THE SUPREME COURT OF INDIA

I.

Introductory

The recent establishment of the Supreme Court of India as the final judicial tribunal in the Indian Republic will be welcomed by all those who are interested in the strengthening of the foundations of the rule of law the world over. As life becomes more and more complex, conflicts not only between individuals but also between the State and the individual tend to grow and multiply. Experience of other federations attests to the fact that the functioning of political institutions in a complicated frame of legal powers frequently gives rise to serious legal controversies. The need for a supreme tribunal, impartial and efficient, and as free as possible from the passions of the moment, to help resolve such conflicts and controversies by the judicial process is obvious. Such a prime need the Supreme Court of India is expected to fulfil for the newly-organised Republic. The object of this paper is firstly to discuss the constitution, powers, and jurisdiction of this important Court, and secondly to offer a brief survey of its work so far.

II.

The constitution, powers, and jurisdiction of the Supreme Court

(A) Constitution of the Court

The Supreme Court of India is to consist of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven judges. Every judge of the Supreme Court shall be appointed by the President after consultation with such of the judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose, and shall hold office until he attains the age of sixty-five years (Art. 124).

(B) Provisions for securing judicial independence.

The judiciary under a constitution, as Alexander Hamilton pointed out in *Federalist* No. lxxviii, is the weakest of the three departments of government, having "no influence over either the sword or the purse; no direction either of the strength or the wealth

of society"; and depending "ultimately upon the aid of the executive arm even for the efficacy of its judgments." As the judiciary was "in continual jeopardy of being overpowered, awed or influenced by its co-ordinated branches," Hamilton stressed the importance of taking great care to provide in the Constitution adequate safeguards to strengthen its firmness and independence such as the guarantee of permanency of office of the judges. And in a limited constitution which contained certain specified exceptions to legislative authority, it was obvious, as Hamilton observed in the same number of the *Federalist,* that "such limitations can be preserved (in) no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." We shall now proceed to enquire how the new Indian Constitution endeavours to secure the independence and impartiality of its final Court of Appeal.

The chief means employed by the Constitution to preserve the integrity and impartiality of this Court are:— (a) the prescribing of a definite tenure for the judges, namely, that they shall continue in office until they attain the age of sixty-five years (Art. 124 (2)); (b) the provision of the safeguard that judges of the Supreme Court shall not be removable from office except by an order of the President passed after an address by each House of Parliament (supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting) has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity (Art. 124 (4)); (c) the provision for payment of fixed salaries to the judges as also the provision that their pensions and privileges shall not be varied to their disadvantage after their appointment (Art. 125 and part D of the Second Schedule); and (d) the imposition of a prohibition upon retired judges of the Supreme Court pleading or acting in any court or before any authority within the territory of India (Art. 124 (7)).

(C) Life tenure versus fixed tenure for judges

It seems to me that the constitution-makers in India were wise in fixing the age of retirement of Supreme Court Judges at sixty-five instead of prescribing a life tenure for them as in some other constitutions. In a tropical country like India it is not reasonable to expect that judges who generally lead sedentary lives and whose work calls for sustained mental effort would be able to preserve

their full mental and physical vigour even beyond the age of sixty-five. There may be exceptional cases of judges retaining their full powers beyond this age but we ought to be guided in this matter by a rule which will hold good in the majority of cases. And instances could be given of judges in other countries who have tarried on the bench even after their mental powers had failed perceptibly. Chief Justice Hughes in his lectures on "The Supreme Court of the United States" at Columbia University, New York, gives the instances of Justice Grier and Justice Field who had stayed too long on the bench and who were reluctant to retire although suggestions to that end had been given by their own colleagues.[1] The desire to cling to office and reluctance to give up the accustomed work even after a mature age appears to be a common human frailty. And aged judges seem to share this frailty along with other humbler folk. Moreover, the task of interpreting a constitution framed to meet the needs of changing times requires a resilient mind able to attune itself to the temper of the times. A constitution is not meant to be a code of law but a general framework within which each generation might conduct its life in an orderly way. And, as Chief Justice Marshall has observed, the Constitution was "intended to endure for ages to come and, consequently, to be adapted to the various crises of human affairs."[2]

