S. No. 32; and S. No. 38 S.No. 45 and S. No. 49.

2. S.No. 50.

In this background, we shall now consider the question of stay ad-interim.

"Stay" explained

5.14. "Stay" is of course, a convenient expression, which may be taken as covering several situations, important amongst which are the following:—

(a) Stay of proceedings held before a quasi-judicial authority (This is most frequently granted when the ultimate writ applied for is of *certiorari*);

(b) stay of executive action (usually prayed for when *mandamus is sought*).

(c) stay of administrative proceedings.

With reference to category (b) above, what is sometimes called "*anticipatory mandamus*", is also relevant. Alleged illegal action is sought to be prevented thereby.

Extent of power to issue writs

5.15. Consideration of this and other questions concerning writs involves a clarification of some vital points. It has been observed, with reference to the power to issue writs[1],—

"Article 226 of the Constitution is not addressed to the Court in the language of an inexorable command. By it the Court is constituted the trustee of a high power for a high purpose maintaining equilibrity between the two antithetical off springs of *jus naturalia* absolute, i.e., the Rights of Man." Its constitutional origins, its immence potentiality for good and harm alike counsel the Court to exercise the power with becoming prudence and reason, so that on the one hand, the State may not be unduly hampered in its legitimate domain, and on the other hand, the essential rights of man may not be abridged unnecessarily."

A delicate balance between the two aspects referred to above has, therefore, to be achieved.

Supreme Courts observations as to the power to issue writs

5.16. As the Supreme Court has observed:

"In view of the express provisions in our Constitution, we need not look back to the early history of the procedural technicalities of these writs in English law, nor feel oppressed by any difference or

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1. *Mustaq Husain* v. *State of U. P.*, A.I.R. 1960 Allahabad 559, 561, para 18 (S.N., Dwivedi J.)

2. Otto Gierkee Barker's Translation), Natural Law and the Theory of Society, 1500—1800—Beacon, B.C. Edi. at pages 41 and 113—114.

change of opinion expressed in particular cases of English Judges. We can make an order or issue a writ in the nature of *certiorari* in all appropriate cases and in an appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law."[1]

Interim stay without notice—effect of

5.17. What we are concerned with at the moment is the subject of interim stay granted in writ petitions. Occasionally, such stay, if issued without notice, causes hardship.

High Court's Power to grant interim stay discussed

5.18. There has been some discussion even about the existence of a power to issue interim stay in writ cases. It has sometimes been argued that the High Court has no power to issue *ad interim* writs. In an Allahabad case, for example, some doubt was raised on the subject.[2]

By and large, however, it is assumed that the power to issue an *ad interim* order exists. We have not come across any other judicial decision on the subject.

5.19. The power being there, the problem is one of ensuring that it is not invoked by litigants in circumstances which lead to its abuse.

In general, a court hearing a request for a preliminary order must determine how best to create or preserve a state of affairs such that the court would be able, upon conclusion of full trial, to render a meaningful decision for either party. The problem thus is of reconciling the interests of both parties, and doing justice to both.

5.20. The problems which we are now facing are not unknown elsewhere.

Position in the U.S.A.

In the U.S.A., a serious problem arose[3] by reason of injunctions issued by (federal) district courts, enjoining the enforcement of State unconstitutional statues. Opposition to this practice gave rise, in 1908,

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1. *T.C. Basappa* v. *T. Nagappa* (1955) I.S.C.R. 250, 256: A.I.R. 1954 S.C. 440, (BK Mukherjea, J.)

2. *Ayan Chand Bhatia* v. *Rent Control and Eviction Officer, Lucknow and another*, A.I.R. 1966 All. 57(FB).

3. Generally, See "The Three Judge District Court", (1963) 77 Havard Law Review 299.

to an abortive congressional attempt to oust the jurisdiction of district courts to enjoin State statutes on the ground of unconstituionality.[1] In 1910, Congress established the extra-ordinary "three judge court", with a direct appeal procedure, for such suits.[2]

The Act of 1910 was motivated less by hostility to the granting of injunctive relief than by concern over the precipitate manner in which a federal judge sitting alone could frustrate carefully planned State policies. Congress seemed desirous of impressing upon federal judges the serious and drastic nature of the injunctive remedy.[2]

What Senator Bacon, one of the sponsors of the Act observed[3] in 1908 is of interest for our purpose also. He said. "If these (federal) courts are to exercise the power of stopping the operation of the laws of a State and of punishing the officers of a State, then at least let it be done on notice and not hastily, and let there be the judgement of three judges to decide such questions, and not permit such dangerous power to one man."

5.21. The present law on the subject in the U.S.A. is as follows:—

> Before a federal district court can grant an injunction against the enforcement of a State[4] of federal[4] statute[5] on the ground that the statute is unconstitutional, the case must be heard and determined by a three judge district court.[6]

The relevant section of the Judiciary and Judicial Procedure Act[4] provides as follows:—

> "Injunction against enforcement of State statute, three judge court required—An inter-locutory or permanent injuction restraining the enforcement, operation or execution of any *State* statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an

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1. 42 Cong. Rec. 4849 (1908).

2. *Note*—"Three Judge Court Reassessed" (1963) 72 Yale. Law Journal 1646.

3. 42 Cong. Rec. 4853, referred to in Note, "Three Judge Court Reassessed". (1963) 72 Yale Law Journal 1646.

4. See (1964) 28 U.S. Code 2281.

5. Also, in the case of the states, "an order made by an administrative board or commission acting under state statutes..... (1964) 28 U.S.C. 2281.

6. The composition and procedure of three judge district courts is described at length in (1964) 28 U.S.C. 2284.

order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

5.22. As regards federal statutes, another section of the Judiciary and Judicial Procedure Act states[1] as follows:

"Injunction against enforcement of federal statutes: three-judge court required—

An interlocutory or permanent injunction, restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of thre judges under section 2284 of this title."

Three Judge Courts

5.23. The three judge courts have ben at the centre of some of the major conflicts between national and State policy, particularly those involving economic regulation and segregation.[2]

Recommendations in Law Commission's 54th Report

5.24. As regards our own law, we may mention that in our Report[3] on the Code of Civil Procedure, we had made recommendations for amendment of the provisions of that Code as to the issue of temporary injunctions. These have already been referred to[3A] .

Rules by High Courts

5.25. We may add that some limitations highlighting the need for notice before the grant of stay in writ petitions, have been inserted in the rules of some High Courts.[4]

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[1] See (1964) 28 U.S.C. 2282.

[2] See, (a) Note, "Three Judge Court re-assessed", (1963) 72 Yale L.J. 1640;

(b) "Developments—Injunctions", (1965) 78 H. L. R. 996, 1048.

[3A] Para 4·4, *supra*.

[3] See, 54th Report (Code of Civl Prosedure), Para 19·18.

[4] See Appendix to this Report.

Conclusion

5.26. We have already referred to the opinion evidence received by us on this question. We have carefully considered that evidence and have come to the conclusion that, on principle, it will be inappropriate to insert in the Constitution any specific provision in regard to the procedure which the High Courts should follow in granting interim orders of stay or injunctions on petitions filed under article 226. We are aware that in many cases, as we have already pointed out[1], writ petitions are filed, mainly, if not soley, for the purpose of obtaining stay and that stay granted indiscriminately, without notice to the respondent, may, in some cases, conceivably cause social injustice. If, for instance, stay is granted in regard to the enforcement of taxation laws, or of any of the provisions of beneficial socio-economic legislation, without hearing the State in support of the validity of the impugned laws, injustice may ensure because speedy implementation of such laws is essential for the welfare of the community. Occasionally, petitions filed by students against orders passed by University authorities are intended merely to postpone the implementation of the impugned order and, if stay is granted in such petitions, it creates a sense of frustration and bitterness in the minds of Universities and in fact, tends to derogate from then autonomy.

5.27. But, on the other hand, while exercising their discretion in granting interim stay or injunction without notice to the other side, if the High Courts examine such petition carefully and refuse to grant interim stay or injunctions unless they are satisfied that not granting such stay or injunction without notice to the respondent would really cause irreparable hardship to the petitioner, then, there will be no scope for complaint. This is a matter which must be left to be governed by the rules framed by the High Courts. In fact, some High Courts have framed rules in this matter.[2] In our view, a procedural matter, though of considerable importance, must normally be governed by the rules framed by the High Courts and should not be inducted in the document of the Constitution itself. That is why we do not propose to recommend the addition of any clause in article 226 pertaining to the procedure which the High Courts should follow in granting temporary stay or injunctions in dealing with writ petition filed under the said article.

Recommendation

5.28. Before we part with this topic, we should, however, like to recommend that the Minister of Law & Justice may suggest to the

[1] Para 5·8, *supra*.
[2] See par 5·25, *supra*.

Chief Justice of India to take such action as he may deem desirable and expedient to see that all the High Courts make appropriate rules in this matter and that such rules are, as far as possible, uniform. The object of such rules should be to enable the High Courts to grant interim relief even without notice to the respondent only in exceptional cases and the rules should require that, ordinarily, a petitioner filing a petition under article 226 should, if he wants to apply for interim stay or injunction, serve a copy of his petition as well as a copy of his application for interim stay on the respondent and make an averment to that effect in the writ petition itself. In other words, the rule should be so framed as to prevent abuse of the process of the Court for obtaining interim stay in frivolous matters while safeguarding genuine cases, where a party has a legitimate point to urge in his writ petition and satisfies the court that without the interim order, his interest would be irreparably damaged. We feel that making such a rule is very necessary in the interest of justice, both of the citizens and of the State.

Trial of disputed questions of fact

Methods to reduce delay

5.29. Having regard to the fact that petitions for the issue of writs under article 226 constitute a fairly large portion of the total civil judicial business of the High Court[1], we thought it proper to consider another problem pertaining to this jurisdiction, namely trial of disputed questions of fact.

Accordingly, the following question was included in our Questionnaire:

> "Q.6. With respect to the jurisdiction of High Courts under article 226 of the Constitution, do you favour the same limitations as to inquiry into disputed facts as have been suggested above, in relation to the Supreme Court?"

Supreme Court's view

5.30. As the Supreme Court of India[2] has observed, the jurisdiction which the High Court exercises under Article 226 is extra-ordinary original jurisdiction, and it is well settled that Article 226 confers a discretionary power on the High Courts to issue appropriate orders and writs.

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[1] See discussion regarding Q. 5, *supra*.

[2] *State of U.P.* v. *Vijay Anad Maharaj*, A.I.R. 1963 S.C. 946.

This jurisdiction is extraordinary or special original jurisdiction, as distant from the ordinary civil jurisdiction conferred by the Letters Patent.[1]

5.31. There are dicta in a case decided by the Privy Council[2] to the effect that the power to issue a writ of *Que Warranto* is within the ordinary original jurisdiction of the High Court.[3] The decision relates to the words "ordinary" and "extra-ordinary" as used in the Letters Patent of the Calcutta High Court, 1865.

5.32. We thought that having regard to this special jurisdiction, it may be[4] desirable to consider the points[5] raised in Q. 6. Before we proceed to a consideration of the question, the present position on the subject may be examined.

Number of Writ Petitions

5.32A. The number of petitions for writs[6] pending in the High Courts at the end of 1971 was as follows[7]:—

1	Allahabad	12336
2	Andhra Pradesh	5029
3	Bombay	4227
4	Calcutta	1440
5.	Gujarat	1,005
6.	Kerala	9,965
7.	Madhya Pradesh	1,292
8.	Madras	4,684
9.	Mysore	6,634
10.	Orissa	1,741
11.	Patna	1,773
12.	Punjab & Haryana	5,984
13.	Rajasthan	3,032

[1] See discussion in *Venkatasubbaya* v. *District Collector* A.I.R. 1960 Andhra Pradesh 381, 384, 385.

[2] *Hamid Hasan* v. *Banwari Lal*, A.I.R. 1947 P.C. 90, 93 (Sir John Beaumont).

[3] For case-law, see *Siyanararayana Murthi* v. *I.T.A.T.* A.I.R. 1957 Andh. 123, 125, para 3.

[4] For history of the Jurisdiction to issue writs,

See–(*a*) *Ryots of Garabandha* v. *Zamindar of Parlakimedi*, A.I.R. 1943 P. C. 164.

(*b*) *Venkataratnam* v. *Secretary of State*, A.I.R. 1930 Mad. 896, 901;

(*c*) A.I.R. 1962 All. 551, 557, 558;

(*d*) *T.C. Basappa* v. *S. Nagga*, A.I.R. 1954 S. C. 440, 443, para 5.

[5] Para 5.29, *supra*.

[6] Under artical 226.

[7] Based on statement No. H—1.

Questions of fact

5.32B. It would appear that as to the question how far, in a writ petition, the High Courts goes into questions of fact which involve the recording of evidence, a simple answer cannot be given. The following analysis of the representative judicial decisions will, to some extent, illustrate the various aspects of the question.

(a) There are decisions which hold that the Court will not ordinarily decide disputed questions of fact,[1] in proceedings for writs.

There are, in particular, decisions holding that the court will not decide disputed questions of fact if they require a protracted inquiry,[2] or except in exceptional cases.[3]

(b) But it is also established[4] that the High Court is not, as a matter of jurisdiction, precluded from deciding such questions.

For example, the High Court would determine the facts if the jurisdiction of an administrative tribunal itself depends on findings of facts.[5]

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[1] (a) *Jagir Singh* v. *The State* A.I.R. 1957 Pat. 163, 166, Paragraph 16 Question about nature of particular land);

(b) *Indian Chemical & Pharmaceutical Works* v. *State of A.P.* A.I.R. 1964 A.P. 430, 433, Para 10 (Question whether chloral hydroate is a "norcotic";

(c) *Abdul Barik* v. *Union of India*, A.I.R. 1964 Cal. 324, 326-327, para 10 P B Mukerji J.;

(d) *Jagir Singh* v. *State of Punjab*, A.I.R. 1964 Punj. 9[illegible]9, Para 13 (Dispute as to accuracy of Rent revenue records, distingushing *Karishan Khanna* v. the *State of Punjab*. A.I.R. 1962 Punj. 32,36.

[2] See, for example, *Union of India* v. *T.R. Varma*, A.I.R. 1957 S.C.882, 885, para 6 (Dismissal of employee).

[3] See for example, *Mohammod Ibrahim* v. *Assansel Iron & Steel Workers' Union* A.I.R. 1955 Cal, 189, 191-192 (Para. 10 and Para 18) (D.N. Sinha J).

[4] (a) *Moti Dass* v. *S. P. Sahi*, A.I.R. 1959 S.C. 942, 951 para 17 (Question whether properties here trust properties.

(b) *Union of India* v. *Chaus Mohd.* A.I.R., 1961 S.C. 1526 1527, para (whether respondent foreign citizens.

(c) *Poincer Traders* v. *Chief Controller, Exports and Import*, A.I.R. 1963 S.C. 569 574, para 12.

(d) *Express Newspapers* v. *The Worker*, A.I.R. 1963 S.C. 569, 574, para. 12.

(e) *S.T.O.* v. *Shiv Rattan*, A.I.R. 1966 S.C.142, 144(facts to be decided related to taxability).

(f) *State of Orissa* v. *Binapani Dei*. A.I.R. 1967 S.C. 1269.

[5]. *State of M.P.* v. *D.K. Jadav*, A.I.R. 1968 S.C. 1186 1190, *para*7 Quoting Rex v. Shoreditch Assessment Committee (1910) 2K.B. 859, 873.

(c) When it becomes necessary to decide questions of facts in a writ petition, the High Court would normally take recourse to affidavits, and it is a matter within its discretion whether to allow cross-examination or not of a person who has sworn to an affidavit.[1]

Usually, the High Court, in the exercise of its discretion, declines to do so.[2]

Discretion of High Court

5.33. The quesetion was discussed by the Supreme Court in a case reported[3] in the year 1967. The Company Law Board (of the Central Government) issued an order on 19th May, 1965, under section 237(b) of the Companies Act, 1955, appointing four persons as inspectors for investigating the affairs of the Barium Chemicals Ltd., and for ascertaining the irregularities and contraventions alleged to have been committed by the managing director and officials of the Company. This order of the Company Law Board was challenged by the Company, in a writ petition under article 226 before the Punjab High Court.

During the course of the hearing, the petitioner company applied to the High Court for summoning a respondent for his cross-examination about certain disputed facts. The High Court did not pass any separate order on this application, but dismissed it in the course of its judgment on the main petition on the ground that it was not necessary to ask additional evidence and that the affidavits filed by parties were enough for the disposal of the petition.

Supreme Court's view on High Courts powers to cross-examine

5.34. The matter came up before the Supreme Court in appeal under article 136. The following observations of the Supreme Court regarding the determination of disputed questions of facts in writ petitions, may be referred to—

"In our opinion, in a proceeding under Article 226 of the Constitution, the normal rule is to decide disputed questions on the basis of affidavits and that it is within the discretion of the High Court whether to allow a person who has given an affidavit before it to be cross-examined or not.

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[1] Barium Chemicals Ltd. Vs. Company Law Board, A.I.R. 1967 S.C. 295.

[2] (*a*) *Dabur Ltd.* v. *Workmen* A.I.R. 1968 S.C. 17, 19 Para 4.

(*b*) *Sri Triumala Venkateswara* v. *C.T.O. Rajah Mandi* A.I.R. 1968 S.C. 784 786 para 5.

[3] *Barium Chemical Ltd.* v. *Company Law Board*, A.I.R. 1967 S.C. 295.

"In exercise of its discretion the High Court has refused permission to cross-examine them. In such a case it would not be appropriate for this court when hearing an appeal by special leave to interfere lightly with the exercise of that discretion."

"The Court has to find the facts and if it finds that it can do so without cross-examination, it is not compelled to permit cross-examination. We have no reason to think that the High Court could not have ascertained the facts on the affidavits themselves."

"In a petition under article 226, there is undoubtedly ample power in the High Court to order attendance of a deponent in court for being cross-examined. Where it is not possible for the court to arrive at a definite conclusion on account of there being affidavits on either side containing allegations and counter-allegations, it would not only be desirable but, in the interest of justice, the duty also of the court, to summon a deponent for cross-examination in order to arrive at the truth."

Oral evidence

5.35. Oral evidence is not thus ruled out. In fact, the rules of courts provide for oral evidence being taken. The Supreme Court has referred, with approval, to the practice of the Calcutta and the Bombay Hing Courts, on their Original Sides, of setting down petitions for hearing evidence in appropriate cases[1-3].

Recent cases

5.36. The matter regarding "disputed questions of facts" in a writ petition came up before the Supreme Courts in an appeal,[4] recently.