A mind which has become set already and which moves only in old grooves lacks the vision required to understand and interpret the general clauses of the constitution so as to subserve the public interests in a changing world. And it was this problem which confronted President Franklin Roosevelt when many of his New Deal measures were vetoed by the Supreme Court of the United States manned by old judges whose minds could not properly apprehend the dynamic problems of contemporary society. And in his Bill to reorganize the judicial branch of the government he sought power to appoint for every judge over seventy years of age who stayed on in office an additional judge. The Bill met with serious opposition. And in view of the voluntary retirement of some of the judges and their replacement by new appointees and the Court's own reversal of some of its earlier decisions, the Court reform proposal was shelved. But the President's Court reform plan had laid bare the deeper issues which underlay this drastic measure, one of which was the problem of old judges being called upon to interpret a Constitution whose spirit is the spirit of the age in which it functions. As

1 Charles E. Hughes: *The Supreme Court of the United States.*
2 *McCulloch v. Maryland,* (1819) 4 Wheat. 316, at 415; 4 Law. Ed. 579, at 603.

Attorney-General Robert H. Jackson (now Mr. Justice Jackson) has observed:

> "The Court, moreover, is almost never a really contemporary institution. The operation of life tenure in the judicial department, as against elections at short intervals of the Congress, usually keeps the average viewpoint of the two institutions a generation apart. The judiciary is thus the check of a preceding generation on the present one; a check of conservative legal philosophy upon a dynamic people, and nearly always the check of a rejected regime on the one in being. And the search for Justices of enduring liberalism has usually ended in disappointment. This conservative institution is under every pressure and temptation to throw its weight against novel programs and untried policies which win popular elections."[3]

It is true that Attorney-General Jackson in the passage above cited was putting forward the viewpoint of government in a situation where the Court by its narrow construction of the constitutional provisions was throwing overboard in rapid succession as unconstitutional several congressional enactments passed with a view to meet the needs of a most difficult economic situation. But even making due allowance for this fact, his observation contains a large element of truth. It sounds a warning note against the difficulties inherent in a system of life tenure for judges who are called upon to interpret the provisions of a constitution. The fixing of the age of retirement of Supreme Court judges at sixty-five, while securing for India a tribunal sufficiently mature to deal impartially and wisely with constitutional problems, also avoids largely the danger of its becoming an ancient institution in the matter of its personnel. We ought never to forget that an essential requisite for judges to reach sound decisions on constitutional matters is a proper understanding of contemporary social and economic forces and sympathy for the efforts of the legislature to deal with such forces.

(D) Removal of judges from office.

The Indian Constitution by prescribing that judges of the Supreme Court can be removed from office only by an address presented to the President by each House of Parliament passed by a majority vote adopts the British practice in this respect. Since the address for removal of a judge has to be grounded on his "proved misbehaviour or incapacity" Parliament has been authorized to regulate by law the procedure to be followed for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of the judge.

[3] Robert H. Jackson: *The Struggle for Judicial Supremacy*, at 315-6.

(E) The jurisdiction of the Court

No written constitution that I know makes such detailed provisions regarding the jurisdiction of the highest tribunal established under it as the new Indian Constitution does. Nor am I aware of any comparable final tribunal in the world which has such massive jurisdiction conferred upon it as the Supreme Court of India has. Before many years go by, the necessity of applying the pruning knife pretty freely to reduce its jurisdiction to reasonable proportions will, I think, become manifest.

The types of jurisdiction conferred upon the Supreme Court may be classified under the following categories:

(1) Original jurisdiction (Art. 131).
(2) Appellate jurisdiction which in its turn may be subdivided into the following groups, namely (a) appellate jurisdiction over cases decided by State High Courts when they involve a substantial question of law relating to the interpretation of the Constitution, (b) appellate jurisdiction over cases decided by State High Courts concerning civil matters, and (c) appellate jurisdiction over cases decided by State High Courts dealing with criminal matters (Arts. 132 to 134).
(3) Advisory jurisdiction by which the President can obtain the Court's opinion upon any question of law or fact of public importance (Art. 143).
(4) Special jurisdiction to issue appropriate writs for the enforcement of the Fundamental Rights enumerated in Part III of the Constitution (Art. 32).
(5) A discretionary residuary jurisdiction of an omnibus character 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 (Art. 136).

These categories of jurisdiction are those which have been defined and embodied in the Constitution itself. Provision has also been made by Articles 134 (2), 138, 139, and 140 for Parliament by law enlarging the jurisdiction of the Supreme Court in certain directions and also for the conferment of jurisdiction with respect to any matter by special agreement entered into by the Government of India and the Government of any State. I shall deal with these types of jurisdiction in the order in which I have mentioned them.

(F) Original jurisdiction

Article 131 of the Constitution defines the original jurisdiction of the Supreme Court as follows:

"Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute—

(a) between the Government of India and one or more States; or

(b) between the Government of India and any State or States on one side and one or more other States on the other; or

(c) between two or more other States,

if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends."

This original jurisdiction of the Supreme Court which springs from the Constitution must be regarded as of a compulsory character so long as there is a dispute, involving any question of the existence or extent of a legal right, as between the Federation and one or more of the States, or between the Federation and any State or States on one side and one or more States on the other, or between two or more States. And it is expressly stated that the original jurisdiction of the Supreme Court shall be to the exclusion of any other court in the land.

One of the essential functions of a Supreme Court set up under a federal constitution is to adjudicate upon justiciable disputes that may arise between the centre and the units or between the constituent units themselves. Under Article III, Section 2, of the United States Constitution the Supreme Court of that country has been given the power to decide interstate disputes under its original jurisdiction.

The question may be asked as to what is the law that the Supreme Court of India has to apply in dealing with interstate controversies under its original jurisdiction. Here the experience of the United States may be of great help to India. Chief Justice Fuller in *Kansas v. Colorado*[4] said:

> "Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand."

In every case of an interstate dispute it is law that must govern the decision. The ascertainment of the appropriate rule of law to be applied may present difficulties. But since the controversy has to be decided by a judicial tribunal, it is legal principles and not political considerations that should govern the ultimate decision. This principle was enunciated by Mr. Justice Baldwin in *Rhode Island v. Massachusetts*[5] in these words:

> "We are thus pointed to the true boundary line between political and judicial power, and questions. A sovereign decides by his own will, which is the supreme law within his own boundary; a court, or judge, decides according to the law prescribed by the sovereign power, and

4 (1902) 185 U.S. 125, at 146; 46 Law. Ed. 838, at 846.
5 (1838) 12 Pet. 657, at 737; 9 Law. Ed. 1233, at 1265-1266.

that law is the rule for judgment. The submission by the sovereigns, or States, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case, which depends upon the subject matter, the source and nature of the claims of parties, and the law which governs them. From the time of such submission, the question ceases to be a political one, to be determined by the *sic volo, sic jubeo*, of political power; it comes to the court to be decided by its judgment, legal discretion, and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending upon the exercises of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires.''

Sir William Harrison Moore in his illuminating article on *The Federation and Suits between Governments* observed that this "appeal to 'legal principles' is ambiguous where there are various standards or systems of law which may be in competition."[6] In *Virginia v. West Virginia*[7] Mr. Justice Holmes, dealing with the controversy over the determination of the proportions of the public debt to be shared by a parent State and a new State created out of it, said that it should be resolved in "an untechnical spirit," a spirit "proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone."

It will be noticed that Article 131 of the Indian Constitution which defines the original jurisdiction of the Supreme Court of India insists that before an interstate dispute becomes cognizable by the Supreme Court such dispute must involve "a question (whether of law or fact) on which the existence or extent of a legal right depends." In a suit where a clear provision of the Constitution governs the matter, or in a suit to recover a debt, or in a suit founded upon a contract, the legal right involved may be clear enough. But interstate controversies are bound to arise where the existence or extent of the legal rights of the disputants may be a matter of grave doubt. It is here that the experience of other federations like the United States, Canada, and Australia may afford valuable guidance. And it is also in this region that the Supreme Court of India may have valuable opportunities afforded to it to build up a body of what Mr. Justice Brewer once described as

6 (1935) 17 Journal of Comparative Legislation (Third Series) 163, at 165; see also the same author's companion article on *Suits between States within the British Empire* in (1925) 7 Journal of Comparative Legislation (Third Series) 155.

7 (1911) 220 U.S. 1, at 27; 55 Law. Ed. 353, at 357.

"interstate common law."[8] The Supreme Court of India may well be a path-finder in many unexplored regions of the law in the years to come.