The petitioner, Kamini Kumar Das Choudhary, was a Sub-Inspector of Police in Calcutta. He was ordered on 20th May, 1951, to carry out the search of a particular house. During the search, he left the house and went out for taking tea. A departmental enquiry was held against him, and he was dismissed from service by the Dy. Commissioner of police on 1st August, 1951.

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[1] See, for example, rule 63[1], Bombay High Courts Rules (O.S.)

[2] *K. Kauchuni Moopil Nayar* v. *State of Madras*, (1959) supp. (2) S.C.R. 316,337 A.I.R. 1959 S.C. 725, 734 para 13.

[3] See also—

(a) *C.R.H. Readymoney Ltd.*, v *State of Bombay*, A.I.R. 1958 Bom. 181, 191, para 21 (Expert evidence as to wine);

(b) *State of Maharashira* v. *Bennet Coleman & Co., Ltd.* A.I.R, 1964 Bom. 213, 216, 217, para. 8 to 10 (Oral evidence as to prize competions). (1973).

[4] *Kamini Kumar Das Choudhary* v. *State of West Bengal* (1971).

5.37. The petitioner filed a writ petition under Article 226 of the Constitution against his dimsissal from service. This petition was dismissed on 11-9-1957 by a Judge of the Calcutta High Court, an appeal filed by the petitioner was also dismissed by a Division Bench of the Calcutta High Court. The matter came up in appeal before the Supreme Court under Article 133(1)(c) of the Constitution[1]. A number of disputed questions of facts were involved in the matter. It was, for example, alleged by the petitioner that he was denied due opportunity to adduce evidence and to cross-examine witnesses in the departmental enquiry. It was also alleged that the Dy. Commissioner of Police, who had passed the dismissal order, became a complainant in the case and there was a bias on the part of the dismissing authority and the order of dismissal was vitiated by mala fides. Dealing with these disputed questions of facts, the Supreme Court observed that the questions whether there was bias, ill-will, mala fides or a due opportunity to be heard or to produce evidence given in the course of departmental proceedings were so largely questions of facts that it was difficult to decide them merely on conflicting assertions made by affidavits given by the two sides.

Alternative remedy

5.38. The Supreme Court also observed that in accordance with the rule laid down by the court in Union of India v. T. R. Varma[2], the writ petition could have been dismissed on the ground that it was not the practice of courts to decide such disputed questions of fact in proceedings under Article 226 of the Constitution. Other proceedings are more appropriate for a just and proper decision of such question.

Summary of Supreme Court view

Thus, the view of the Supreme Court in this matter is that disputed questions of fact should not ordinarily be tried in a writ petition under article 226 of the Constitution, and such questions should be left for consideration by an ordinary civil court.

Discretion of the High Court

5.40. It, thus, appears that the question whether a disputed question of fact should be tried on a petition for writ is left to the discretion of the High Court. In some cases, the High Court may consider it desirable to let the matter be decided by a regular suit in an ordinary civil court. If the High Court so desires, it may decided the question on affidavits; the power to cross-examine the persons

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[1] 48, S.C.J. No. 11, page 632 (Supreme Court Journal dt. 1-6-1973).

[2] Union of India *vs* T.R. Varma AIR 1957 S. C. 882.

who have sworn the affidavits, and, if necessary, the power to take evidence as in a suit, is not denied. Any such power may be resorted to at the discretion of the High Court, if the circumstances of the case render such a course just. What circumstances render cross-examination or taking of evidence desirable, cannot, it seems, be categorised into hard and fast rules.

Gist of replies

5.41. The opinion on question 6[1] is divided, and there are various shades of view expressed. There are those who favour the suggested limitations, and those who oppose any amendment.

The first constitutes equally strong group as the second. These two, taken together, exhaust a large number of replies. A few replies favour affidavits, while there is one suggestion for recording evidence through Commissioners.

Some Judges[2] of the Supreme Court are not in favour of making any changes regarding the limitations as to inquiry into disputed facts under Article 226 of the Constitution.

5.42. Some of the important points made in the replies are the following:

With respect to the jurisdiction of High Courts under Article 226, one High Court Judge[3] does not favour the view that disputed questions of fact should not be gone into. For the trial of such issues of fact, the Judge suggests that the District Court may be directed to record evidence so as to save the precious time of the High Court. The present practice of filing affidavits and counter-affidavits may be continued.

In exceptional cases, the High Court may send it for recording evidence in the same manner as in suit.

Broad propositions

5.43. In the course of our oral discussions at a few places with the Judges and the bar, we put the query whether the following propositions substantially reflect the present practice, and we understand that they broadly reflect the present practice.

Where in a petition for a writ or order under article 226, a question of fact arises,—

(a) where the question of fact is frivolous and appears to have been raised only to oust the jurisdiction of the High Court tries it;

(b) where the question of fact is genuine but cannot, by reason of any provision of law, be tried in a proceeding other than such petition, the High Court tries it;

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[1] Para 5.29, *supra*
[2] S.No. 50.
[3] S. No. 17.

(c) where the question of fact is geniune, and can be more appropriately tried in a proceeding other than a petition under article 226, the High Court declines to try it, except where the question can be decided on admitted documents and can, in the opinion of the High Court, be satisfactorily disposed of in such a petition;

(d) if the High Court decides to try a question of fact in any such petition, it gives an opportunity to the parties to cross-examine the opposite parties and persons who have made affidavits supporting their case with reference to the statements made in their affidavits.

Rigid provisions not necessary

5.44. We have no doubt that High Courts ordinarily do act upon some such broad principles as have been stated above. Views expressed to us in writing[1] as well as during oral discussions—taking the majority opinion—do not regard any rigid provision in this regard to be necessary, and we have also, after careful consideration, come to the same conclusion.

Conclusion—no change needed

5.45. The matter appears to be one which can be left to the discretion of the High Courts—a discretion which, as we have stated above,[2] is generally exercised on the broad principles already indicated.

It would, we think, be inappropriate to introduce any provisions on this point in the Constitution.

Recommendation

5.46. In this connection, we would like to recommend that the Minister of Law and Justice may suggest to the Chief Justice of India to take such action as he may deem desirable and expedient to see that all the High Courts may appropriate rules in this matter and that such rules are, as far as possible, uniform. The object of such rules should be to lay down a definite procedure in dealing with disputed questions of fact in writ petitions filed under article 226.

It may also be stated that, at present, there is divergence of opinion[3] on the question whether, by virtue of section 141 of the Code of Civil Procedure, 1908, the provisions of that Code are attracted to petitions for writs. The framing of self-contained rules on important procedural matters would be useful, with respect to petitions under article 226 of the Constitution.

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[1] Para 5.41, *supra*.

[2] Para 5.44, *supra*.

[3] See 54th Report of the Law Commission (Code of Civil Procedure), Pages 107—108 para 1-0-25 to 1-9-32.

CHAPTER 6

MATTERS RELATED TO TAXATION

Importance of questions relating to taxation

6.1. The determination of questions relating to taxation laws is one of the most important types of judicial business. This function of the Courts has assumed greater importance with the increase in the content of the taxing laws. The problems raised by taxing statutes are of a complex and difficult character. As the eminent economist Harris has pointed out, taxing statutes become complex, not because any one really wants them to be so, but because there are certain pervasive reasons. In that connection, he mentions that one special problem after another arises in matters relating to tax, and the law tends to be complex. This complexity of the taxing laws renders it desirable that the problems of interpretation which arise in consequence should be solved without delay. By delay, onerous costs are incurred by parties, and, on occasions, by reason of uncertainty in the law, business and personal activities are often held up because of such uncertainty. It is thus plain that the interest of the community as well as of the State preemptorily require that tax matters should be disposed of satisfactorily and expeditiously.

Question 7

6.2. It is in the light of these considerations that Question No. 7 has been formulated by us. The question reads thus:

"(a) Do you favour the creation of a National Tax Court for hearing references from the Income-tax Appellate Tribunal (or similar tribunals constituted under taxation laws of the Centre and the State), whose decisions will be final, subject only to appeals as indicated below?

(b) If so, should appeals to the Supreme Court from the decisions of the Tax Court,—

(i) be allowed with special leave or,

(ii) be allowed with special leave but only if a substantial question of law of general importance is involved, or

(iii) be allowed subject to any other limitation?

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[1] C. Lowell Harris, "Adaptation of the Tax System" (1971) 25 Public Finance 113-142.

(c) In the alternative, are you of the view that the decision of the present Income-tax Appellate Tribunals (or corresponding Tribunals under other Central and State laws relating to taxation) should be final, subject to review by the High Court under article 226 of the Constitution or appeal to the Supreme Court under article 136 of the Constitution?

(d) If yes, what should be the status and terms and conditions of service of Judges of the above Court?

Three alternatives

6.3. and 6.4. It will be noticed that Question No. 7 elicits opinion on two alternative courses, and the third alternative was evolved in the course of our inquiry. The first alternative is that a National Tax Court should be established and against its decision, an appeal should lie to the Supreme Court under one or the other of the three conditions indicated under Q. 7(b). The other two alternatives are as follows. Either the decision of the Income-tax Appellate Tribunal should be revisable by the High Court under article 226 of the Constitution and an appeal against the decision of the High Court (under that article) should lie to the Supreme Court under article 136, or, instead of the present reference proceedings, an appeal against the judgement of the Tribunal should lie to the High Court on a substantial question of law, and against the decision of the High Court in such an appeal, a further appeal should be to the Supreme Court if the case involves a substantial question of law of general importance which needs to be decided by the Supreme Court.

Object of inquiry

6.5. In including the two alternatives in Question No. 7 our main purpose was first to solicit opinion on the question as to whether the present reference proceedings, which take considerable time and almost always lead to delay in the disposal of references in the High Court, should be continued or should be dropped.

Provisions in Income-tax Act

6.5A. We shall briefly deal with provisions in the Income-tax Act. The provisions in regard to reference to the High Court are contained in sections 256 to 260 of that Act. Sections 256(1) provides that the assessee or the Commissioner may, within the prescribed period, move the Appellate Tribunal by an application made in that behalf in the prescribed form, for a reference to the High Court on any question of law arising out of such order. It further imposes upon the Appellate Tribunal an obligation to draw up a statement of the case and refer it to the High Court within the prescribed period.

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1. Para 6-1, *supra*.

6.6. Sub-section (2) of s. 256 deals with cases where the Appellate Tribunal refuses to state the case on the ground that no question of law arises, and it lays down that in such cases, the assessee or the Commissioner may, within the prescribed period, move the High Court for a direction that the Tribunal be called upon to state a case and to refer it. If the application made by the assessee or the Commissioner under this clause succeeds and the High Court requires the Tribunal to state the case, the Tribunal shall state the case and refer it accordingly. That is the effect of the provisions of clause (2). With sub-section (3) of s. 256, we are not concerned.

6.7 Section 257 authorises the Appellate Tribunal to draw up a statement of the case and refer it, through its President, to the Supreme Court, if, on an application made to it under s. 256 it is "of the opinion that on account of conflict in the decisions of the High Courts in respect of any particular question of law, it is expedient that such a reference should be made."

6.8. Section 258 empowers the High Court or the Supreme Court to refer the case back to the Tribunal for the purpose of making such additions to the reference already made by it or such alternations in such a reference, if the High Court or the Supreme Court is satisfied that the statement in the case referred to it is not sufficient to enable it to determine the question raised thereby. In other words, under this section, a further statement or a modification of the statement already made can be requisitioned by the High Court or the Supreme Court.

6.9. Section 259 provides for the manner in which the High Court should hear Income-tax reference and dispose of the same. Section 260 lays down that a copy of the judgment delivered by the High Court or the Supreme Court will be forwarded to the Tribunal in the manner indicated by the section and that on receipt of such a copy, the Tribunal shall pass such orders as are necessary to dispose of the case conforming to such act Clause (2) of section 260 deals with the question of costs with which we are not concerned.

6.10. Sectioh 261 provides for an appeal to the Supreme Court against the judgment of the High Court delivered by it on a reference made to it under section 256 provided the High Court certifies the case to be a fit one for appeal to the Supreme Court. Section 262(1) lays down the procedure for the hearing of the appeals before the Supreme Court. Sub-section (2) and (3) of section 262 are not relevant for our purpose.

6.11. It may, incidentally, be pointed out that the order passed by the High Court calling upon the Tribunal to state a case for the decision of the High Court can be described as an "order in the nature of a *mandamus*".

Gist of views expressed on the question

6.12. In regard to the opinion received by us on this question, it may be stated broadly that the majority of the replies oppose the creation of the National Tax Court; some replies are inclined to support the idea that the decisions of the Tribunals should be final subject to articles 226 and 136 of the Constitution. On the other hand, some replies indicate dissatisfaction with the proposal to leave it open to the party aggrieved by the decision of the Income-tax Appellate Tribunal to seek relief either under article 226 or under article 136 of the Constitution. According to these replies, an appeal should lie to the High Court in place of the present reference and thereafter, if a party is aggrieved by the appellate decision of the High Court, a further appeal should lie to the Supreme Court on a substantial and important question of law.

Unanimity as regards replacement of reference by appeal

6.13. In regard to the present provisions relating to the reference proceedings, there appears to be almost complete unanimity for deleting them and for substitution of an appeal in their place; and this trend of opinion can be well appreciated, because it is common experience that the procedure of reference, at present contemplated by section 256, is dilatory and serves no significant or important purpose. We ought to add that if proceedings relating to reference are omitted from section 256, it is certain that the decisions of the Income-tax Appellate Tribunal would naturally be more elaborate and conform to the traditional requirements of an appellate judgment[1]. We are, therefore, satisfied that the present provisions about reference should be deleted. We shall deal later with the question of the procedure to be substituted in their place.

National Tax Court

6.14. The concept of a National Tax Court may have merit of leading to uniformity of decisions in respect of direct tax laws throughout the country and this, no doubt, is a relevant consideration. The other point in favour of this concept is that, if a National Tax Court is to be established, its Members would, inevitably, be chosen for their expertise in tax laws; and judges pre-eminently qualified in this matter who might sit on the National Tax Court would be expected to dispose of tax appeals expeditiously.

Practicability considered

6.15. On the other hand, there are some considerations which are very much against the practicability and feasibility of this concept. The first consideration which detracts from the merits of the

[1] See Paragrph 6·36 and 6·37 *infra*.

concept is that even if a National Tax Court is established, unless suitable amendments are made in the Constitution, it would be impossible to exclude the applicability of article 226 and article 136 of the Constitution to the decisions of such a Court, and we are reluctant to make such a recommendation.

Likelihood of large number of appeals

6.16. Besides, if the National Tax Court is intended to deal with tax appeals arising from the decisions of the Income-tax Appellate Tribunals all over the country, it is easy to imagine that the Court will be flooded with a large number of appeals; and in that case, the problem of arrears in tax matters will merely be shifted from the High Courts to the National Tax Court. That cannot be said to be a solution to the problem of arrears.

Difficulty if located at one place

6.17. The concept of National Tax Court suffers from another serious infirmity, and that is, that such a Court cannot conveniently function in one place like the Supreme Court in New Delhi. For the convenience of the parties, it would be essential that the Court will have to sit in Division Benches at convenient places all over the country, and that would weaken the argument that the Court sitting in one place might lead to uniformity of decisions. Therefore, in our opinion, it would not be reasonable or feasible to support the idea of a National Tax Court.

Not recommended

6.18. Having thus, carefully considered all the pros and cons in the matter, we have no hesitation in coming to the conclusion that the idea of National Tax Court cannot be recommended.

Article 226

6.19. Similarly, we do not think it would be advisable to adopt the alternative of leaving it open to the party aggrieved by the decision of the Income-tax Appellate Tribunal to move the High Court under article 226 because the jurisdiction of the High Court under article 226, no doubt, more limited than its appellate jurisdiction. While exercising its jurisdiction under article 226, the High Court would be inclined to interfere with the impugned order of the Income-tax Appellate Tribunal only if it is shown that it discloses an error apparent on the face of the record. It is well-known that this requirement limits the jurisdiction of the Court ahd may not always enable the citizen aggrieved by the order of the Income-tax Appellate Tribunal to raise even a substantial question of law before the High Court against the said order.

Observations of Lord Denning

6.20. In this connection, we would like to refer to the observations made by Denning L.J., (as he then was) in *Rex* v. *Northumberland Compensation Appeal Tribunal.*[1] Said Lord Denning:—

> "There was no way other than this by which the mistake could be rectified. The Attorney-General pointed out the undesirability of the court interfering with the decisions of tribunals set up by Parliament. I agree with him that the Divisional Court cannot extend its powers. It can only act according to the well-recognised rules. It is equally important that the court should not hesitate to act to prevent an injustice being done if the remedy sought is within the scope of its powers. Much time has been expended in recent years in considering whether in particular circumstances *certiorari*, or prohibition, will lie. A great deal of it could be saved. The regulations under the National Health Service Act, 1946, are of great complexity. The interpretation of them is left to the tribunal; there is no provision for an appeal to the courts. That position arises frequently now-a-days.
>
> I most earnestly wish that in such cases, where *difficult questions of law, and of interpretation, must arise, there should be given some right of appeal.* Perhaps the most convenient form is that adopted in section 37 of the National Insurance (Industrial Injuries) Act, 1946, under which any question of law arising in connection with the determination of certain questions may, if the Ministry thinks fit, be referred to the decision of the High Court, and any person aggrieved by the decision of the Minister on any question of law not so referred may appeal from that decision to the High Court. And there is provision in sub-section (5) that the decision of the High Court shall be final,—a provision which may be thought desirable in such cases. After all, it is the function of the courts to determine questions of law. Tribunals are sometime given an unduly difficult task. There must be a feeling of dissatisfaction if it is recognised that a decision of a tribunal is wrong in law and yet there is no power to correct it—in other words, if there is no right to obtain the opinion of the court.
>
> I am satisfied that the course I have suggested would result in a saving of time, and of expense, and would be for the public good."

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[1] *Rex.* v. *Northumberland Compensation Appeal Tribunal* (1952) 1 All E.R. 122, 127 (C.A.).

6.21. While we agree with the view taken by Denning, L.J., that the remedy by way of an appeal would be more suitable in proceedings before tribunals,[1] we may, incidentally, point out that the National Insurance Tribunals cannot be compared to the Income-tax Appellate Tribunals in our country. The reason is that Income-tax Appellate Tribunals in India are almost invariably presided over by a Senior Judge with adequate judicial experience.

Article 136

6.22. We are also reluctant to accept the alternative suggestion that an aggrieved party should be given the option of either invoking article 226 or article 136 of the Constitution. In our view, if such an option is provided for in a relevant provision of the Income-tax, that will not affect the right of the party, who is aggrieved by the decision of the High Court under article 226, to move the Supreme Court under article 136 unless article 136 is suitably modified in that behalf, and we are not prepared to suggest any such amendment in article 136.