(G) Appellate jurisdiction in constitutional cases

Article 132 of the Indian Constitution defines the appellate jurisdiction of the Supreme Court in constitutional matters. It prescribes: (1) that an appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the State High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution; and (2) that an appeal shall also lie even where the State High Court has refused such a certificate if the Supreme Court, on being satisfied that the case involves a substantial question of law as to the interpretation of the Constitution, grants special leave to appeal from such judgment, decree or final order. Where such certificate is given, or such leave is granted, any party may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided and, with the leave of the Supreme Court, on any other ground. This appellate jurisdiction of the Supreme Court makes the court the final interpreter and guardian of the Constitution. It eliminates the danger of confusion resulting from contradictory interpretations of the provisions of the Constitution placed by different tribunals in the land.

(H) Appellate jurisdiction in civil matters

Now we may pass on to the consideration of the appellate jurisdiction of the Supreme Court in appeals from High Courts in ordinary civil matters. Article 133 of the Constitution, which deals with this matter, runs thus:

> "133. (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—
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> (a) that the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than twenty-thousand rupees or such other sum as may be specified in that behalf by Parliament by law; or
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> (b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

[8] *Kansas v. Colorado*, (1907) 206 U.S. 46, at 98; 51 Law. Ed. 956, at 975.

(c) that the case is a fit one for appeal to the Supreme Court; and, where the judgment, decree or final order appealed from affirms the decision of the court immediately below in any case other than a case referred to in sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law.

(2) Notwithstanding anything in article 132 any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.

(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."

On a reading of this Article it is clear that appeals will lie as of right in a case decided by a State High Court where the subject-matter in dispute in the court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees when the High Court reverses the decision of a court of first instance. When the High Court affirms the decision of the lower court it is not enough for the appeal to be taken to the Supreme Court that the subject-matter of the case reaches the prescribed pecuniary limit of twenty thousand rupees, but the High Court should also certify that the appeal involves some substantial question of law. The High Court is authorised in its discretion to give a certificate that the case is a fit one for appeal to the Supreme Court irrespective of the value of the subject-matter, provided it is not a decision of a single judge.

(I) Appellate jurisdiction in criminal matters

Article 134 defines the appellate jurisdiction of the Supreme Court in regard to criminal matters in these terms:

"134. (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 by law."

Article 134, sub-section (1), confers a limited appellate jurisdiction on the Supreme Court in criminal matters. It will be noticed that

an appeal will lie in three circumstances, namely: (a) when a High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or (b) when a High Court has after withdrawing a case for trial before itself from a lower court sentenced an accused to death; or (c) when a High Court has certified that the case is a fit one for appeal to the Supreme Court.

Sub-section (2) of this Article gives power to Parliament to confer by law on the Supreme Court further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court, subject to such conditions and limitations as may be prescribed in such law.

(J) Advisory jurisdiction

Article 143, sub-section (1), provides that the President, "if at any time it appears to him that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, may refer the question to that Court for consideration", and the Court on such reference may, after such hearing as it thinks fit, report to the President its opinion thereon.

A provision similar to the above provision has been made by the Parliament of Canada (by section 55 of the Supreme Court Act, R.S. Can. 1927, c. 35) empowering the Governor-General in Council to obtain opinions of the Supreme Court of Canada on questions of public importance. The number of Canadian cases decided under this jurisdiction is quite large. This procedure would be useful in ascertaining the opinion of the Supreme Court on important legal and constitutional questions likely to have wide impact on public affairs and individual rights. It has been frequently used in Canada to ascertain the constitutional validity of Dominion legislation. The system of procuring advisory opinions has, however, certain obvious defects. It is rather difficult to answer questions of law in the abstract without reference to any actual controversy.[9] Legal questions take

[9] The United States Supreme Court has from the early days of its foundation refused to render advisory opinions or to deal with hypothetical questions not necessary for the determination of the case. See *Hayburn's Case*, (1792) 2 Dall. 409, 1 Law. Ed. 436; *Alma Motor Co. v. Timken-Detroit Axle Co.*, (1946) 329 U.S. 129, 91 Law. Ed. 128. As Mr. Justice Brandeis, in his dissent in *Ashwander v. Tennessee Valley Authority*, (1936) 297 U.S. 288 at 345-346 and 80 Law. Ed. 688 at 710, has observed: "The Court has frequently called attention to the "great gravity and delicacy" of its function in passing upon the validity of an act of Congress; and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions."