Substitution of appeal recommended in section 256

6.23. Therefore, having carefully examined this problem, we are satisfied that the only reasonable solution, which may tend to make the disposal of tax matters more satisfactory and expeditious, would be to delete the present provision relating to reference (section 256, Income-tax Act) and to provide for an appeal against the decision of the Income-tax Appellate Tribunal on a substantial question of law instead of on a simple question of law, as at present, and also to provide that against the appellate decision of the High Court, it should be open to the aggrieved party to move the Supreme Court with a certificate of the High Court that the case involves a substantial question of law of general importance which needs to be decided by the Supreme Court.

Section 257, Income-tax Act

6.24. Section 257 of the Income-tax Act, to which we have already referred[2], provides for a direct reference from the Tribunal to the Supreme Court on an application made in that behalf, if the Tribunal is of opinion that on account of a conflict in the decisions of High Courts in respect of any particular question of law, it is expedient that such a reference should be allowed direct to the Supreme Court. This section was, for the first time, introduced when the Income-tax Act was revised in 1961, and its genesis lies in a recommendation

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[1] Para 6.20, *supra*.

[2] Para 6.6 and 6.7, *supra*.

of the Tyagi Committee[1]. The principal object of the recommendation was to secure uniformity in interpretation. It was represented to the Tyagi Committee that, apart from the delay in disposal, a great deal of hardship was caused to the tax-payers on account of the lack of uniformity in the interpretation put on the various provisions of the taxing statutes by the assessing and the appellate authorities. The Committee made a recommendation for inserting such a section. It can be invoked after the Tribunal has pronounced its order.

6.25. In terms, this provision (S. 257) proceeds on the assumption of an application made either by the assessee or the department under section 256, and consequently, section 258 deals with the power of the High Court and the Supreme Court in regard to the reference made to them. In other words, if a reference is made to the Supreme Court by the Appellate Tribunal under section 257, it would be competent to the Supreme Court to refer the case back to the Appellate Tribunal, if it is satisfied that the statement in the case in question is not sufficient to enable it to determine the question raised. It also follows that, as a consequence of section 260, the judgment delivered by the Supreme Court would be in the nature of an advisory opinion, it would no doubt be binding on the Tribunal, but it does not amount to a final decision of the case. The Appellate Tribunal has to pronounce its judgment on the point referred to the Supreme Court in the light of the opinion which the Supreme Court may express on that point. Thus, the reference directly made to the Supreme Court is, speaking legally, of the same character as the reference made by the Tribunal to the High Court under s. 256.

Continuance of s. 257 discussed

6.26. Having decided to recommend[2] that the reference procedure contemplated by s. 256 should be replaced by an appeal, the question which we have to consider is whether the reference procedure contemplated by s. 257 should continue.

Vexed problem

6.27. We have examined this question elaborately and we are free to confess that this appears to us to present a vexed problem. There is no doubt that a direct reference to the Supreme Court contemplated by s. 257 would be in the interests both of the State and the assessee inasmuch as it avoids delay in decision of the point on which there is a divergence of opinion in the different High Courts in the

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1. Direct Taxes Administration Enquiry Committee, Report (1958-59), page 93 paragraph 4.45.

2. Para 6.23, *supra*.

country. Section 257 enables the Appellate Tribunal to circumvent the High Court of the State in which it is functioning and send the case to the Supreme Court direct for its verdict and thereby avoid delay in the final decision of the case. Delay is avoided for the reason that ultimately the Tribunal formulates its conclusion on the question of law, which had been referred to the Supreme Court, in the light of the verdict of the Supreme Court; and that, in a sense, becomes final.

Simultaneous reference not ruled out

6.28. Nevertheless, in spite of the reference which may be made under s. 257, if the assessee wants a reference to be made to the High Court of the State on certain other points, and the Tribunal is satisfied that the reference should be made, the reference has to be made within the time and in the manner prescribed by section 256. The other provisions of section 256 as to the procedure open to the party, whose request for a reference has been rejected by the Tribunal, would also apply in relation to points other than the one which is the subject matter of the reference under section 257. Thus, in a case where a reference is directly made to the Supreme Court, it is not unlikely that, in some cases, reference may be pending in the same case both in the High Court and in the Supreme Court, though, in the reference to the High Court, the point referred to the Supreme Court directly would not be involved.

No reported cases

6.29. Section 257 was inserted when the Act was revised[1] in 1961: but unfortunately, we have not been able to collect statistics as to the number of references directly made by the Appellate Tribunal to the Supreme Court under this section, nor have we been able to find any pronouncements by the Supreme Court on such references (as none have been reported). Therefore, we have to decide the question about the propriety and reasonableness of the continuance of section 267 hereafter on purely juristic and the oeretical grounds.

6.30. In our opinion, the view that recourse to section 257 might avoid delay, which prima facie appears to be attractive, may not prove to be quite sound in actual practice. Even if a reference is made to the Supreme Court under section 257, it may involve delay if the Supreme Court exercises its power under section 258 and calls for a further statement of facts. That consideration cannot be treated as irrelevant.

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1. Para 6·24 *supra*.

6.31. Besides, even if a reference is made to the Supreme Court under section 257, the reference which is pending in the High Court[1] will have to run its own course, and after the verdict of the Supreme Court is pronounced on the reference made to it directly by the Tribunal, the Tribunal will have to modify, if necessary, its conclusion on the question referred to the Supreme Court; and this modified decision of the Appellate Tribunal may have to be brought to the notice of the High Court.

Procedure not serving any significant purpose

6.31A. There is another consideration which has weighed with us in dealing with this question, namely, that the procedure involved in the reference proceedings does not serve any significant purpose; we have already adverted[2] to this consideration while dealing with section 256. On the recommendation that we have made, as a result of which section 256 will be replaced by an appropriate section providing for an appeal to the High Court on a substantial question of law, a direct reference to the Supreme Court under section 257 seems to us to be juristically unjustified. If there is a divergence of opinion amongst the High Courts on any issue of law, it is legitimate that even that question should form part of the grounds which the party affected by that decision will take in its appeal before the High Court, and the High Court may consider the divergence of opinion, and, conceivably, in some cases, may change its view. That is the normal procedure of appeals and second appeals in judicial proceedings; and we see no justification for departing from this procedure, particularly when we are, in substance, assimilating the proceedings before the Tribunal to those before the first appellate Court.

Substitution of appeal in section 257 considered inappropriate

6.32. During the course of our discussion, we considered the question whether the substitution of an appeal to the Supreme Court (in place of the present procedure of reference) in section 257 would be an appropriate course, and we examined the point whether providing for such an appeal would be juristically sound and practically useful and convenient to the party concerned. We came to the conclusion that, if an appeal is provided instead of the present reference proceedings under s. 257, it would be inappropriate to limit the appeal to only the point on which there was a divergence of opinion amongst the High Courts. The concept of an appeal and its scope will naturally be determined by the conditions on which an appeal is provided for

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1. Para 6.28 *supra*.

2. Para 6.23 *supra*.

under the statute; and, in the present case, we are recommending[1] the amendment of section 261 of the Act and suggesting that an appeal to the Supreme Court should lie on a certificate by the High Court that the case involves a substantial question of law of general importance which, in the opinion of the High Court, needs to be decided by the Supreme Court.

6.33. If that recommendation (concerning section 261) is accepted, then it would be juristically unsound to provide for an exception in regard to cases falling under section 257 and state that, in cases where an appeal lies to the Supreme Court directly, all questions which arise in appeal should fall to be considered by the Supreme Court even if they do not satisfy the tests recommended by us.

This latter provision would be inconsistent with section 261, if that section is amended in accordance with our recommendation.

Recommendation to delete section 257

6.34. Having given our anxious and careful consideration to the problem, we are satisfied that, consistently with the philosophy which we have accepted against the usefulness of the reference proceedings, the provision about the direct reference to the Supreme Court contemplated by section 257 should also be deleted.

Resulting scheme

6.35. In the result, the scheme of the proceedings subsequent to the Judgment of the Tribunal (sections 256 *et seq* of the Income-tax Act) would be that, after the Appellate Tribunal has pronounced its judgment, an appeal will lie to the High Court on a substantial question of law, and against the appellate judgement of the High Court, an appeal will lie to the Supreme Court[2] on a certificate of the High Court that it involves a substantial question of law of general importance which, in the opinion of the High Court, needs to be decided by the Supreme Court.

In consequence, section 256 will need to be revised. Section 257 will need to be deleted.Sections 258 to 262 may also require to be deleted or amended.

We need mention have 2.a all the consequential amendment[3]. But we deal below with one important point[4].

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1. Para 6·35 and 6·39, *infra*.

2. See para 6·39, *infra*.

2-a. See Appendix.

3. Similar changes will be needed in other Laws dealing with direct taxes containing similar provisions.

4. Para 6·36, *infra*.

Section 255(7) (New) Judgments of Tribunals

6.36. At present, there is no provision in the Income-tax Act requiring the Appellate Tribunal to pronounce a judgment. Under section 256(1) of the Act, where there is a reference to the High Court, the Tribunal is required to draw up a statement of case and refer it to the High Court. It has been emphasised more than once[1] that the statement of case to be prepared by the Tribunal should contain an intelligible summary of the facts found by the Tribunal, the points raised by the parties, the authorities or statutory provisions relied upon for view taken by the Tribunal, and its own conclusions and findings of fact. In view of the recommendation to substitute an appeal in place of reference, it now becomes imperative that the Tribunal should give a formal judgment in every case[2]. Under the Civil Procedure Code,[3], a Court is required to give, in its judgment, a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. This and other important provisions of that Code applicable to contents of judgments should now be extended to the Tribunal. We recommend the insertion of sub-section (7) in section 255 of the Income-tax Act for that purpose.[4]

Reasons for recommendation

6.37. Since we are recommending radical changes in respect of proceedings subsequent to decision of the Income-tax Appellate Tribunal, it is necessary that we should explain the reasons which have weighed with us in making these recommendations. We have already dealt with the point that the provisions about reference serve no useful purpose, and, in fact, they invariably tend to introduce an element of delay in the final disposal of Income-tax cases. That is why, consistently with the opinion almost unanimously expressed in our present inquiry, we are recommending that the procedure as to reference should be dropped.

Proceedings at the stage of Tribunal—truly judicial proceedings

6.38. In regard to the appeals to the High Court,—which we are recommending,—we are providing for an appeal to the High Court only if it involves a *substantial* question of law, and not merely a question of law as permitted under the present section 256. In our view,

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1. *L.B.A. Alladin* v. *Income Tax Commissioner*, A.I.R. 1968 S.C. 788, 794, Para 11.

2. See also para 6.13, *supra*.

3. Order 20, Code of Civil Procedure, 1908.

4. See Appendix.

though it is true that the assessment proceedings before the Appellate authority can be legitimately regarded as proceedings before Departmental persons, and, in that sense, not judicial proceedings as such, there can be no doubt that when the case reaches the Income-tax Appellate Tribunal, the proceedings before the Tribunal are judicial.[1] A Bench of the Tribunal ordinarily consists of two members,[2] and one of them is invariably a senior person with adequate judicial experience. From that point of view, the proceedings before the Appellate Tribunal can well be regarded as the first appeal either by the assessee or the Commissioner. We are prepared to describe these proceedings as the first appeal, though, ordinarily, the question has been considered by two authorities, namely, the Income-tax Officer and the Appellate Authority. If that be so, the apepal to the High Court can well be considered to be in the nature of a second appeal and we think, it would not be unfair or unreasonable to suggest that such a second appeal to the High Court should lie on a substantial question of law. We have made a similar recommendation in regard to the second appeal under section 100 of the Code of Civil Procedure.[3]

6.39. Then, as to the appeal to the Supreme Court, we propose to adopt the same philosophy of jurisprudence on which article 133(1)(c) has been already amended by Parliament in accordance with our recommendations; and opting the same philosophy, we are recommending a similar amendment in article 134(1)(c) of the Constitution. This article deals with criminal appeals to the Supreme Court[4] and the test, we are recommending, is that, except for the cases covered by article 134(1)(a) and (b), an appeal from the appellate criminal decision of the High Court certifies that it raises a substantial question of law of general importance which, in its opinion, needs to be considered by the Supreme Court. We see no reason, why, if the High Court had considered the appeal in Income-tax matters and has decided even important questions of law, an appeal should lie against its decision to the Supreme Court if the point of law, decided by the High Court, is not a point of first impression or is not one on which there is a divergence of opinion amongst different High Courts in country.

6.40. That, in brief, explains why we have recommended a somewhat radical change in the scope of the appeal to the High Court as well as the appeal to the Supreme Court.

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1. *cf.* section 255(6), Income-tax Act, 1961.

2. Section 255(2), Income-tax Act, 1961.

3. 54th Report.

4. Chapter 3, *supra*.

Special leave when can be obtained

6.41. Incidentally, we may be permitted to point out that, in view of the specific provision in the Income-tax Act, providing for an appeal to the Supreme Court subject to the conditions specified by section 261, it would, ordinarily, not be open to the party aggrieved by the appellate decision of the High Court in Income-tax matters to circumvent the provision of s. 261 and move the Supreme Court for special leave under article 136. Such a course may be open to the aggrieved party if he satisfies the Supreme Court that though his appeal does not satisfy the test prescribed by s. 261 of the Income-tax Act, the judgment of the High Court has led to a grave miscarriage of justice.

CHAPTER 7

DISPUTE CONCERNING INDUSTRIAL RELATION

Question 8

"1. We now proceed to deal with question 8 formulated in our Questionnaire. This Question reads thus:

"8

(a) Do you favour the creation of a National Appellate Court for industrial disputes whose decision will be final, subject to appeal as indicated below?

(b) In the alternative, do you favour the creation of a Commission for Industrial Relations as recommended by the National Labour Commission?

(c) Or, would you recommend the revival of Labour Appellate Tribunals, as they existed previously?

(d) If you are in favour of any of these alternatives, should appeals to the Supreme Court from the decisions of the proposed National Appellate Court or Labour Appellate Tribunal or National Commission on Industrial Relations—

(i) be allowed with special leave, or

(ii) be allowed with special leave but only if a substantial question of law of general importance is involved, or

(iii) be allowed subject to any other limitation, or

(iv) not be allowed at all?

(e) What should be the status and terms and conditions of service of Judges appointed to the above Court or Commission"?

Voume of industrial litigation and relevant statistics

7.2. The inquiry contemplated by this Question was intended to elicit opinion from interested parties on the different aspects of the problem raised in the question and decide which method of dealing with industrial disputes would lead to a satisfactory and expeditious disposal and reduce the volume of industrial litigation on the dockets of the High Courts and the Supreme Court. The volume of litigation relating to industrial relations ending before the Supreme Court can

be illustrated by the figures which have been supplied[1] to us for the years 1969, 1970 and 1971 :

	1969	1970	1971
(*a*) Number of appeals at the opening of the year	290	311	430
(*b*) Number of appeals instituted during the year	628	175	256
(*c*) Number of appeals disposed of during the year—			
(*i*) allowed	536	6	22
(*ii*) dismissed	52	14	87
(*iii*) compromised	19	36	16
Total ..	607	56	125
(*d*) Number of appeals Pending at the end of the year ..	311	430	591

We ought to add that these figures include appeals under Article 132 and Article 133 of the Constitution. They also show that disposal of these matters is not able to keep pace with institution: and, as is well-known, expeditious and satisfactory disposal of industrial matter is very important to the industrial life of our country. That is one consideration which weighed in our mind when we formulated the Questionnaire. We thought time had come when all interested parties should consider whether any satisfactory alternative method could be devised by which the number of industrial matters going to the High Courts under Art. 226 and to the Supreme Court under Articles 132 and 136 could be appreciably reduced.

Difference of opinion revealed in the replies

7.3. In regard to Question 8, we have received several replies from the members of the Bar and the Judiciary. These replies show a sharp difference of opinion. Some replies seem to favour the creation of a National Court of Industrial Disputes, while others desire that the Industrial Relations Commission, as recommended by the National Labour Commission, should be established, while some others would like the revival of the Labour Appellate Tribunal. The replies received from the different Government of the States[2] as well as from the Union Government[3] show a divergence of opinion.

1. Statement No. S. 6.

2. See Appendix.

3. S. No. 25. (Reply of Additional Secretary, Ministry of Labour).

We may state that the reply from the Ministry of Labour,[1] indicates that a comprehensive machinery including the creation of Industrial Relations Commission, as recommended by the National Commission on Labour, is favoured.

Paucity of replies from organisations of employers and employees

7.4. Unfortunately, however, we have received only just a few replies from employer-organisations, and none at all from any of the national and State trade unions to which our Questionnaire had been sent. Since we did not receive any response from the employers and the employees, it was not possible for us to organise a meeting of the representatives of the employers and the employees and, without a discussion with them, it would, we think, be unreasonable to make any recommendation in the matter covered by Question 8.

Relevant considerations

7.5. It is possible that the failure of the employers and the employees to respond to our Questionnaire may be due to the fact that hey know that the Ministry of Labour in the Union Government[2] is thinking of introducing a comprehensive machinery, including the creation of Industrial Relations Commission, as recommended by the National Commission on labour, on the lines agreed to by the tripartite conference. Under these circumstances, we do not propose to discuss this Question at length; but would content ourselves merely with starting broadly some relevant considerations.

Importance of productivity

7.6. It may sound platitudinous, but nevertheless it is profoundly true, that, in modern times, no nation can make progress in achieving its objective of establishing social and economic justice, unless it is able to persuade both the employers and the employees to help the process of productivity in the country; and productivity in industrial matters cannot be accelerated without industrial harmony. That is why the main objective of industrial jurisprudence is to help the growth of industrial harmony between the employers and the employees. In considering one or the other of the alternatives indicated in Question 8, this main objective must be kept in mind

Trade union movement in India compared with U.S.A. and U.K.

7.7. It may, incidentally, be pointed out at this stage that unfortunately, trade union movement in this country did not have to undergo the trials and struggle which were witnessed in the United

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1. S. No. 25. (Reply of Additional Secretary, Ministry of Labour.)

2. *Cf. f.* para 7·3, *supra.*

States of America and in the United Kingdom. In both the countries, before unionism attained the status of respectability, trade unionists had to undergo severe trial. In the United States, the struggle for recognition that was carried on by the trade union movement often led to violent fights between employers and the employees. The 'yellow-dog' contracts, which were used as weapon by the employers, came to an end only in 1932 under the Norris La Guardia Act and the National Labour Relations Act, 1935 makes reasonable provisions on the basis of the legitimacy of the Trade Union Act.

In the United Kingdom, the Common Law doctrine of conspiracy held away, and even if two or more workmen combined to bargain for better terms of employment, they were hauled up on the charge of conspiracy, and sometimes sentenced to undergo what would now strike one as a savage sentence. It was in 1906 that the Trade Disputes Act took the first stern step recognising the right to form Trade Unions.[1]

Thus, both in the U.S.A. and in the U.K., trade unionism had gone through the batism of fire before receiving recognition and attaining the status of respectability.

History in India

7.8. On the other hand, in India the story of the growth of trade union movement is not so deserved. It is true that, in 1918 for instance,[2] the Common Law doctrine was invoked by the Madras High Court in dealing with the case of the Madras Labour Union led by B.P. Wadia which had declared a strike. But, with the passing of the Trade Unions Act in 1926, the Employees' right to form trade unions was, in substance, recognised. Several other Acts were passed later, which conferred legitimacy on the trade union movement and its activities.

Rule 81A, Defence of India Rules

7.9. In the development of industrial law in this country, Rule 81A of the Defence of India Rules,[3] has played an important role. Originally, this Rule was passed during the Second World War, with a view to providing speedy remedy for the settlement of industrial disputes by referring them compulsorily to conciliation or adjudication by making awards legally binding on the parties and by prohibiting

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1. Elegg Fox and Thompson, History of British Trade Unionism (1964) Vol. 1 page 313-325.

2. (a). (a) Rustamji, law of Industrial Disputes in India (1964), p. 145.

(b) K.N. Subramania, Labour Management Relations in India 1967, pages 37, 41, 53.

(c) National Commission on Labour Report (1969) page 55, para 6.44 and 6.45.

3. The Defence of India Rules, 1939.

strikes or lockouts during the pendency of conciliation or adjudication proceedings and for two months thereafter. This Rule also put a blanket ban on disputes which were not genuine industrial disputes.

Later Ordinance and Act of 1947

7.10. After the termination of the Second World War, Rule 81A of the Defence of India Rules, 1939 was about to lapse on the 1st October, 1946, but it was kept alive by an Ordinance issued in exercise of the Government's Emergency Powers. This was followed by the Industrial Disputes Act,[1] 1947. This is an Act which contains[2] more than 60 sections, and none of its sections lays down any principles of industrial law as such. Section 10 of the Act authorises the appropriate Government to make a reference of industrial disputes to Boards, Courts or Tribunals wherever the said Government is of opinion that any industrial dispute exists or is apprehended. In exercise of this power, several disputes were referred by different Governments to Boards, Courts or Tribunals, and it is the awards or decisions of these bodies that laid the foundation of industrial law in our country.

Labour Appellate Tribunal

7.11. Later, the Industrial Disputes (Appellate Tribunal) Act, 1950 brought into existence the Labour Appellate Tribunal, and appeals against the awards of Industrial Tribunals all over the country were provided for, subject to the conditions mentioned in the relevant provisions of that Act.

7.12. The Labour Appellate Tribunal sat in defferent branches at different places, and it must be said to the credit of the Tribunal that its decisions evolved principles of industrial law which later formed part of the industrial jurisprudence of tht country.

Abolition of the Labour Appellate Tribunal

7.13. However, complaints were heard that the Industrial Disputes (Appellate Tribunal) Act, 1950 did not serve its purpose, because proceedings before the Labour Appellate Tribunal took unduly long time, and industrial disputes, which are always sensitive in character, brook no delay in their disposal. That is why, in 1956, the Labour Appellate Tribunal was abolished.

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1. The Industrial Disputes Act, 1947 (14 of 1947).

2. There are several sections inserted by amendments.

7.14. The Statement of Objects and Reasons[1] annexed to the Bill, which proposed the abolition of the Labour Appellate Tribunal, stated as follows:—

> "There is a large volume of criticism that appeals filed before the Appellate Tribunal take a long time for disposal and involve a great deal of expenditure which the workers cannot afford. It is proposed to repeal the Industrial Disputes (Appellate Tribunal) Act, 1950, and at the same time, to substitute the present system of tribunals by tribunals manned by personnel of appropriate qualifications. References to the National Tribunals will be made by the Central Government, and they will cover disputes which involve questions of national importance or which are of such a nature that establishments situated "in more than one State are likely to be interested in, or affected by, the disputes."[2]

Supreme Court

7.15. On the commencement of the Constitution, the Supreme Court had begun to function, and its decisions on a number of important questions had already laid the foundation of a sound industrial jurisprudence. When an appeal was brought before it, against an award passed under the Industrial Dispute Act in *Bharat Bank* v. *Bharat Bank Employees Union*,[3] a question was raised as to whether an award in an industrial matter is subject to the appellate jurisdiction of the Supreme Court under article 136 of the Constitution. By a majority judgment 3:2, the Supreme Court held that the awards made by the Industrial Tribunals are subject to appeal to the Supreme Court under article 136 of the Constitution. In one sense, this judgment constitutes a landmark in the history of India's quest for industrial harmony, based on sound principles of industrial jurisprudence. It is well known that, ever since the Supreme Court pronounced its judgement in the *Bharat Bank's case*, the Court has dealt with principles of industrial law in several decisions, and these decisions, along with the decisions of the Labour Appellate Tribunal, constitute, as already pointed out, the essence of industrial jurisprudence in India.

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1. Statement of Objects and Reasons, Gazette of India, 1955, Extra., Part II, Sec. 2, Page 433, relating to the Industrial Disputes (Amendment and Miscellaneous Provisions) Bill, 1955.

2. The Bill was discussed in the Lok Sabha on 9th and 23rd December, 1949, 28th January, 1950, 10th Feb. 1950 and 8th and 11th April, 1950.

3. *Bharat Bank* v. *Their Employees Union*. (1950) S.C.R. 459: A.I.R. 1950 S.C. 188.

Federal Court

7.16. But, before the Supreme Court came on the scene, one special feature of industrial law was considered by the Federal Court in *Western India Automobile Association* v. *Industrial Tribunal, Bombay*[1]. In that case, the dispute brought by the employers before the Federal Court was in relation to the powers of industrial tribunal to direct the reinstatement of an employee where services had been terminated by the employer. Basing the argument on principles of Common Law, relating to master and servant, the employees urged that the Industrial Tribunal had no jurisdiction to direct reinstatement, since the termination of the employment was in accordance with the terms of contract. "Adjudication", said the Federal Court in rejecting this argument, does not, in our opinion, mean adjudication according to the strict law of master and servant. "The award of the tribunal may contain provisions for settlement of a dispute which no court could order if it was bound by ordinary law, but the tribunal is not fettered in any way be these limitations." It is on this basis that the whole of industrial jurisprudence has been subsequently founded by the decisions of the Supreme Court.

Importance of collective bargaining

7.17. During all these years, however, both the trade unionists and the employers have expressed the feeling that the course so far followed by adjudicatory methods in dealing with industrial matters has indirectly, though unwittingly, stalled the progress of collective bargaining; and it is an accepted principle, on which there is no difference of opinion, that the best way to solve industrial disputes is to persuade the parties to come to an agreement by collective bargaining. If adjudication takes the place of collective bargaining, legalism pervades the proceedings and the spirit of trade-unionism and its independent philosophy do not thrive. It is in the light of this criticism that we formulated[2]. Question 8 with a view to considering which of the alternatives would least hinder the growth of collective bargaining. It was also our intention to find out which of the alternatives would reduce the burden on the dockets of the High Courts and the Supreme Court of miscellaneous industrial disputes.

Three alternatives

7.18. Three alternatives were placed for soliciting opinion. The concept of National Appellate Court for Industrial Disputes has, no doubt, received support from some lawyers and Judges and, as we have

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1. *Western India Automobile Association* v. *Industrial Tribunal, Bombay*, (1949) S.C.R. 321.

2. Para 8·1, *supra*.

already stated,[1] we have not received any opinion from the trade-unionists and very few from the employers. The opinions received from Governments are divergent. However, in regard to the National Appellate Court for Industrial Disputes, we would like to make two incidental observations. If one National Appellate Court for industrial disputes were established, it would, in substance, amount to the revival of the Labour Appellate Tribunal. We do not think it would be reasonably possible for the National Appellate Court to sit in one place and deal with all the disputes arising in the term of appeals against the decisions of Boards, Courts or Industrial Tribunals all over the country.

First alternative—National Appellate Court—difficulty in creation of

7.19. Besides, unless suitable constitutional changes are made and the National Appellate Court is given the status of the Supreme Court jurisdiction of the High Courts under Article 226 and of the Supreme Court under Article 136 cannot be excluded. In other words, against the decisions of the National Appellate Court, writ petitions will lie to the High Courts under Article 226 and applications for special leave to the Supreme Court would be competent under Article 136; and the problem of delay in the decision of the National Appellate Court may arise, and, in the process, the burden on the dockets of the High Courts and the Supreme Court may not be appreciably reduced. That, however, should be treated as an incidental observation made by us.

Second alternative—Commission for Industrial Relations

7.20. The idea of creating a Commission for Industrial Relations has been considered exhaustively by the National Commission on Labour in its Report.[2] The National Labour Commission has also suggested that Labour Courts should be established, and they should be entrusted with the judicial function of interpretation and enforcement of all labour laws, awards, and agreements. The main feature of the proposed Industrial Relations Commission is that it combines in itself both the conciliation and adjudication functions. The Report claims that, if the Commission as recommended is established, it would help the process of collective bargaining and ultimately reduce the influence of adjudication on the settlement of industrial disputes.

Third alternative—Labour Appellate Tribunal

7.21. As we have already indicated,[3] it appears that the Union Government proposes to introduce a comprehensive Bill on the question of industrial relations. The revival of Labour Appellate

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1. Para 7.4, *supra*.
2. National Commission on Labour—Report, Paragraphs 23.61 and 23.62.
3. Para 7.3 and 7.5, *supra*.

Tribunal may also have to be considered by the Government, but, *prima facie*, we may point out that it came to be abolished for reasons which may present themselves even today.[1] These, however, are matters on which we propose to express no conclusion, because we have had no opportunity to discuss this question with the trade-unions and the employers.

Recommendation

7.22. The only recommendation we would like to make in this connection to the Minister of Law and Justice is that he should suggest to the Union Minister of Labour to take such action as he may deem fit and necessary, in consultation with the State Governments National Trade-Unions, and bodies of employers, to create a machinery which should encourage and strengthen collective bargaining, will remove political pulls and pressures in the functioning of trade-unions, and will persuade both the trade-unions and the bodies of employers not to lean on adjudication. Collective bargaining should find a pride of place in the settlement of collective disputes; failing that, conciliation or arbitration should step in, and adjudication should come in, if at all, only last. That is the objective which the Union Labour Minister will, we have no doubt, keep in mind when he formulates his proposals to enact a comprehensive Bill to regulate industrial relations.

Conclusion

7.23. In conclusion, we wish to emphasise that, in our view, it is high time that the machinery for the settlement of industrial disputes should be so devised that the dockets of the High Courts and the Supreme Court are not burdened with too many industrial matters.

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1. Para 7.13 and 7.14, *supra*.

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CHAPTER 8

DISPUTES RELATING TO SERVICES

Introductory

8.1. In this chapter, we shall discuss another type of specialised litigation-disputes between the State and members of the civil service. This class of cases is commonly known as "service matters."

The civil service—the legal background

8.2. Before we go into the actual question, it is desirable to explain the legal background in which the question was framed. The question is primarily concerned with the civil service. Service under the Crown in England (or under the State in another country) has come to be known as the "civil service". It may be of interest to note that this expression itself has an association with India; the expression "civil service" originated in India in connection with the East India Company.[1] It was provided in the Charter Act[2] that the East India Company could engage "civil servants".

In order that decisions of the Government may be first formulated and then implemented, a corps of Government officials is essential.[3] This is the function of the civil service, so called in contra-distinction to the Armed Forces and to the exclusion of political servants.

Position in common law—Two balancing principles

Position at common law—dismissal at pleasure

8.3. At common law, a civil servant can be dismissed at pleasure, even if he was engaged for a definite period, which has not yet expired. The Crown's right to dispense with his service at will can be restricted only by statute. Even a term providing that the employment of a civil servant may be terminated only in a specified way would be a clog on the Crown's right to dismiss at pleasure, and therefore unenforceable. The principle on which this peremptory rule rests, was thus explained by Lord Herschell.[4] "Such employment being for the good of the public, it is essential for the public good that it should be capable of being determined at the pleasure of the

1. See Shorter Oxford English Dictionary.
2. Charter Act of 1793.
3. Garner, Administrative Law (1967), page 34.
4. *Dunn v. The Queen*, (1896) 1 Q. B. 116.

Crown, except in exceptional "cases where it has been deemed to be more for the public good that some restrictions should be imposed on the power to dismiss its servants."

Security—the counter balancing principle

8.4. The rigour of this rule is, however, set off by another principle —which, in England, is only a convention, but in India has been given the status of a constitutional provision—whereunder the civil servant has a very high degree of security. Here the principle[1] is this. It is important that those who are most closely concerned with the higher administration of the public services should, in fact, enjoy security of tenure, without which it would be difficult to ensure continuity of loyal service to successive Ministers of different political parties. It is to be borne in mind that in contrast with private employees, civil servants have to serve a master which in theory is an absraction (the State), and in practice operates through official superiors.

The synthesis between the two principles, apparently in conflict with each other, is achieved in the Constitution,[2] as we shall explain later.[3]

Reason for rule barring action for wrongful dismissal

8.5. It is sometimes stated that the reason for the rule which bars an action for wrongful dismissal by a servant of the Crown is that the relationship between the Crown and its servant "is probably not one of contract at all, but a status, as it is in the case of the Armed Forces".[4] But even this reason is really one which can be subsumed under the general, and more fundamental, principle of public welfare or public interest.

Rowlatt J. has stated.[5]—

> "The government cannot by contract hamper its freedom of action in matters which concern the welfare of the State. Thus, in the case of the employment of public servants, which is a less strong case than the present, it has been laid down that, except under an Act of Parliament no one acting on behalf of the Crown has authority to employ

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1. Wade & Phillips, Constitutional Law (1970), pages 218 and 680-682.
2. Articles 310 and 311.
3. Paras. 8.13 and 8.14 *infra*.
4. Anson, Law of Contract (1969), citing *Shenton* v. *Smith*, (1895) A.C. 229; *Rodwell* v. *Thomas*, (1944) K.B. 596; *Inland Revenue Commissioner* v. *Hambrook* (1956) 2 Q. B. 641.
5. *Rederiaktiebolaget Amphitrite* v. *The King*, *(1921)* 3 K. B. 500, 504.

any person except upon the terms that he is dismissible at the Crown's pleasure; the reason being that it is *in the interest of the community* that the Minister "for the time being advising the Crown should be able to dispense with the services of its employees if they think it desirable."

Provision in England excluding jurisdiction of Parliamentary Commissioner

8.6. It may be of interest to note that, in England, the Parliamentary Commissioner Act[1] excludes, from investigation by the Parliamentary Commissioner, "action taken in respect of appointments or removals, pay, discipline, super-annuation or other personnel matter", affecting those employed under the Crown (including the long list of public authorities set out in the Second Schedule to the Act) and members of H.M. Forces, including the reserve and auxiliary and cadet forces.

Position in Commonwealth

8.7. In many countries of the Commonwealth, the position is the same in substance, and the principle of pleasure, co-existing with the safeguards created by statute, has provided up with a rich harvest of judicial decisions, many of which are from the Commonwealth countries.[2] These cases fully bear out the proposition that the civil servant can be dismissed at pleasure, except in "special cases whereby it is otherwise provided by law".[3]

The rule of pleasure has been altered in many cases in Australia, and civil servants, as a general rule, now have rights which were not thought of in earlier days. *Gould* v. *Stuart*,[4] provides an illustration of such a case.

8.8. On the other hand, *Cross* v. *Commonwealth*,[5] is an example of the complete maintenance of the older rule in the case of the Commonwealth military forces, even though the statute itself in that case provided that the commission of an officer should not be cancelled unless a procedure designed to give him a hearing was observed. Knox C. J. held that these words were directory only and that they conferred no legal rights upon an officer.

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1. Parliamentary Commissioner Act, 1967, Third Schedule, Para 10.

2. For a detailed discussion, see Marshall "Legal relationship between State and servants", (1966) 15 I. C. L.Q. 150; and the judgment of the Australian High Court in *Fletcher* v. *Knott*, (1938) 60 Commonwealth Law Reports 556.

3. *Inland Revenue Commissioner* v. *Hambrook*, (1956) 2 Q.B. 640, 653; on appeal (1956) 2 Q.B.958, corresponding to (1966)1 All E.R. 807, 811 and (1956) 3 All E.R. 388.

4. *Gould* v. *Stuart*, (1896) A.C. 575.

5. *Cross* v. *Commonwealth*, (1921) 29 C.L.R. 219.

Aspects of Contract

Position viewed from the point of view of a contract

8.9. Some aspects relating to contracts may now also be referred to. A contract may contain, within itself, the elements of its own discharge—in the form of a provision, express or implied, for its termination in certain circumstances. In particular, a continuing contract may contain a provision making it determinable at the option of one of the parties.

Contract of service under common law

8.10. Under the law of master and servant, a contract of service may be for a fixed period of time, or it may be for work without fixing any period of time. In either case, a contract may contain a provision enabling it to be terminated by notice. If the contract does not provide for its termination by notice and is not for a fixed period, then, in the absence of custom, the law implies an obligation to give a reasonable notice, the reasonableness of the notice being a question of fact.[1] If a contract is terminated without giving the requisite notice, the aggrieved party can claim damages for wrongful termination of the contract. If the contract is for a fixed period without any power to terminate it by notice, the termination of the contract, before the expiry of the fixed period, is again, a wrongful termination, the aggreived party can claim damages for its breach.[2] However, whether the contract is for a fixed period or not, the contract can be terminated by the master if the servant is guilty of misconduct, or conduct which is inconsistent with his duties as a servant. This is the position as regards private employment.

Service under Government

8.11. But the position changes in the case of a servant under the Government. In England, in respect of service under the Crown—civil as well as military—except where it is otherwise provided by statute, the Crown has the power to dismiss at pleasure.[3] [3a]The tenure of service at pleasure applies to the Colonies also.[4]

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1. *Halsbury*, 3rd Ed. Vol. 25, pp. 459 et. Seq.
2. Halsbury, 3rd Ed., Vol. 25, p. 520.
3. (a) *Shenton* v. *Smith*, (1895) A.C. 229 (P.C.);
   (b) *Gould* v. *Stuart*, (1896) A.C. 575 (P.C.)
   (c) *Dunn* v. *The Queen*, (1896) 1 Q. B. 116.