their colour from the flesh and blood of live controversies. An attempt to dissect legal problems in a judicial vacuum is obviously unsatisfactory. Moreover, answers given on hypothetical questions may require modification when an actual controversy presents itself. As Mr. Justice Duff in *Re Waters' Reference*[10] has observed:

> "It is important, also, since the opinions evoked by such questions are of course, as Lord Loreburn L.C. states in the same passage, 'only advisory, and will have no more effect than opinions of the Law Officers', to observe that, when a concrete case is presented for the practical application of the principles discussed, it may be found necessary, under the light derived from a survey of the facts, to modify the statement of such views as are herein expressed."[11]

(K) Power to issue writs

The Supreme Court has been invested by Article 32 of the Constitution with the special 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 of the Fundamental Rights conferred by Part III of the Constitution. Under Article 226 a similar power to use such writs, directions or orders, either for the enforcement of the Fundamental Rights or for other purposes, has been conferred on the High Courts. The Supreme Court speaking through Mr. Justice Patanjali Sastri has ruled in *Romesh Thappar v. State of Madras* (known as the *Cross Roads Case*)[12] that the Supreme Court can be approached even in the first instance for the issue of writs or directions provided in Article 32, without a prior approach to the State High Court under Article 226, as Article 32 "does not merely confer power on this Court, as Article 226 does on the High Courts, to issue certain writs for the enforcement of the rights conferred by Part III or for any other purpose, as part of its general jurisdiction," but 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."

10 [1929] 2 D.L.R. 481.

11 See also the observations of Viscount Haldane L.C. in *Attorney-General for British Columbia v. Attorney-General for Canada,* [1914] A.C. 153, at 162.

12 (1950) 5 D.L.R. Supreme Court 42, at 45; (1950) 13 Supreme Court Journal 418, at 420.

(L) Residuary jurisdiction

Under Article 136 a general residuary power has been conferred upon the Supreme Court to grant, in its discretion, 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.

(M) Expansion of the Court's jurisdiction by Parliament

The categories of jurisdiction enumerated above concern the jurisdiction expressly conferred upon the Supreme Court by the Constitution. The Constitution empowers Parliament to enlarge the jurisdiction of the Supreme Court in the following directions: (1) Under Article 134 (2) Parliament may by law confer on the Supreme Court powers further than those specially authorised under Article 134 (1) to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court. (2) The Supreme Court may be invested with further jurisdiction and powers with respect to any of the matters in the Union List as Parliament may by law provide (Art. 138 (1)). (3) The Supreme Court may be given such further jurisdiction and powers with respect to any matter as the Government of India and the Government of any State may by special agreement confer, if Parliament by law provides for the exercise of such jurisdiction and powers by the Supreme Court (Art. 138 (2)). (4) Parliament may confer power on the Supreme Court to issue directions, orders or writs of the character mentioned in Article 32 for purposes other than the enforcement of fundamental rights (Art. 139). (5) Parliament may by law make provision for conferring upon the Supreme Court such supplemental powers not inconsistent with any of the provisions of the Constitution as may appear to be necessary or desirable for the purpose of enabling the Court to exercise the jurisdiction conferred upon it by the Constitution (Art. 140).

(N) The integrated character of the Indian judicial system

The scheme of the Constitution is to establish an integrated judicial system of which the State High Courts are essential component elements, the Supreme Court of India being at the apex. It is necessary to mention that the constitution, powers, and jurisdiction of the State High Courts are also defined in the Constitution itself. And as a matter of fact every judge of a High Court is to be appointed by the President of India after consultation with the Chief Justice

of India, the Governor of the State, and, in the case of the appointment of a judge other than the Chief Justice, the Chief Justice of the High Court. The survey of the jurisdiction of the Supreme Court of India made in the foregoing paragraphs shows that the Supreme Court of India not only performs the essential functions of a federal court but also functions as a regular Court of Appeal in ordinary civil and criminal cases decided by the High Courts.