3a. See also para 8.3 to 8.7, *supra*.

4. *Denning* v. *Secretary of State for India in Council*, (1920) 37 T.L.R. 138 (P.C.).

Position in India before the Constitution

8.12. The tenure of service at pleasure applied in India also before the Constitution. In *Dennings' case*,[1] the paintiff, Denning, was appointed by the defendant, Secretary of State for India in Council to a post in Bengal for a period of five years from January, 1910. In breach of the agreement, the defendant terminated the plaintiff's appointment in January, 1913. No imputation of misconduct was made against the plaintiff. It was held that a Crown servant (even if no misconduct was alleged) was liable to be dismissed at the pleasure of the Crown without notice, even if the form of agreement under which he had been engaged implied that except in the case of misconduct the engagement could be terminated only by notice.

Principle of pleasure continued under the Constitution

8.13. The 'tenure during pleasure' principle continues under our Constitution, but with an important qualification,—to be noted presently. There are two forms of tenure, of persons holding public offices, namely, (1) tenure during pleasure, and (2) tenure during good behaviour. Tenure during good behaviour applies to persons holding high judicial offices like the Judges of the Supreme Court and the Judges of the High Courts and also to the Comptroller and Auditor General of India and the Chief Election Commissioner of India. The difference between the two forms of tenure is that a person holding tenure during good behaviour cannot be removed from office except for misconduct, and the procedure for such removal has been laid down in clauses (4) and (5) of article 124 of the Constitution; whilst a person holding tenure during pleasure can be removed without any reason being assigned for his removal.

Modification by statute

Restriction by statute

8.14. The 'tenure during pleasure' principle, however, can be restricted by statute. In India, it is qualified by the Constitution,[2] which provides several safeguards for the protection of Government servants.[3]

Constitutional provisions relevant

8.15. We have referred to these aspects of civil service under the State because much of the litigation relating to "service matters"—to which this Chapter is devoted—is directly relatable to the constitutional provisions (articles 310 and 311),[4] relevant to these aspects.

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1. *Dennings v. Secretary of State in India*, (1920) 37 T.L.R. 138 (P.C.).
2. See Para 8.4., *supra*.
3. Article 311.
4. Para 8.17 and 8.18, *infra*.

Special Courts

8.16. We shall now consider the specific suggestion with which this Chapter is concerned, namely, the creation of Special Courts—National as well as State,—for hearing 'Service matters'.

Service disputes

8.17. Disputes in service matters arise in the following circumstances:—

Article 310 of the Constitution provides that every person who is a member of a defence service or of a civil service of the Union or of an All-India service, or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State. This principle of holding office during 'pleasure' is borrowed from the English Common Law.[1]

Constitutional safeguards

8.18. But, the "during pleasure" principle is, under our Constitution, subject to several restrictions and safeguards for the protection of the Government servants. Article 311 of the Constitution provides, in effect, that no Government servant shall be dismissed or removed by an authority subordinate to that by which he was appointed, nor dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charge against him and given a reasonable opportunity of being heard in his defence.

There are other safeguards which have the status of fundamental rights. Clause (1) of Article 16 of the Constitution lays down that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The Supreme Court has held[2] that the protection of this clause is not limited to the initial stage of appointment, but throws its protective mantle on the Government servant throughout his career and extends the principle of equality of opportunity in such matters as promotion, selection for special posts, retrenchment, retirement (including compulsory retirement), pension and so on. Clause (2) of Article 16 enjoins that no citizen shall on grounds only of religion, race, caste, sex, descent or place of birth, residence or any of them be ineligible for or discriminated against in respect of any employment or office under the State. In addition to these special safeguards, Article 14 lays down that the State shall not deny to any person equality before the law or the equal

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1. See para. 8.3., *supra*.

2. *General Manager* v. *Rangachari*, A.I.R. 1962 S.C. 36, 40—41.

protection of the law within the territory of India. As stated above, the general guarantee of equality under Article 14 and the special guarantees of equality of opportunity and of non-discrimination under Article 16 have the status of fundamental rights.

Enforcement of safeguards

8.19. The protection of Article 311 against arbitrary dismissal, removal, or reduction in rank, as well as the guarantees of equality of opportunity and of non-discrimination under Articles 14 and 16 can be enforced in Courts of law, and government servants have availed of this remedy in a large number of cases.

Then again, conditions of service of government servants are governed by rules framed under Article 309 by the Central or the State Government, as the case may be. These rules lay down the conditions of service and prescribe the procedure which should be followed before taking disciplinary action against a government servant. Furthermore, the rules themselves must be consistent with the provisions of the Constitution, and must not offend against the safeguards provided by Article 311 and by Articles 14, 15 and 16. In several cases, a government servant, in his petition before the High Court, has challenged the validity of a particular rule as ultra vires.

Article 226—use of, in service matters

8.20. Article 220 of the Constitution provides a convenient, expeditious and effective remedy for every government servant in case of violation of his rights under Article 311 or under Article 14, 15 and 16, or any action against or affecting him which is unconstitutional, illegal, arbitrary or mala fide. It is not surprising, therefore, that a large volume of the work of High Courts consists of disposal of cases arising out of "service matters". In addition, a fairly large number of suits are filed in the civil courts which ultimately reach the High Court, and in some cases, the Supreme Court in appeal. Some petitions have been filed in the Supreme Court under Article 32 where the petitioner alleged that his fundamental rights under Article 14, 15 or 16 had been violated.

Types of service matters

Types of cases

8.21. A study of the recent judgments of the High Courts and the Supreme Court indicates that these cases generally arise out of—(1) dismissal or removal from service, (2) termination of service not falling within Article 311 of the Constitution; (3) compulsory retirement; (4) reduction in rank; (5) reversion to substantive post, not amounting to reduction within Article 311 of the Constitution; (6) withholding of increments; (7) suspension from service; (8) termination of

probation, as a punishment; (9) abolition of a permanent post; (10) denial of claim to promotion; (11) supersession; (12) non-selection for a particular post or defect in selection; (13) denial of right to seniority; (14) denial of or delay in confirmation; (15) reduction or denial of pension; (16) denial of dearness allowance, particularly if there is alleged a violation of the principle of equality; (17) change in conditions of service not permitted by the Constitution or the law.

Cases under (1) and (2) are the most numerous.

Question 7

8.22. Now, the suggestion has been made that service matters should be heard by specialised courts having jurisdiction to try them, to the exclusion of the courts of law including the High Courts and the Supreme Court. This suggestion was made with various objects in mind. The first object to create tribunals composed of members with expertise, who can bring to bear their special knowledge and experience upon the consideration of these complicated matters.

As Bose J said, in a case involving the construction of the Central Civil Services (Temporary Services) Rules and the Fundamental Rules. "No one can be blamed for not knowing where they are (sic) in this wilderness of rules and regulations and coined words and phrases with highly technical and artificial meanings."[1]

8.23. We had two other objects in mind in putting the question about service courts. First, the creation of such courts reduce the existing arrears in the courts (including the High Courts and the Supreme Court), and also reduce the load of other courts of law; secondly, it would be in the interest of the Government servants themselves, who will have a better opportunity of placing their grievances before such courts.

8.24. We have considered the proposal on merits, in some of the paragraphs which follow; but, as the suggestion has been made from time to time in this country, we decided to elicit opinion on issue. Accordingly, question 9 was framed thus:

> "9. (a) Do you favour the creation of a court at the national level exclusively vested with jurisdiction over disputes between the Government and members of the public service in matters relating to service[2] (including, in particular, petitions based on article 311 of the Constitution), whose decisions will be final, subject to appeal to the Supreme Court as indicated below?

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1. *K.S. Srinivasan v. Union of India*, A.I.R. 1958 S.C. 419, 432, Para 37.
2. These would include terms and conditions of service, promotions, service etc.

(b) Should such a court be presided over by a person of the status of Supreme Court Judge or High Court Judge, aided by two experts whose independence is guaranteed by their tenure?

(c) Should the experts referred to in (b) above be members of the Court, or should they be only assessors?

(d) If your answer to (a) is in the negative, what other suggestions would you make as to the terms and conditions of service of its members?

(e) Should appeals to the Supreme Court from the above Court—

(i) be allowed with special leave, or

(ii) be allowed with special leave but only if a substantial question of law of general importance is involved, or

(iii) be allowed with special leave but only if a question of fundamental right is involved, or

(iv) be allowed subject to any other limitation?

(f) Besides a National Court as suggested in (a) above, do you favour regional courts for the purpose mentioned in (a) above?"

8.25. The replies to this question indicate that opinion is divided on almost every aspect of the proposal. The suggestion for the creation of Special Courts at the State level for hearing the grievances of the State Government servants has received a large measure of support, but the proposal for a National Court to decide disputes arising out of matters involving the All-India Services of posts under the Union has not received strong support.

As regards the composition of the Courts, opinion of those who support the proposal is almost unanimous that the Chairman of the State Court should be a person of the status of a High Court Judge, and in the case of the National Court he should be of the status of a Supreme Court Judge, and in each case the Court should have two associate members of high status, one of whom should be an expert and the other a senior official. All the replies in favour of the proposal have emphasised that the Service Courts, National as well as State, must have exclusive jurisdiction to hear and decide service matters and the jurisdiction of ordinary Civil Courts should be barred.

Supervisory jurisdiction—view as to

8.26. Should the Service Courts be subject to the supervisory jurisdiction of the High Courts under Article 226 and the appellate jurisdiction of the Supreme Court under articles 132, 133 and 136 of the Constitution or any of them?

On this question, the majority of replies were strongly in favour of making these Courts subject to the jurisdiction of the High Court and the Supreme Court, though a small minority favoured the exclusion of the jurisdiction even of the High Court and the Supreme Court and the amendment of Articles 32, 226, 132 and 136 of the Constitution if necessary.

Special Courts—merits

Special Courts—merits considered

8.27. After a detailed analysis of the replies received and giving our anxious consideration to the proposal, we are of the following opinion.

The proposal for the creation of Service Courts has some merit. In several countries, Administrative Courts which deal with the grievances of private citizens against the administration also deal with the grievances of civil servants against the State, where illegality is alleged. These Courts enjoy a reputation for independence, impartiality and integrity. In the opinion of several eminent writers, these Administrative Courts give a fairer deal to the aggrieved party than the Common Law Courts in England.

Continental concept of public employment

8.28. It should be noted that the Continental conception of public employment is somewhat different. The civil servant adversely affected by an administrative action that bears on his employment has the same remedies available as the ordinary citizen injured in his personal or property rights. For example, the French civil servant who is damaged in his career by an administrative decision may obtain review of that decision by the administrative courts, just as a private individual can whose property rights are adversely affected by a decision of the administration.[1]

This assimilation of the civil servant in French law, not to the private employee, but to the ordinary citizen vested with personal or property rights, stems in part from the fact that his relationship to the government is not conceived as a contractual one. "The situation of the civil servant vis-a-vis the administration is wholly governed by statutes and regulations," reads the law of October 19, 1946, now the basic law governing the legal status of the French civil servant. If he is adversely affected by administrative action, he is affected not in his contract rights, but in the rights given him by statutes and regulations. And, he may resort to administrative courts if those rights are violated, just as any Frenchman can whose personal or property rights are infringed by the administration.[2]

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[1]. Schwartz, French Administrative Law, page 86.

[2]. Schwartz, French Administrative Law page 86.

Greater protection and reduction of arrears

8.29. The creation of Special Service Courts in India may, therefore, provide to the honest and efficient government servant greater and more effective protection against discrimination or victimisation, than at present.

Furthermore, the creation of service Courts may reduce the growing volume of arrears in the High Courts and the Supreme Court, *provided they are not made subject to the jurisdiction of the High Court under Article 226 and of the Supreme Court under Articles 133 and 136 of the Constitution.*

Supervisory jurisdiction

Crucial issue—supervisory jurisdiction

8.30. This brings us to the crucial issue in this proposal. The creation of Service Courts, if it is to serve any useful purpose, must involve the amendment of the Constitution if the supervisory jurisdiction of the High Courts and the Supreme Court over these Courts is to be abolished. Such a proposal has, however, been opposed by the large majority of replies received by us. They are not in favour of restricting the powers of the High Courts and the Supreme Court for the purpose of conferring "exclusive" jurisdiction on Service Courts.

No likelihood of reduction of arrears if supervisory jurisdiction

8.31. But, if the supervisory jurisdiction of the High Court and the Supreme Court remains intact, and the decision of the Service Court is subject to review by these higher Courts, we do not see how the creation of Service Courts will reduce the growing volume of arrears[2] in these Courts.

Existing rules eleguate

8.32. There is one more consideration which has weighed with us in dealing with the present problem. We have carefully considered the procedure prescribed by the relevant statutory Central as well as State Rules in relation to disciplinary proceedings, and we are satisfied that the procedure prescribed by these Rules is, on the whole, satisfactory. All the essential ingredients of a fair and just trial are prescribed by the relevant Rules and experience shows that this procedure, which is self-contained, has generally not caused miscarriage of justice. Since this procedure has, on the whole, operated satisfactorily over the years, it would, we think, be unnecessary to make a

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1. Para 8·27 *supra*.

2. See Para 8·29, *supra*.

radical change by recommending the creation of a Service Tribunal. In this connection, we ought to emphasise that, if in a given case, the procedure prescribed by the relevant Rules is not strictly followed, or the fundamental rights guaranteed by articles 14 and 16 are contravened, or the requirements prescribed by article 311 are not complied with in their letter and spirit, the aggrieved public servant is entitled to claim relief under the writ jurisdiction of the High Court, and (if fundamental rights are involved), the Supreme Court. In our opinion, the existing legal and constitutional position affords sufficient protection. We do not, therefore, recommend the creation of a separate Service Tribunal.

Likelihood of abuse

8.33. There is yet another reason which is against the proposal. It may be true that Service Courts consisting of judges of high status, independence, and integrity, will give protection to the honest and capable Government servant against victimisation, discrimination, or arbitrary action; but, as against this, we cannot ignore the fact that access to Service Courts with large powers of interference with executive decisions is likely to be abused by underserving or dishonest officials, and may conceivably, in some cases, be subversive of discipline, inasmuch as undue advantage may be taken of the facility provided.

Conclusion

8.34. Taking all the relevant circumstances into consideration, we are of the opinion that the existing provisions for the protection of the rights of the Government servants are on the whole adequate, and the creation of Special Service Courts is neither necessary nor desirable under the present conditions prevailing in India.

CHAPTER 9

ZONAL COURTS OF APPEAL—PROPOSAL FOR CREATION OF

Question 10

9.1. Question Number 10 in our Questionnaire deals with the suggestion for creating Zonal Courts of Appeal. It reads thus:—

> "Do you favour the creation of Zonal Appellate Courts dealing with appeals against the decisions of High Courts in a particular Zone?"

Question 11

9.2 Question Number 11 deals with the details of the composition of Zonal Courts and the points raised by clauses (a) to (d) of that Question would naturally have fallen to be considered if we had decided to recommend the establishment of Zonal Courts. Question Number 12 reads thus:—

> "If you are not in favour of Zonal Courts of Appeal, as proposed above, have you any other suggestions for avoiding the possibility of accumulation of arrears in the Supreme Court"?

Question 12

9.3. Since we have decided[1] not to recommend the creation of Zonal Courts, it is unnecessary to consider the points raised under Question Number 11. Under Question Number 12, just a few suggestions have been received, but they are not of any significance and so it is not necessary for us to deal with Question 12 as well. We will now deal with Question Number 10 and first indicate briefly the grounds which were urged in favour of establishment of Zonal Courts.

Idea of Zonal Court

9.4. The idea of Zonal Court was suggested for our consideration by some eminent persons who occupied a very high position in the judicial life of this country. In support of this idea, it can be urged that the establishment of an intermediate Court of Appeal like a Zonal Court may help to reduce the load on the docket of the Supreme Court. The idea of the Zonal Court postulates that our country should be divided into four Zones and each Zone should have

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1. Para 9-15, *infra*.

a Zonal Court. Zonal Courts, according to this concept, are really intended to function as Courts of Appeal at the stage of the High Courts. This idea postulates that in each High Court, all the Judges should function in single Divisions, and appeals against their judgments should lie to the Zonal Courts. Zonal Courts should be composed of Judges, selected from each of the High Courts in the States constituting the Zone on some rationale principle as that of seniority. The Chief Justice of each High Court and one or two of his senior colleagues should become members of Zonal Courts. The Zonal Courts thus contemplated would function like Circuit Courts. They should hold their sittings in each High Court and hear appeals against the judgments delivered by single Judges of that High Court. Since Zonal Courts would thus be constituted by senior judges of the High Court and may sit in a Bench of three judges, it was suggested that article 136 of the Constitution could be suitably amended and appeals against the decisions of such Zonal Courts should be allowed only on substantial question of law of general importance. If the idea of the establishment of Zonal Court is accepted, some consequential amendments may have to be made even in articles 133 and 134.

Additional grounds in support of proposal for Zonal Courts

9.5. Some additional grounds in support of the proposal were also suggested for our consideration. One reason in support of this idea was that it would encourage mobility amongst the lawyers of different High Courts constituting the Zone and would enable healthy exchange of ideas amongst different Judges who would constitute the Zonal Courts. The number of Judges, who should constitute the Zonal Courts in each Zone, would naturally depend upon the extent of work which was likely to come before such Zonal Courts. If in each High Court a Zonal Court of three Judges consisting of one Judge from the High Court concerned and two Judges from outside is formed, it would, it was thought, enable exchange of judicial ideas and that would be a healthy development in making the administration of justice more satisfactory.

Desirability of avoiding local pressures

9.6. Another argument which was urged in support of this idea was that complaints are heard in some quarters that some of the Judges of the High Courts in some places are likely to be subjected to local pulls and pressures and it was apprehended that this tendency to attempt to exert local pulls and pressures even on Judges of High Courts may conceivably increase in future. That is why, a Zonal Appellate Court, consisting of three Judges, two of whom

would be from other High Courts, functioning in a State which is a constituent of the Zone, would avoid this unhealthy trend. Mobility of the Bar, to which we have already referred,[1] was also emphasised as a very important factor. It was thought that if Zonal Courts begin to function, members of the Bar from one High Court are likely to be invited to appear in other High Courts, forming parts of the Zone, and any step, which establishes more intimate relationships between Bars practising in different High Courts, would be welcome.

Importance of one language

9.7. Another ground which was suggested in favour of this idea was that if Zonal Courts are established, they would naturally function in English until Hindi becomes rich and ripe enough to take the place of English and it receives acceptance from all the States of the country, including particularly the non-Hindi speaking States. The argument is that in the interest of judicial administration, it is important that the High Courts and the Supreme Court should function in the same language. For quite some time, this language has to be English and the advocates of the concept of Zonal Courts fear that under local pressures, it is not unlikely that High Courts may begin to function in the language of the State and if that happens, it will have adverse effects on the efficiency of judicial administration and impair the utility of judicial process as an important instrument for sustaining the unity of the country. If the High Courts begin to function in regional languages, the language of the Supreme Court may pose a serious question which may be over-loaded with political considerations; and such a possibility can be avoided if Zonal Courts are established because that would guarantee the continuance of English for such time until, as we have already mentioned, Hindi takes the place of English with the concurrence of all the States.

It is on such considerations that the Commission was requested to consider the concept of Zonal Courts.

Views expressed on the proposal

9.8. In reply to the Questionnaire, we received answers from different Bar Associations and High Courts and we found that the opinion expressed in these answers is almost unanimously against the concept of Zonal Court. After careful consideration of these replies and giving due weight to the grounds set out above in support of the concept, we have come to the conclusion that it would be unreasonable and unwise to accept the concept and to recommend it to the Union Government.

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[1]. Para 9.5 *supra*.

Proposal not favoured

9.9. In our view, it would be undesirable to require that all High Court Judges should function in Single Division and[1] that every appeal against every appealable decision of a Single Judge of a High Court should be taken to the Zonal Court; as most of the High Court Judges have stated in their replies as well as in their oral discussions with the Commission, this would impair the dignity and status of the High Court Judges.

Problem of selection

9.10. Besides, the selection of Judges for the Zonal Courts would present problems which it would be very difficult to solve in a rational manner without creating bitterness and dissatisfaction in the minds of many High Court Judges.

Socio-economic history of local legislation

9.11. There is yet another consideration which is very much against the concept of Zonal Court. In many States, High Courts are called upon to consider questions of interpreting provisions of different pieces of State legislation, and it is well-known that when socio-economic legislation is passed by any State, it has a history of its own. The context in which the legislation has been passed, the mischief which it is intended to cure and remedy, the conditions which are laid down in different provisions of the Act by reference to the genesis of the Act, the previous legislation, if any, in respect of the matter and prior judicial decisions in respect of the provisions thereof are all relevant factors, and it is difficult to visualise that the two additional Judges, who would constitute the Zonal Court alongwith one Judge of the High Court of the State, would be able to appreciate these relevant factors as well and as quickly as the Judges of the said High Court would themselves be able to do.

Objective of reducing docket of Supreme Court not likely to be achieved

9.12. Even if Zonal Courts are established, since they would take the place of the Courts of Appeal of the different High Courts, it would not be easy to accept the suggestion[2] that finality should be attached to the decisions of such Zonal Courts and articles 133, 134 and even article 136 of the Constitution should, accordingly, be suitably modified; and if these articles cannot be modified even after the Zonal Courts begin to function, that cannot help the main objective of reducing the burden on the docket of the Supreme Court.

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1. Para 9·4, *supra*.
2. Para 9·4, *supra*.

Sense of separateness likely to be created

9.13. Besides, it is feared by those who oppose this concept that if the country was divided into four Zones and Zonal Courts were established in such Zones, far from helping the integration of the country, it may create four blocs attached to each other, and may encourage a sense of separateness in these separate blocs.

Question of language considered

9.14. In regard to the problem of the language[1] of the Court, it is urged that one need not take recourse to the concept of the Zonal Courts to achieve that objective. On principle, it can and should be urged that it is desirable and essential that the language of the High Courts and the Supreme Court should continue to be one and that one language, for some years, has inevitably to be English. On this point, both the advocates and the opponents of the concept of Zonal Courts are agreed. The opponents, however, contend that an artificial device of establishing Zonal Courts which would radically alter the structure and functions of the High Courts, would hardly assist the object on which most of the lawyers and Judges of the country are agreed. Therefore, we have come to the conclusion that the idea of Zonal Courts cannot be accepted and should not be recommended.

Conclusion

9.15. As we have already indicated,[2] in view of this conclusion, Question No. 11 does not fall to be considered and on Question No. 12, we have received just a few suggestions which need no examination.

9.16. This disposes of Questions 10 to 12 of our Questionnaire.

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1. Para 9.7, *supra*.
2. Para 9.3, *supra*.

CHAPTER 10

CONDITIONS OF SERVICE OF JUDGES

Introductory

10.1. We now proceed to deal with the terms and conditions of service mainly of the Judges of the High Courts and, incidentally, of the Judges of the Supreme Courts as well. We ought to add that we regard our recommendations on this point as very important and indeed, we attach considerable significance to this part of our inquiry.

Conditions of service of lower judiciary

10.2. Before we proceed to deal with the problem, we ought to make it clear that we are fully conscious that terms and conditions of service of the members of the lower judiciary require improvement in a substantial manner without any delay. In fact, in our Report on the Code of Civil Procedure,[1] we have devoted one Chapter which deals with the terms and conditions of the subordinate judiciary and with other measures, such as the setting up of a National Academy for training Junior Judicial Officers with a view to improving the quality of judicial service in that cadre. While doing so, we were conscious that we had been asked to make recommendations about the revision of the Code of Civil Procedure and, strictly speaking, the terms and conditions of service of the subordinate judiciary were not within the purview of that reference. Besides, we were also conscious that the terms and conditions of service of the subordinate judiciary, and the steps we had recommended for the improvement of quality in the cadre of subordinate judges were constitutionally subject to the authority of the State Governments and, yet, we thought that the question was of such importance that we should, by devoting a Chapter to that problem, invite the attention of the Union Government and request them to get in touch with the State Governments and consider the recommendations made by us favourably and as early as possible. We have made these observations at the outset of the present discussion, because we are anxious to avoid the impression that we are concentrating on the improvement of the terms and conditions of the higher judiciary and are ignoring the urgency of the problem of substantially improving the terms and conditions of service of the lower judiciary.

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1. 54th Report (Code of Civil Procedure).

Question 14

10.3. In order to ascertain opinion from the members of the Bar, the Judiciary, and other interested parties, Question 14 was thus formulated by us in our Questionnaire:

"Do you agree with the suggestion that one of the necessary steps to help the efficient and speedy disposal of cases in the High Courts is to attract experienced, senior and competent lawyers to the Bench, and that this object may be achieved if—

(i) the terms and conditions of service of the High Court Judges are improved;

(ii) their age of retirement is increased to 65 years;

(iii) the salaries of the Supreme Court Judges and the High Court Judges are increased, or, in any event, suitable additional fringe benefits are provided for them;

(iv) on retirement, the pension of the Supreme Court Judges and the High Court Judges is made equal to their pay, or, in any case, is materially enhanced?"

Gist of views expressed on the question

10.4. On this question, considered as a whole, evidence received by us from the Bar Associations and from the Judges of the High Courts is unanimous. It is clear from the answers sent to us by the Judges of different High Courts in writing after discussing the question in their respective chamber meetings, and the oral evidence given by Judges of the High Courts, visited by the Members of the commission, that all the Judges of the High Courts are completely dissatisfied with the present position in regard to the terms and conditions of their service. All of them complained that, though they are doing their best to discharge their onerous function in the administration of law, they do not feel at peace with themselves, because of the unsatisfactory nature of their salaries and the absence of any additional amenities. We wish to emphasise that the existence of such widespread discontentment in the minds of almost all the Judges of the High Courts is a very disturbing factor, and its relevance in the discussion and decision of the question of improving their terms and conditions of service must be fully recognised.

View of Supreme Court Bar Association

10.5. We do not propose to deal with the evidence supplied by the replies sent to us by the different Bar Associations; but we think it would not be inappropriate to refer to the opinion expressed by the Supreme Court Bar Association as an illustration.

This is what the Supreme Court Bar Association has said in reply to the relevant question:[1]

> "We are strongly of the opinion that the most essential step to aid in the efficient and speedy disposal of cases in the High Courts is to attractable, experienced and competent lawyers to the Bench. We feel that the terms and conditions of service of the High Court Judges should be substantially improved. Their age of retirement should be increased to 65 years so as to be at par with that of the Judges of the Supreme Court. Suitable additional fringe benefits should be provided for the Judges of the Supreme Court, the High Courts and the Tribunals and Courts mentioned above. On retirement, the pension of "the Supreme Court Judges, the High Courts Judges and the Members of the Tribunals mentioned above should be equivalent to not less than two-thirds of their pay, and provisions for free medical aid and subsidised housing should be made for them after their retirement."

Work of Administrative Service not under-estimated

10.6. After this summary of opinions, we shall dispose of one aspect concerning the proposal for an improvement of the conditions of service of Judges of the High Court.

In discussing the question of the improvement of the service conditions of the Judges of the High Court, it is necessary to remember that comparison of their salaries with the salaries drawn by members of the Administrative Services is really not relevant and, in any case, should not be given undue significance. We have no hesitation in expressing our appreciation of our brilliant young men and women who, in a spirit of idealism, join Administrative Services in our country, though they know fully well that the salaries with which their careers initially begin are inadequate and that, even at the end, the salaries which they may expect to draw at the top of the ladder may also not be attractive. We are also conscious that as members of the Administrative Service rise in their own cadre, they deal with important matters concerning the welfare of the community, because a welfare State like India has inevitably to lean on its administrative agency to carry out the welfare policies laid down by socio-economic legislation. Therefore, when we say that the salaries drawn by the members of the Administrative Service should not be treated as relevant or significant in re-examining the question of the terms and conditions of Judicial Service, we do not wish in any manner to underestimate the importance of administrative work in the progress of our country.

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1. S. No. 74 (Supreme Court Bar Association).

Prospects of promotion in administrative service

10.7. When a person chooses to join Administrative service, a spirit of idealism no doubt inspires his choice, because, as we have already pointed out,[1] his initial salary is inadequate, and the highest he may hope to reach cannot be regarded as too attractive. But, on the other hand, when he begins his career, as an Administrative Officer, he has a security of tenure, and he occupies a position of authority in the area for which he is appointed. He is entitled to look forward to a gradual rise in his salary according to the increments prescribed in his scale. He is also entitled to look forward to promotion and, in that sense, from the commencement of his career, he does not have to face the problem of uncertainty about his future.

Position of members of the Bar different

10.8. The position in regard to the members of the Bar who are called upon to join the Bench is very different. All persons who join the Bar—including those who have reached the highest position in the profession—have to face the severe test of a fairly long period of probation when briefs do not come their way. When the junior begins to get briefs, he is never too certain that the flow of briefs will continue until he reaches a stage when he establishes his own reputation, and the sense of security in the profession can then be enjoyed by him. All of us must recognise that members of the Bar who are invited to join the Bench have to face a peculiar dilemma.[2]

Problems dealt with by administrative service not so complex

10.9. Besides, the problems which the administrative branch of the public service has to face are, by and large, not so complex, sensitive or difficult as are the problems which the higher judiciary has to face. Thus, the nature of work performed by the two branches, the administrative and the judicial, also materially differs. It is in the light of these circumstances that we take the view that the position of the administrative service is not comparable to that of the higher judicial service and, from that point of view, in dealing with the problem of the terms and conditions of service of the High Court Judges, the emoluments paid to the public servants in the administrative branch should treated as irrelevant.

Opinion of distinguished persons in democratic countries—Churchill's speech.

10.10. Having summarised the position of the evidence which we have to consider in dealing with the question, and having dealt with the question whether Judges can be compared to members of the

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1. See para 10·6, *supra*.

2. See Para 10·16 *infra*.

administrative service, we propose to refer to the opinion expressed by important and distinguished persons in two democratic countries, in order that our discussion in this Chapter, and the recommendations which we propose to make, should be considered by the Union Government in their proper perspective.

When Churchill moved a Bill for raising the salaries of Judges in England on the 23rd March, 1954, he paid a tribute to the service rendered by Judges and bore eloquent testimony to the importance and significance of their work. Said Churchill,[1]

> "The service rendered by Judges demands the highest qualities of learning, training and character. These qualities are not to be measured in terms of pounds, shillings and pence according to the quality of work done. A form of life and conduct far more severe and restricted than that of ordinary people is required from Judges and, though unwritten, has been most strictly observed. They are at once privileged and restricted. They have to present a continuous aspect of dignity and conduct... The Bench must be the dominant attraction to the legal profession, yet it rather hangs in the balance now, and heavily will our society pay if it cannot command the finest characters and the best legal brains which we can produce; and heavily will our country pay in an epoch where our relative material power has diminished, if we do not sustain these institutions for which we are renowned."

In fact, like many of Churchill's utterances, this piece has attained the status of a classic.

Silverman quoted

10.11. Participating in the debate[2] in support of the Bill moved by Churchill, Mr. Sidney Silverman said,

> "The real case for this increase is the quite simple one, for which we need make no apology at all, that the value of the salary is not now equal to the nature of the job. I agree with my hon. friends who said that we were living in a different kind of society from that in which we were living in 1831. Judges cannot expect to retain that degree of advantage over ordinary citizens which they enjoyed then. But it is very different from saying that the discrepancy was too great, than to say that the salary, with all the charges that have taken place since then, is adequate now.

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1. H. C. Debates (23rd March, 1954), Vol. 525, Col. 1061, 1062.
2. H.C. Debates (23rd March, 1954), Vol. 525, Col. 1099.

The proof that it is not is that there is great dissatisfaction on the judicial Bench, which is a new phenomena. One must have sufficient confidence in the judges to recognise that if almost unanimously they feel aggrieved, disturbed and inadequately treated, there is probably sufficient in the grievance to justify this House in correcting it. For these reasons, I support the Bill."

Salaries revised in England since 1873

10.12. So far as England is concerned, it may be noted that the salaries of the higher judiciary, last increased on April 1, 1966, were increased again under the Judges' Remuneration Order, 1970. The new scale of £11,500 p.a. for a High Court Judge compares[1] with £10,000 introduced in 1966, £8,000 in 1954 and £5,000 in 1873. This will clearly show that in England, Parliament has been raising the salaries of Judges during the last 100 years.

Present salary in India not adequate

10.13. In India, until 1950, a Judge of the High Court received Rs. 4,000 as his monthly salary, whereas, when the Constitution came into force in 1950, the said salary was reduced to Rs. 3,500 per month. The amount of Rs. 3,500 per month cannot, in our opinion, be regarded as a reasonable salary for the Judges of the High Court.

Mansfield's view

10.14. It was stated[2] by Lord Mansfield (though in a different context) that a senior member of the Bar with good practice, when called upon to join the Bench, is in a whimsical situation between tragedy and comedy; inclination drawing one way and imperative call of duty to serve on the Bench the other.

It is noteworthy that, over the years, the British Parliament has shown awareness of this problem and has, as already indicated by us[3], increased the salaries of the Judges from time to time.

Increase in pofessional gains since Second World War

10.15. It is sometimes not appreciated by persons who are not connected with the working of the High Courts and the Supreme Court

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1. See (*a*) Holdsworth, H.E. L., Vol. 1.

(*b*) Editorial in (1970), 120 New Law Journal 421.

2. Lord Mansfield, letter to Garrick, quoted by Holdsworth, Some Makers of English Law.

3. Para 10.12, *supra*.

that a significant phenomenon has taken place in relation to the functioning of these Courts. After the Second World War, the cost of living has been steadily increasing, until we have reached a stage when it can be said without any exaggeration that Judges, who draw a salary of Rs. 3,500 are finding it difficult to live a life with ordinary amenities —much less a life of comfort and ease. On the other hand, after the Second World War, the professional gains at the Bar have increased by leaps and bounds. The inevitable result of this anomalous situation has been that senior members of the Bar have lost faith in the validity of the principle which governed the ethics of the Bar in the past, and which compelled them as a matter of duty to the profession to accept an invitation of the Chief Justice to join the Bench. In the past, if the Chief Justice of the High Court sent for a member of the Bar and offered him an invitation to be his colleague, it was thought to be a matter of duty to the nation to say "yes" and never to decline the offer. Decline in the faith of this professional principle has now led to this unfortunate and distressing result that the Chief Justice of every High Court has the sad experience of getting a "No" to his request from several members of the Bar. This is a circumstance the relevance of which cannot be ignored in considering the present problem.

Reason for reluctance

10.16. Any senior, or even mid-senior, practitioner at the Bar is used to a certain way of life and to the conveniences and comforts of the members of his family and the education of his children in a certain style. Besides, he has before him an alluring prospect of reaching the position nearabout the top of the professional ladder where professional incomes have reached unprecedented heights today. In this situation, if members of the Bar are reluctant to join the Bench, it would not be easy to disapprove of or condemn their conduct. It is from the class of these members of the Bar that the Chief Justices of the High Courts are very keen to recruit members on the Bench.

This predicament is the determining factor for the quality of the higher judiciary, and, therefore, it will be dangerous and ostrich-like to ignore this dilemma.

The dilemma, to which we have referred, should not be treated as illusory, and the reality behind the dilemma should not be ignored in considering the service terms of the High Court Judges.

Role of judiciary in determining important questions of law

10.17. There is another aspect of this problem, to which we must refer. In a democratic State, committed to the ideal of establishment of socio-economic justice and the creation of a new social order of an egalitarian type, it is well-known that the law plays a major role as

an instrument of change, and so, it is but natural that questions about the validity of the law or even about the construction of its benevolent provisions are bound to play a major role in assisting democracy in its onward march towards socio-economic justice. In dealing with questions, both constitutional and legal, which the judicial process has to face from time to time, both the lawyers and the judges have to play their role not merely as legal technicians but as jurists. We must note that the stakes involved are very high.

Cohen's view

10.18. What Cohen has observed about the role of lawyers, in our view, applies equally to the role of Judges. Says Cohen[1]:

> "A lawyer must study the stream of life and be constantly thinking of ways of improving the containing legal forms. We too are men, and now we will live not as pall-bearers of dead past but as the creators of a more glorious future. By all means let us be loyal to the past, but above all loyal to the future, to the Kingdom which doth not yet appear."

Judges must possess vision

10.19. Discussing the function of the Judge, W. A. Robson([2]) has pointed out that stress is always laid on the duty of a Judge to be a trustee of the past, but, in reality, it is far more important that he should be a prophet of the future, in so far as that is compatible with the faithful administration of the existing body of law.

Even as to the problem of judicial interpretation, a Judge must be endowed not only with deep knowledge of law, but must also possess a proper vision about the significance of the role of law in a democratic State. As Cardozo has observed.[3]

> "The problem of judicial interpretation is to hold a just middle way between excess of valour and excess of caution." "My duty as a Judge may be", said Cardozo[4], "to objectify in law not my own aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of men and women of my times. Hardly shall I do this well if my own sympathies and beliefs and passions and deviations are with a time that is past."