(O) The work of the Supreme Courts of the United States and India compared

In the United States of America the Supreme Court deals only with federal cases. It is in the first place the final court of appeal for the federal hierarchy of courts, the Federal District Courts being at the base, and the Circuit Courts of Appeal forming an intermediate tier, the Supreme Court being at the apex. The Federal District Courts and Circuit Courts of Appeal have been organised by Congress under the federal judiciary power. In the second place the Supreme Court is also the ultimate authority in cases decided by the State Supreme Courts in which a federal question is involved. Cases reach the Supreme Court of the United States from the State Supreme Courts by the two avenues of appeal and *certiorari*. As Professor Paul A. Freund has observed:

> "The avenue of appeal, which replaced the older writ of error, is reserved principally for cases from state courts in which the highest court of the State has held a state statute valid under the Federal Constitution. Other cases from the highest courts of the states—decisions holding the state statutes unconstitutional, construing federal statutes, or involving federal privileges and immunities like full faith and credit to judgments of sister states—must take the avenue of certiorari. The functional difference between appeal and certiorari is that jurisdiction under the former is obligatory, under the latter discretionary with the Supreme Court."[13]

In the United States the promulgation and administration of ordinary civil and criminal laws—both substantive and procedural—come within the residuary field of the States of the American Union. In respect of controversies arising in this domain—controversies which comprise the main grist of litigation for the courts in most countries—the State Supreme Courts are final authorities and no appeals lie from them to the United States Supreme Court unless a federal question is presented in connection with such litigation. The position in India in this respect is rather different. The legislative

[13] *The Supreme Court of the United States,* (1951) 29 Can. Bar Rev. 1080, at 1081.

power over the vast domain of civil and criminal substantive law and procedure—including the law governing transfer of property, contracts, actionable wrongs, bankruptcy and insolvency, marriage and divorce—come within the concurrent legislative jurisdiction of the Union Centre and the states under the new Constitution. And today over the whole length and breadth of the territory of India the vast bulk of the law governing property, contractual and other civil rights, civil and criminal procedure, is central legislation. The interpretation of federal laws concerning such matters—matters which lie within the field of the constituent units in the United States—will mean a large amount of work for the Supreme Court of India. Even though the Supreme Court of the United States is not burdened with this type of work, that Court finds it difficult to cope with the mounting load of appeals and certiorari petitions. The Supreme Court of the United States is very chary in granting certiorari petitions, the vast majority of them being denied. And there is a feeling in some quarters in that country that many cases of importance coming by the certiorari route are blocked entry by the Supreme Court. But one must realise that the Court is pressed for time. And even the initial consideration of the hundreds of *certiorari* and *in forma pauperis* petitions which are filed during every term of court, even though the bulk of them are dismissed at the first stage itself, absorbs a good deal of the Court's time. And it must be borne in mind that judges are after all human beings and their capacity for work is not unlimited; they can turn out good work only if they are not overloaded with cases and reasonable time for study and reflection is made available to them. In the case of judges sitting in the highest tribunal of the land, these considerations assume great importance as the impact of their decisions on the life of the country is of the gravest character.

(P.) Necessity of reducing the court's jurisdiction

If the United States Supreme Court, invested as it is with a jurisdiction which is much more limited in character as compared with the vast jurisdiction conferred on the Supreme Court of India, finds it difficult to manage its crowded docket, it is reasonable to expect that when the flow of work into the Supreme Court of India gains momentum as the years go by, the problem of congestion of work in that court will require serious attention. It is to the consideration of this important matter that I now turn.

(Q) Curtailment of the Court's present jurisdiction

The problem to be considered is in what directions can the present jurisdiction of the Supreme Court be pruned, a process which, while securing a reasonable reduction of its work, will still not impair its usefulness as the final tribunal. I would suggest that the following changes in the present jurisdiction of the Court may be considered: (1) The raising of the pecuniary limit of the subject-matter for appeal from State High Courts from the present figure of twenty thousand rupees to a higher figure. Under Article 133 (1) the Parliament is empowered to vary the pecuniary limit in its discretion. (2) The deletion of the provision contained in Article 143 for the securing of advisory opinions of the Supreme Court, a procedure which, for reasons already mentioned, cannot be regarded as satisfactory. (3) The modification of the present constitutional arrangement by which the jurisdiction of the Supreme Court for the enforcement of the Fundamental Rights could be invoked even in the first instance without a prior approach to the State High Court, by a suitable amendment of the Constitution that the State High Court should be first approached and then only the Supreme Court.