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1. Morris R. Cohen, A Dreamer's Journey, (Autobiography of Morris R. Cohen), pages 180-181.

2. Robson, Justice and Administrative Law, pages 242—245.

3. Margaret E. Hall, (Ed) Selected writings of Benjamin Nathan Cardoze. p. 40

4. Cardozo, Nature of the Judicial Process, p. 173

This illustrates the proposition which we have just enunciated, namely, that both lawyers and Judges must bring to bear upon their respective tasks not only their skills as technicians in the law, but also their vision as jurists.

Law as a dynamic instrument

10.20. In a democratic State, law can never be static. It is dynamic, and it is fully conscious of its purpose as an instrument of social change. It is in connection with this dynamic role of law that Friedmann[1] has observed:

> "It would be tragic if the law were so petrified as to be unable to respond to the unending challenge of evolutionary or revolutionary changes in society. To the lawyer, this challenge means that he cannot be content to be a craftsman. His technical knowledge will supply the tools, but it is his sense of responsibility for the society in which he lives that must inspire him to be jurist as well as lawyer."

Crucial role of Judges

10.21. Having referred to the significance of the role of law and the importance of judicial process in that connection, we ought to add that Judges have to play a crucial role in this process. As Mr. Eric Fletcher has stated[2]:

> "Whatever detailed reforms may be introduced for improving the machinery of justice, for speeding up the process of litigation and for developing a more expeditious and cheaper system of justice in the country, we shall always find that the linchpin of the system is the Judge."

When we are discussing the question of revising the terms and conditions of service of the Judges, we must bear this observation in mind.

Problems of arrears

10.22. All persons, who take interest in the administration of justice, are disturbed by the problem of growing arrears in different High Courts and even in the Supreme Court; but it is not appreciated by ordinary persons that this problem cannot be solved merely by appointing additional number of Judges. When one speaks of expeditious disposal of cases pending in the High Courts and the Supreme Court, one is not asking for superficial or hasty decisions of cases; one is expecting the Judges to bring to bear upon their task the wealth

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1. W. Friedmann, Law in a changing Society, p. 503.

2. Eric Fletcher in H.C. Debates, 23rd March, 1954, Col. 1089.

of their experience and their legal acumen coupled with a vision of the true character of their function with a view to dealing with matters expeditiously; and, in that connection, the quality of the Judges matters much more than the number of Judges.

Likely consequence of refusal by members of the bar

10.23. If we find by experience that distinguished and experienced lawyers continue to say 'No' to the invitation made by their Chief Justice to accept a seat on the Bench.

Chief Justices may have to choose lawyers who do not occupy a position even in the second rank at the Bar. Lawyers of this category may, no doubt, be happy to be elevated to the Bench; but selection of such lawyers will not add to the strength of the Bench; on the contrary, it may lead to the lowering of judicial standards and deterioration of the administration of justice. This fact cannot be ignored in dealing with the problem of the improvement of the salaries of the High Court Judges.

If the Chief Justices of High Courts show reluctance to choose such lawyers for elevation to the Bench, the only course open to them would be to recruit on the Bench distinguished District Judges; and, if such a course is adopted, as it may well have to be, ultimately all the High Courts may be manned by District Judges, because in their case, elevation to the High Court Bench invariably means substantial financial rise in their salaries.

Limitations of persons appointed from the subordinate judiciary

10.24. When we make this observation, we are not, in any manner, under-estimating the quality of the contributions made by some District Judges who were elevated to the Bench of different High Courts. Experience shows that District Judges elevated to the High Court Bench bring to bear upon the discharge of their functions a balanced approach and a mind trained by long judicial experience in appreciating evidence and in assessing the merits of rival contentions. But there is no denying the fact that, in his long judicial career, a member of the subordinate judiciary does not get an opportunity to become familiar with some of the important branches of law which constitutes an important part of the judicial business of different High Courts.

Thus, in some respects, their work in the High Courts is qualitatively different from that which they do in the district courts.

Variety of experience gathered by members of the bar

10.25. On the other hand, members of the bar, who practice in their respective High Courts, become familiar with all branches of law and acquire excellence and expertise by virtue of the experience gained in handling a variety of cases before different Benches of the High

Courts. Besides, on elevation to the Bench, successful members of the Bar bring to bear upon the discharge of their duties a fresh outlook characterised by creative thinking and unhampered by precedents and inspired by the vision of the role which law has to play in a democratic society.

Role of each complementary to role of other

10.26. We would like to add that on the Bench of the High Court those appointed from the bar and those appointed from the subordinate judiciary are complementary to each other, but in no sense a substitute for each other.

That is why Chief Justices always expect to have a large number of practising lawyers on the Bench, in addition to the District Judge who, by the excellence of their work, are naturally promoted to the High Court. This expectation of the Chief Justices is being gradually defeated. That is a very serious problem which the administration of justice in the High Courts is facing today, and may have to face in future in a much larger measure. We earnestly hope that the policy-makers in our country will take this consideration into account in dealing with our recommendations on this subject.

Present economic conditions not a deciding factor

10.27. It is in this background that we have given anxious consideration to this problem. In doing so, we have constantly borne in mind the fact that we have adopted the ideal of establishing a new society based on social, economic and political justice in our country and that a democracy like ours is reluctant to allow any section of public servants to claim exaggerated salaries or amenities. We have also taken into account the fact,—very distressing indeed—that, at present, we are passing through a very difficult time. But the problem, we are dealing with, is a long-range problem, and we suggest that, in finding proper solution to this problem, the present economic conditions in the country should not be the deciding factor.

Recommendations

10.28. Having considered all the aspects and given them very careful thought, we are not inclined to recommend any increase in the salary of High Court Judges. We would, however, make the following recommendations which we earnestly suggest should be taken as one integral recommendation.

Age of retirement of High Court Judge to be increased to 65 years

10.29. We recommend, in the first place, that the age of retirement of the High Court Judges should be raised from 62 to 65 years. This question has been argued over and over again, and we do not

think it necessary to advance elaborate arguments in support of our recommendation. We may only add that, in its Fourteenth Report, the Law Commission[1] had made a similar recommendation.

If the High Court Judge is normally appointed at the age of 45 to 50 years and is able to look forward to a career on the Bench for 15—20 years, that may, we venture to think, persuade some of the members of the Bar, who are inspired by the desire to serve the cause of the administration of justice, to accept the invitation of their Chief Justices to serve on the Bench. We do not apprehend that, if the age of retirement of High Court Judges is raised to 65, there would be difficulty in persuading eminent Judges of the High Court to move to the Supreme Court. Appointment as a Judge of the Supreme Court is regarded by all the members of the higher Judiciary as the highest prize, and the identity of the age of retirement of Judges of the High Courts and the Supreme Court will certainly not act as a disincentive to the High Court Judges if they are called upon to join the Supreme Court.

Incidentally, raising the age of retirement will mean that the vacancies will arise less frequently than at present. As the average age of appointment may be expected to be as at present a longer tenure automatically means less frequent vacancies.

Free unfurnished house or house rent allowance for High Court Judges

10.30. Secondly, we recommend that Judges of the High Courts should be provided with a free unfurnished house, or, in lieu thereof, a suitable amount of House Rent Allowance. The option should be left to the Judges in this matter. It may be provided that, in regard to High Courts situated in cities notified as "A" Class for the purpose of the general rules in force for the drawal of house rent allowance by Central Government servants, the House Rent Allowance should be Rs. 500 per month and in other cities it should be Rs. 350 per month. It is hardly necessary to add that exemption from the taxability of the house rent allowance should be permissible to the extent to which it is exempt in the case of ordinary Government servants.

Conveyance allowance

10.31. Thirdly, we recommend that a conveyance allowance of Rs. 300 per month should be given to Judges of the High Court.

Pension of Judges

10.32. Fourthly, in regard to pensionary benefits, we recommend as a broad rule that High Court Judges who have rendered ten years of service or more should, on retirement by superannuation, get by way of pension half their monthly salary.

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1. 14th Report (Reform of Judicial Administration).

If a High Court Judge retires otherwise than by superannuation, after completing ten years of service or more, he should be entitled to a pension of Rs. 1,000 per month. Similarly, if a High Court Judge retires (otherwise than by superannuation) after completing less than ten years of service, he should be entitled to a proportionate pension not to exceed Rs. 500 per month (the amount will be determined proportionately according to the length of service, subject to the maximum of Rs. 500 per month).

Pension to be granted to widow of sitting High Court Judge

10.33. Fifthly, we recommend that if a sitting High Court Judge dies, his widow should receive a monthly pension of Rs. 500 or of an amount equal to half the pension to which the Judge would have been entitled, if he had retired on the date of his death, whichever is higher. This pension should be paid to the widow during her life time.

Pension of Chief Justice of High Court to be increased

10.34. Sixthly, in regard to the Chief Justice of a High Court retiring on superannuation, we recommend that if a Judge functions as Chief Justice for five years or more, he should get, as his pension, half his salary as Chief Justice. If he functions as Chief Justice for less than five-years, his pension should be proportionately determined. But in no case should his pension be less than the maximum pension of a High Court Judge.

Medical benefits after retirement to High Court Judges

10.35. Seventhly, we recommend that free medical attendance and other medical benefits, available to the High Court Judges in service, should be available to them even after retirement.

Conditions of service of High Court Judges in other respects to be equalled to those of Secretary to Government of India

10.36. Our eighth and last recommendation regarding High Court Judges is as follows:—

> With regard to the conditions of service of a Judge of a High Court, for which no express provision has been made in the High Court Judges (Conditions of Services) Act, 1954, it has been provided[1] that "such conditions shall be, and shall, from the commencement of the Constitution, be deemed to have been, determined by the rules for the time being applicable to a member of the Indian Administrative Service holding the rank of Secretary to the Government of the State in which the principal seat of the High Court is situated." In our view, it would be more appropriate to

[1] High Court Judges Rules (1956), rule 2 and proviso thereto.

equate the High Court Judges with the Secretary to the Government of India, rather than with the Secretary to the Government of the State in this matter. Unfortunately, in regard to the Judges of the Delhi High Court, they seem to be equated by the relevant rules with the person holding the rank of Joint Secretary in the Government of India. That, we think, should be suitably changed.

Recommendation regarding Supreme Court Judges—increase in pension

10.37. Now, in regard to the Judges of the Supreme Court, we would like to make the following recommendations:—

First, we recommend that Judges of the Supreme Court, who have rendered 8 years of service or more in that Court should, on retirement by superannuation, be entitled to a pension equal to half their salary.

Medical aid after retirement to Supreme Court Judges

10.38. Secondly, we recommend that medical attendance and other medical benefits should be available to retired Supreme Court Judges as they are available during their tenure of service.

Conveyance allowance to Supreme Court Judges

10.39. Thirdly, we recommend that Supreme Court Judges should be given a conveyance allowance of Rs. 300 per month.

Pension of Supreme Court Chief Justice

10.40. Fourthly, in regard to the Chief Justice of India, we recommend that if he functions as such for three years or more, he should, on retirement on superannuation, get a pension equal to half his salary as Chief Justice. If he works as Chief Justice for a period less than three years, the amount of pension (on such retirement) should be proportionately determined. In no case should the pension of a retiring Chief Justice be less than the maximum pension of a High Court Judge.

Leave travel concession to be allowed every year to Supreme Court Judges

10.41. Our fifth recommendation relates to the Supreme Court Judges Travelling Allowance Rules, 1959. It appears that recently[1] a rule[2] has been added to these rules, whereunder travel concession is

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[1] Rule 6A, Supreme Court Judges Travelling Allowance Rules, 1959, inserted 1972. (Min. of Law & Justice, Notification No. 1/7/72. Jus dated 28-2-1972).

[2] See Appendix.

allowed to every Supreme Court Judge and members of his family for travel to his permanent residence in his home state.

We recommend that this concession should be available every year, instead of every two years as at present. Incidentally, we note with satisfaction that on retirement Supreme Court Judges are now entitled to T.A., under a recent amendment made in the relevant rules[1].

No deduction to be made in allowing rail fare for purposes leave travel concession

10.42. We now come to our last recommendation relating to Supreme Court Judges. It pertains to the rule relating to travel concession, to which we have referred[2]—rule 6A of the Supreme Court Judges T.A. Rules, 1959, concerning travel by a Judge etc. to his permanent residence in his home State during his leave. The rule provides that for this purpose, rule 6 of the Supreme Court Judges Rules, 1959, read with the rules applicable in this behalf to a Member of the Indian Administrative Service holding the rank of Secretary to the Government of India, shall be applicable. Under the rules applicable to the Indian Administrative Service, there is a deduction for rail fare while calculating the amount of the leave travel concession. This deduction, in our view, should not apply to Judges of the Supreme Court and the members of their family. Our sixth and last recommendation, therefore, is that rule 6A, referred to above (which was inserted in 1972), should be amended, so as to carry out the above object.

Recommendations should receive early consideration

10.43. As we have repeatedly pointed out during the course of our discussion in this Chapter, we have given anxious consideration to this problem and very carefully weighed the pros and cons. We have ultimately come to the conclusion that it is absolutely essential that the recommendations which we are making, and which, we think, on the whole, are modest and moderate, should receive early and favourable consideration from the Union Government.

Contended Judiciary essential for Rule of Law

10.44. We wish to emphasise that a contended Judiciary satisfied with the terms and conditions of service and at peace with itself, can be a source of incalculable significance for sustaining the Rule of Law

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1. Rule 6(3), Supreme Court Judges Travelling Allowance Rules, 1959.
2. Para 10·41, *supra*.

in a true democratic manner, and helping Indian democracy in its march towards the ideal set before it by our Constitution.

In this connection, it is pertinent to recall what Justice Holmes said about the ambiguity of words. Holmes said:[1]

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used. *Lamar* v. *United States*."[2]

In particular, when words are used in socio-economic legislation, they sometimes appear to be ambiguous vehicles of thoughts or ideas. On such occasions, blind reliance on the dictionary of a mechanical application of the rules of grammer may not help. What will assist in the judicial process of discovering the true and full meaning of the words is the vision of the Judge and his awareness of what Justice Holmes described, "as the major inarticulate premises". Thus, when socio-economic welfare legislation is placed on the Statute Book, it is the judicial interpretation which makes much legislation meaningful. and thereby facilitates its easy and effective implementation. We feel confident that if the function of the judiciary of considering the validity of legislative or executive actions and of interpreting the true intention of legislative enactments is considered in this perspective, all shades of opinion will readily accept the modest and the moderate recommendations which we have made in this Chapter.

Conclusion

10.45. Before we part with this topic, we may point out that we have made rough calculations as to the additional expenditure which Government may have to incur if all the recommendations made in this Chapter are accepted; and we have found that the extent of the additional expenditure is not likely to be unduly heavy. In this connection, we would also like to refer to the fact that, consistently with the tradition of judicial behaviour, our High Court Judges have shown dignity, restraint and decorum and have not publicly articulated their dis-satisfaction with the terms and conditions of their service, nor have they, either individually or collectively, made any representation in that behalf. In our view, that is all the greater reason why the Union Government should, without delay, take into account the prevailing dissatisfaction in the minds of the Judges and accept the recommendations which we have made in this Chapter after deep, careful and anxious consideration.

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1. *Towne* v. *Eisner*, (1917) 245 U.S. 247; 60 L. Ed. 372, 276.

2. *Lamar* v. *U.S.*, 240 U.S. 60, 65; 60 L. Ed. 526, 528, 36 Sup. OC5. Rep. 255.

SUMMARY OF RECOMMENDATIONS AND CONCLUSIONS

1. Article 134(1)(c) of the Constitution should be amended,[1] so as to restrict criminal appeals to the Supreme Court by certificate to cases where the certificate by the High Court is to the effect that the case involves a substantial question of law of general importance which needs to be decided by the Supreme Court.

2. No amendment is recommended in respect of appeals to the Supreme Court by special leave under article 136 of the Constitution.[2]

3. No change is recommended as regards the procedure in respect of writ petitions before the Supreme Court in respect of the trial of disputed questions of fact or the issue of ad-interim orders in such petitions.[3]

4. The Minister of Law and Justice may request the Chief Justice of India to suggest to the High Court that framing of suitable rules in respect of petitions under article 226 of the Constitution, as regards the issue of ad-interim orders[4] in such petitions.

5. No amendments are recommended as regards the trial of disputed questions of fact[5] in writ petitions before the High Court.

6. In regard to taxation matters, in place of reference to the High Court by the Income Tax Appellate Tribunal, an appeal on a substantial question of law should be substituted. From the decisions of the High Court on such appeal, an appeal should lie to the Supreme Court only where the High Court certifies that the case involves a substantial question of law of general importance which needs to be decided by the Supreme Court.[6]

7. A general recommendation is made with reference to industrial relations,[7] as follows:—

> The Minister of Law and Justice should suggest to the Union Minister of Labour to take such action as he may deem fit and necessary, in consultation with the State Governments, National Trade Unions, and bodies of employers, to create a machinery which would encourage and strengthen collective bargaining, will remove political pulls and pressures in

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1. Chapter 3.
2. Chapter 3.
3. Chapter 4.
4. Chapter 5.
5. Chapter 5.
6. Chapter 6.
7. Chapter 7, Para 7·22 and 7·23.

the functioning of trade unions, and will persuade both the trade unions, and the bodies of employers, not to lean on adjudication. Collective bargaining should find a pride of place in the settlement of collective disputes; failing that, conciliation or arbitration should step in, and adjudication should come in, if at all, only last. That objective, it is hoped, will be borne in mind when the Union Labour Minister formulates his proposals for a comprehensive Bill to regulate industrial relations.

It is high time that the machinery for the settlement of industrial disputes was so devised that the dockets of the High Courts and the Supreme Court are not burdened with too many industrial matters.

8. Creation of special Service Courts for the trial of service[1] matters is not favoured.

9. Creation of Zonal Courts of appeal is not favoured.[2]

10. Conditions of service of High Court Judges and Supreme Court Judges should be improved.[3] In this connection, detailed recommendations are made as follows:

HIGH COURT JUDGES

(1) The age of retirement of High Court Judges should be raised from 62 to 65 years.

(2) Judges of the High Courts should be provided with a free unfurnished house, or, in lieu thereof, a suitable amount of house-rent allowance. The option should be left to the Judges in this matter. It may be provided that, in regard to High Courts situated in cities notified as "A" Class for the purpose of the general rules in force for the drawal of house rent allowance, the house rent should be Rs. 500 per month, and in regard to other cities, it should be Rs. 350 per month.