It may be urged that when the work of the Court goes on piling up, making it difficult for the Court with its existing personnel to keep pace with it, the situation must be met by a progressive increase in the number of judges and not by axing the present jurisdiction in any way. With this view I do not agree. There is a limit to the number of judges who can constitute a good workable team. In my opinion the ideal number of judges for a constitutional court is either seven or nine. To have more than nine judges would be to sacrifice its institutional character and to convert it into a heterogeneous crowd. A judicial tribunal manned by judges of character, learning, and high professional attainments, and working in close collaboration in the lofty task of administering justice, is bound in course of time to develop a personality of its own. That personality —indefinable but recognizable—cannot emerge unless the judicial team is compact. Moreover it must be the country's endeavour to get the best men possible to staff its highest tribunal. Men of the requisite calibre are not over-plentiful in any country in the world. For these reasons I would have a compact court of reasonable size. There is one other matter to which I would like to refer in this context. The Constitution provides that the rules made by the Supreme Court to regulate its practice and procedure shall take care that the minimum of judges who are to sit for deciding any case involving a

substantial question of law as to the interpretation of the Constitution or for the purpose of hearing a reference under article 143 shall be five. Personally I would favour constitutional questions being heard and decided by the full complement of judges.

III.

Review of the Supreme Court's Work

The Supreme Court has now been in existence for less than two and a half years. Though young in years it has, by the excellence of its work, already earned the esteem of the people at large. It has been called upon to deal with many intricate questions, both in the field of constitutional law and in the field of ordinary law, and the number of cases decided is already large. In view of the limitations of space it is not possible here to attempt anything more than a brief review of a few of the contitutional cases decided by the Supreme Court so far.

(A) Delegation of legislative power

The first case to be referred by the President under Article 143 of the new Constitution for the advisory opinion of the Supreme Court, *In re Art. 143 of the Constitution of India, etc.*,[14] raised important questions relating to the delegation of legislative power to an executive authority. The reference was decided by a bench of seven judges. Each of them wrote a long and learned opinion. There was a wide divergence of opinion among them. An adequate analysis of the opinions delivered requires a long article by itself. Though a detailed analysis of the case cannot be undertaken here, I have, however, considered it both desirable and proper to deal at some length with this complex problem of delegation of legislative power in order to formulate what in my view should be the correct approach to it.

Three separate questions were referred for the Court's opinion in this case. I shall take the last of the questions referred for consideration here. The question was as follows: "Is section 2 of Part C States (Laws) Act 1950, or any of the provisions thereof and in what particular or particulars or to what extent 'ultra vires' the Parliament?" Section 2 of the Part C States (Laws) Act 1950 ran as follows:—

> "Power to extend enactments to certain Part C States—The Central Government may, by notification in the official Gazette, extend to any

[14] A.I.R. (38) 1951 Supreme Court 332, 14 Supreme Court Journal 527.

> Part C State (other than Coorg and the Andaman and Nicobar Islands) or to any part of such State, with such restrictions and modifications as it thinks fit, any enactment which is in force in a Part A State at the date of the notification and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State.''

Part C. States, I may here mention, are certain small areas (ten in number) which for historical or other reasons have been allowed to remain as separate units instead of being merged in the neighbouring States. By Section 2 of the Part C States (Laws) Act 1950, Parliament had empowered the Central Government by notification to extend to any Part C States, with such modifications and restrictions as it thinks fit, any enactment in force in any Part A State, i.e., the former British Indian Provinces. Three judges, Fazl Ali, Sastri, and Das JJ., held that section 2 of the act aforesaid was valid and no part thereof was *ultra vires* the Parliament. Two judges, Mukherjea and Bose JJ., held that the Act was *intra vires* except the concluding portion of it by which "provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State." Kania C.J. and Mahajan J. held that section 2 of the Act was *ultra vires* to the extent that it gave power to government to extend Acts other than Acts of the Central Legislature to the Part C States.