(3) A car allowance of Rs. 300 per month should be given to Judges of the High Courts.

(4) In regard to pensionary benefits, a broad rule is recommended that High Court Judges who have rendered ten years of service or more should, on retirement by superannuation, get by way of pension half their monthly salary.

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1. Chapter 8.

2. Chapter 9.

3. Chapter 10.

If a High Court Judge retires otherwise than by superannuation, after completing ten years of service or more, he should be entitled to a pension of Rs. 1,000 per month. Similarly, if a High Court Judge retires (otherwise than by superannuation) after completing less than ten years of service, he should be entitled to proportionate pension not exceeding Rs. 500 per month. (the amount will be determined proportionately according to the length of service, subject to the maximum of Rs. 500 per month).

(5) If a sitting High Court Judge dies, his widow should receive a monthly pension of Rs. 500 or of an amount equal to half the pension to which the Judge would have been entitled, if he had retired on the date of his death, whichever is higher. This pension should be paid to the widow during her lifetime.

(6) In regard to the Chief Justice of a High Court retiring on superannuation, the recommendation is that if a Judge functions as Chief Justice for five years or more, he should get, as his pension, half his salary as Chief Justice. If he functions as Chief Justice for less than five years, his pension should be proportionately determined.

In no case should he get less than the maximum pension of a puisne Judge of the High Court.

(7) Free medical attendance and other medical benefits, available to the High Court Judges in service, should be available to them even after retirement.

(8) With regard to the conditions of service of a Judge of a High Court, for which no express provisions has been made in the High Court (Conditions of Service) Act, 1954, they should be equated to a Secretary to the Central Government.

SUPREME COURT JUDGES

(1) Judges of the Supreme Court, who have rendered 8 years of service or more in that Court should, on retirement by superannuation, be entitled to a pension equal to half their salary.

(2) Medical attendance and other medical benefits should be available to retired Supreme Court Judges as they are available during their tenure of service.

(3) Supreme Court Judges should be given car allowance of Rs. 300 per month.

(4) In regard to the Chief Justice of India, the recommendation is that, if he functions as such for three years or more, he should, on retirement on superannuation, get a pension equal to half his salary as Chief Justice. If he works as Chief Justice for a period less than three years, the amount of pension (on such retirement) should be proportionately determined.

In no case should he get less than the maximum pension of a Judge of the Supreme Court.

(5) Leave travel concession should be available to Supreme Court Judges (and their family) every year, instead of every two years as at present.

(6) In regard to railway fare, no deductions should be made while calculating the leave travel concession, permissible to them.

We desire to place on record our warm appreciation of the valuable assistance we have received from Mr. Bakshi, Member-Secretary of the Commission, in the preparation of this Report. At all stages of the study of this problem, Mr. Bakshi took an active part in our deliberations.

P. B. GAJENDRAGADKAR —Chairman

P. K. TRIPATHI —Member

S. S. DHAVAN —Member

S. P. SEN-VARMA —Member

P M. BAKSHI —Member-Secretary

Dated the

New Delhi, the 8th January, 1974

APPENDICES

APPENDIX I

RULES OF SOME HIGH COURTS AS TO AD INTERIM STAY

Andhra Pradesh[1]

"5. Whenever a petition is presented accompanied by an application for stay or suspension of orders, notifications and the like of the Government, or for other directions, or wherever stay of collection of any tax, fees, or dues is sought, the copies of the petition, application and the accompanying affidavit shall be served on the Government Pleader or Standing Counsel concerned, and the said petitions and the applications shall not be accepted in the Registry unless they contain an endorsement of service signed by the Government Pleader or Standing Counsel or someone authorised by him."[2]

Calcutta[3]

"25. Unless otherwise ordered by the Court, all applications for a *rule nisi* shall be made *ex parte* in the first instance, before the Court, on such day or days and at such time or times as is fixed by the Court.

"Provided that an application for a *rule nisi involving revenue* law, shall not be moved, unless the Judge otherwise directs, without serving a fortyeight hours' prior notice along with a copy of the application under Article 226 of the Constitution proposed to be moved on the Administrative Head of the department concerned with the administration of the revenue law."

"26. The Court, hearing such application, may issue a *rule nisi* or summarily reject the application or make such order thereupon as it thinks fit. A Judge issuing a *rule nisi* may make it returnable before a Division Bench. A *rule nisi* shall be drawn up as far as may be in the model form set out in Annexure I.

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1. Andhra Pradesh High Court rules regulating proceedings under article 226 of the construction.

2. Notification by High Court of Andhra Pradesh Roc. No. 159, 170, 311 Supplementary to A.P. Gazette Part II, dated 21 May, 1970.

3. Calcutta High Court Rules relating to petitions under article 226 of the Construction (1971) (with the amendments made on 9th June, 1973, by High Court Notification No. 5863-G, incorporated).

Punjab[1]

"29. Subject to the cases covered by rule 3 below, all Civil Writ Petitions shall be brought to a hearing of notice of motion to the respondents. "Notice of motion with a complete copy of the petition (including its annexures) for each respondent shall be presented to the Deputy Registrar of the Court at the time of filing the writ petition. The date on which the writ petition is to be heard by the Motion Bench shall be entered by the Deputy Registrar in the notice of motion and its copies and also noted on the writ petition. The notice of motion in form C.W.P. 4 shall then be endorsed by the Deputy Registrar under his signature and date. The petitioner or his counsel may thereupon serve the notice on the opposite party either in person or by registered post acknowledgement due and produce before the Deputy Registrar affidavit proof of Service of the notice on the respondent in the prescribed form C.W.P. 5 *at least two working days before the date of the motion hearing* of the petition. The office shall then record a note on the opening sheet indicating that the notice of motion has been served by the counsel of the petitioner on the respondent for the date on which the case is being placed before the Court for motion hearing."

1. Punjab High Court, Rule 29 of the Amended writ Rules

APPENDIX 2

PRE-1950 POSITION AS TO WRITS

The position immediately before the Constitution, in respect of each of the writs, or directions in the nature of those writs, was as follows:—

(a) **Habeas corpus**—Every High Court could issue a direction of the nature of a *habeas corpus*[1] under section 491 of the Code of Criminal Procedure, 1898. The jurisdiction was statutory[2]. After the amendment made in 1923, it was not confined to the ordinary original limits of the High Court's jurisdiction. Any High Court could issue the direction within the limits of its "appellate criminal jurisdiction."

(b) **Certiorari**—Each of the three High Courts of Calcutta, Madras and Bombay could issue this writ within the limits of its ordinary original civil jurisdiction.[3]-[6].

In the case of *certiorari*, it is to be noted that it could not issue in any matter concerning the revenue or its collection.

(c) **Prohibition**—Each of the three High Courts of Calcutta, Madras and Bombay had authority to issue this writ within the limits of its ordinary original civil jurisdiction.[5]-[8].

(d) **Mandamus**—The three High Courts could issue an order in the nature of this writ within the limits of their ordinary original civil jurisdiction. The jurisdiction was defined by section 45 to 50 of the Specific Relief Act, 1877, which was then in force.[9]

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[1]. Chapter 37, Cr. P.C., 1898.

[2]. *C.P. MATHEN* v. *D.M. Tribandrum V*, A.I.R. 1939 P.C. 213.

[3]. *Indumati* v. *Bengal Court of Wards*, 42 C.W.N. 230.

[4]. *In Re Ramjidas*, I.L.R. 1935 Cal. 1011.

[5]. *In Re National Carbon Co.*, 38 C. W.N. 729; A.I.R. 1934 Cal. 725, 727, 728

[6]. *Annie Besant* v. *Advocate General*, 23 C. W.N. 986; A.I.R. 1919.

[7]. *Indumati* v. *Bengal. Court of Wards*, 42 C.W.N. 230.

[8]. *In Re Ramjidas*, I.L.R. 1935 Cal. 1011.

[9]. *Alcock Ashdown & Co.* v. *Chief Controlling Revenue* Authority, 50 Indian Appeals 227. A.I.R. 1923 P.C. 138.

(e) **Quo warranto**—Each of the three High Courts of Calcutta, Madras and Bombay had jurisdiction to issue this writ within the limits of its ordinary original civil jurisdiction. The jurisdiction has been assumed[1] or discussed[2-3] in several cases.

The doubts that were thrown on this subject by one of the Privy Council decisions[4] were mainly in relation to exercise of the jurisdiction where the subject-matter of the dispute arose *outside the Presidency town*. The discussion in the High Court of Calcutta relating to the quo-warranto case[5] gives history of the jurisdiction. Of course, the point was kept open by the Privy Council on appeal, because the Privy Council was of the opinion that the jurisdiction could not be exercised outside the Presidency town.[6]

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1. *Amarendra* v. *Narendra*, 56 C.W.N. 449.

2. *In Re Banwari Lal*, 48 C.W.N. 766.

3. *I.Q. Master's Union* v. *Dutt.*, A.I.R. 1951, Cal. 570, 573.

4. *Ryots of Garabandho* v. *Zemindar of Parkamedi*, (1943) 70 I.A. 129; A.I.R. 1943 P.C. 165.

5. *In re Banwari Rai.*, 48 C.W.N. 766 (on appeal, A.I.R. 1947 P.C. 90).

6. For history of all writs, see S.R. Das J. in 48 C.W.N. 766, 795, 796, 797, Para 35, 37, 36 and 40 respectively.

APPENDIX 3

PROPOSED[1] AMENDMENTS[2] IN THE INCOME-TAX ACT, 1961

Section 255 (7) [New]

The Appellate Tribunal shall, at the close of the case, pronounce a judgment, and the provisions of the Code of Civil Procedure, 1908, relating to judgments shall, so far as may be, apply in the case of the Appellate Tribunal as they apply in the case of a district court.

[If the procedure of appeal is to be substituted in place of reference, the principal sections[3] of the Income-tax Act, 1961, may be revised[4] as follows:—]

Re-draft of certain sections of Income-tax Act

Re-draft section 256

Revised Section 256—"256(1). The assessee or the Commissioner may, within sixty days of the date upon which he is served with notice of an order under section 254, by a *memorandum of appeal in the prescribed form, accompanied where the appeal is made by the assessee by a fee of one hundred and twenty-five rupees, appeal to* the High Court on a *substantial* question of law arising out of such order.....

.....

(2) If, *on an appeal under sub-section* (1) *the High Court is of the opinion that the facts stated in the order under appeal are not sufficient for the disposal of the appeal,* the High Court may require the Appellate Tribunal to state *the facts,* and, on receipt of any such requisition, the Appellate Tribunal shall state *the facts accordingly.*

"(3) Where, *before the hearing of the appeal by* the High Court, the assessee withdraws his *appeal,* the fee paid shall be refunded."

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1. There are very rough drafts.

2. Corresponding provisions, if any, in other laws relating to direct taxes should be amended on similar lines.

3. There may be minor changes needed in other sections of the Income-tax Act also.

4. Similar changes could be made in other laws dealing with direct taxes and providing for reference to the High Court.

Section 257 to be omitted.

Section 258 to be omitted.

Re-draft of section 259

"259. (1) When any *appeal* has been *preferred* to the High Court under section 256, it shall be heard by a Bench of not less than two judges of the High Court, and shall be decided in accordance with the opinion of such judges or of the majority, if any, of such judges.

(2) Where there is no such majority, the judges shall state the point of law upon which they differ, and the case shall then be heard upon that point only by one or more of the other judges of the High Court, and such point shall be decided according to the opinion of the majority of the judges who have heard the case, including those who first heard it."

Re-draft of section 260

"260. (1) The High Court, or the Supreme Court, upon hearing any such appeal *as is provided for in section* 256 shall decide the questions of law raised therein, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and a copy of the judgment shall be sent under the seal of the Court and the signature of the Registrar to the Appellate Tribunal, which shall pass such orders as are necessary to dispose of the case conformably to such judgment.

(2) The costs of *any such appeal* to the High Court, *which shall also include the fee for the appeal*[1], shall be in the discretion of the High Court."

[Section 260 A (New)]

"260A. The provisions of the Code of Civil Procedure, 1908, relating to appeals to the High Court shall, so far as may be, and subject to the provisions of sections 258, 259 and 260, apply in the case of *appeals to the High Court under section* 256, as they apply in the case of appeals from decrease of a civil court."

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1. It is but fair that the costs should include the appeal fee also.

Re-draft of section 261

"261. An appeal shall lie to the Supreme Court from any judgment of the High Court delivered on *an appeal* under section 256, if the High Court certifies *that the case involves a substantial question of law of general importance which needs to be decided by the Supreme Court.*"

[Under the present section[1], an appeal shall lie to the Supreme Court from any judgment of the High Court, delivered on a reference made under section 256, "in any case which the High Court certifies to be a fit one for appeal to the High Court."]

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1. Section 261, I.T. Act, 1961.

APPENDIX 4

TABLE SHOWING ANSWERS TO QUESTION 8 OF THE LAW COMMISSION QUESTIONNAIRE

(as received from the Governments)

8. (a) National Appellate Court, (b) Industrial Relations Commission, (c) Labour Appellate Tribunals.

Supported	Not Supported	Supported	Not supported	Supported	Not supported
	S. No. 25 (Central Government)	S. No. 25 (Central Govt.)			S. No. 25 (Central Govt.)
	S. No. 32 (Minister of Labour, W.B.).		S. No. 32 (Minister of Labour W.B.)	S. No. 32 (Minister of Labour, W.B.)	
	S. No. 38 (Labour Deptt. W.B.)		S. No. 38 Labour Deptt. W.B.)	S. No. 38 (Labour Department W.B.)	
	S. No. 51(R) (Minister, T.N.)	S. No. 51(R) (Minister T.N)			
	S. No. 58 Minister, Punjab)		S. No. 58 (Minister, Punjab).		S. No. 58 (Minister, Punjab.)
S. No. 59 (Labour Deptt. H.P.)		S. No. 59 (Labour Deptt. H.P.)			
	S. No. 83 (Labour Deptt. Gujarat).	S. No. 83 (Labour Deptt. Gujarat).			S. No. 83 (Labour Deptt. Gujarat).
S.No. 96 (Minister, Bihar).				S. No. 96 (Minister, Bihar).	

APPENDIX 5

RULES AS TO DISCIPLINARY PROCEEDINGS AGAINST GOVERNMENT SERVANTS IN SOME STATES

(1) Kerala

The Kerala Civil Services (Disciplinary Proceedings Tribunal) Rules, 1960

These have come into force on 1-1-1960. The rules apply to all officers under the rule-making control of the State Government other than those referred to in article 314 of the Constitution of India.

The Tribunal consists of a judicial officer who has worked or is eligible to be appointed as District and Sessions Judge. Appointment to the Tribunal is made by the Government. The Government may refer to the Tribunal any case or class of cases, which they consider should be dealt with by the Tribunal.

If on a complaint or other information received and after such investigation, if any, as may be deemed necessary, the disciplinary authority or the appointing authority or any officer or authority employed by the Government in this behalf is satisfied that there is a *prima facie* case for taking action against an officer before the Tribunal, the authority shall forward to Government all the records of the case. The Government may, after examining such records and after making such consultations as may be deemed necessary decide whether the case shall be proceeded with and if so whether it shall be tried by the Tribunal. The Departmental authorities may so send to the Government the records of cases other than of corruption which they think fit to be tried by the Tribunal and the Government may decide whether they shall be tried by the Tribunal or not. If the Government decide that the case shall be tried by the Tribunal they shall send the records to the Tribunal. When the Tribunal is seized of the case all departments of Government shall assist the Tribunal in the production of witnesses, in securing the necessary documents, and in such other ways as the Tribunal may desire.

The proceedings of the Tribunal are held in camera and after all the evidence and the arguments have been heard the Tribunal records its findings in respect of each charge and in case the accused Government servant is held guilty of any charge, it recommends to Government the punishment to be imposed.

(2) Orissa

The Disciplinary Proceedings (Administrative Tribunal) Rules, 1951

(a) These have been framed under the proviso to article 309 of the Constitution. They apply to all Government servants under the rule making control of the Orissa Government.

(b) The Tribunal shall consist of 3 members, one of whom shall be a member of the Board of Revenue, another a judicial officer who is or was of the status of a District Judge and the third, the head of a Department.

(c) An assessor may be coopted from the Department to which the official charged belongs.

(d) Cases relating to Government servants drawing a monthly salary of Rs. 150 and above may be referred to the Tribunal in respect of matters involving corruption, failure to discharge duties properly. irremediable general inefficiency and personal immorality.

(e) In conducting enquiries the Tribunal shall be guided by rules of equity and natural justice and shall not be bound by formal rules relating to procedure and evidence.

(f) The Tribunal is also required to make recommendations about the punishment to be awarded including compulsory retirement, with or without pension or gratuity.

(3) Tamil Nadu

Madras Civil Services (Disciplinary Proceeding Tribunal) Rules, 1948

(a) These rules have been made under the powers conferred by section 241(1) (b) and (2) (b) of the Government of India Act, 1935.

(b) The Tribunal shall consist of two judicial officers of the status of the District and Sessions Judge.

(c) Cases relating to Government servants drawing Rs. 150 per mensem and above in respect of matters involving corruption are particularly to be referred to this Tribunal.

(d) Government can also refer any particular case or class of cases which in its opinion should be dealth with by the Tribunal.

(e) The record of investigation will be sent to the Government and the Government will then decide in consultation with the head of the Department whether the case should be sent up before the Tribunal.

(f) The Police will help the Tribunal in securing documents, in producing witnesses and in such other ways as the Tribunal may desire.

(g) Counsels will be allowed on both sides.

(h) The Tribunal may co-opt an assessor who should be an officer of the Department to which the Government servant charged belongs.

(j) It appears that the Tribunal should suggest the penalty to be imposed also in cases where the charges are held proved, but this is not quite clear in the rules.

APPENDIX 6

EXTRACT OF SUPREME COURT JUDGES' T.A. RULES, 1959, AS AMENDED

"6A. Notwithstanding anything contained in rule 6, a Judge of the Supreme Court shall be entitled to travel concession for himself and the members of his family for visiting his permanent residence in his home State during his leave, once in a block of two years, in accordance with rule 6 of the Supreme Court Judges Rules, 1959, read with rules applicable in this behalf to a Member of the Indian Administrative Service holding the rank of Secretary to the Government of India.

For this purpose, leave shall include vacation:

Provided that the Judge and his wife will have the option to travel by air subject to the condition that reimbursement of air fare will be permitted after deducting the rail fares which he would have been liable to pay under the Leave Travel Concession applicable to a Member of the Indian Administrative Service holding the rank of Secretary to the Government of India."

L/P(D)194MofLJ&CA—2,000—11-1-1975—GIPS