Two of the learned judges, Sastri and Das JJ., took a very broad view of the extent of the power of the legislature to delegate its own power. Provided that the legislature keeps within the ambit of the power granted to it by the Constitution, short of complete abdication or effacement of its own legislative power, there is, according to these judges, no qualitative or quantitative limit to the power which may be delegated. As Mr. Justice Das put it (at p. 428):

> ''In my opinion, the true tests of the validity of a law enacted by the Indian legislature conferring legislative power on a subordinate authority are: (i) Is the law within the legislative competency fixed by the instrument creating the legislature? and (ii) Has the legislature effaced itself or abdicated or destroyed its own legislative power? If the answer to the first is in the affirmative and that to the second in the negative, it is not for any Court of Justice to enquire further or to question the wisdom or the policy of the law.''[14a]

The attempt made by Chief Justice Kania and Mr. Justice Mahajan in their separate opinions to draw a distinction between essential legislative power which may not be delegated, and sub-

[14a] At 704 in 14 Supreme Court Journal.

ordinate powers like the framing of regulations or ancillary rules to carry out the purposes of legislation which may be delegated, is, in my opinion, neither logically sound nor easily workable. No judge has ever succeeded—even in the United States—in formulating clear-cut criteria to test the distinction between these two categories of powers. To say that the power to frame regulations or ancillary rules is not a part of the legislative power is to lay down a proposition which to my mind is untenable.[15] After all when a legislature delegates part of its power—whether large or small—it is still legislative power that is being delegated. The principle that legislative power may not be delegated stems from the doctrine of separation of powers which had great vogue in the closing years of the eighteenth century when the United States took its birth. Though this doctrine is not explicitly mentioned in the United States Constitution, the fact that the Constitution vests legislative, executive, and judicial powers in the Congress, the President, and the Supreme Court (and inferior federal courts) respectively, under three separate Articles, was regarded as raising the inference that it was a foundation principle of the Constitution. A logical application of the principle involving complete divorce of these powers from one another would halt the whole governmental process. In order to reconcile this dogma with the needs of a complicated political order large breaches in the doctrine have been made in the United States. Wide powers to prescribe rules of conduct—and that is law—have been granted to numerous executive authorities under congressional enactments and their validity upheld. To describe this delegation of power as delegation of "ancillary power" or "quasi-legislative power" and not "essential" or "pure" legislative power is to mask words and to draw distinctions having no logical basis. After all every grant of power to an executive agency by a legislature is a delegation of its own power which is legislative power and nothing else. The nature of the power delegated does not alter with the width of the grant. The fusion of legislative and executive and sometimes even judicial powers in the same authority is common enough even in the United States where the

15 See in this connection the observations of Evatt J., in *Victorian Stevedoring and General Contracting Co. v. Dignan,* (1931) 46 C.L.R. 73 at 119, where he said, "In my opinion every grant by the Commonwealth Parliament of authority to make rules and regulations, whether the grantee is the Executive Government or some other authority, is itself a grant of legislative power."

dogma of separation of powers has had the largest vogue. As Mr. Justice Holmes in *Springer v. Phillipine Islands*[16] has observed:

> "It is said that the powers of Congress cannot be delegated, yet Congress has established the Interstate Commerce Commission, which does legislative, judicial and executive acts, only softened by a quasi . . . It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires."

In *Panama Refining Co. v. Ryan*[17] Chief Justice Hughes delivering the opinion of the Court explained the Court's doctrine that essential legislative powers cannot be delegated in these terms:

> "The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. 1. Sec. 1. And the Congress is empowered 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. 1, Sec. 8, para. 18. The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply . . . But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."

As to how much of precision is required of the legislature in laying down its policy and standards to escape the charge that it is making an unconstitutional delegation of its essential legislative powers, the decisions of the Supreme Court of the United States afford no clear guidance. Nor are there any workable tests to distinguish "essential legislative powers" from "non-essential legislative powers." In *Schechter Poultry Corporation v. United States*[18] the Supreme Court condemned as an unconstitutional delegation of legislative power the code-making authority conferred on the President by the National Industry Recovery Act on the basis that the authority

16 (1927) 277 U.S. 189, at 210-211; 72 Law. Ed. 845, at 853.
17 (1935) 293 U.S. 388, at 421; 79 Law. Ed. 446, at 459.
18 (1935) 295 U.S. 495, 79 Law. Ed. 1570.

delegated was too wide. But in *American Power and Light Co. v. Securities and Exchange Commission*[19] very wide powers given to the Securities and Exchange Commission were upheld. The recent trend of the Supreme Court decisions has been uniformly to uphold very broad delegations of legislative power to administrative agencies and to repel contentions put forward that there has been unconstitutional delegation of legislative power.[20] But it is impossible to say that this doctrine of the non-delegability of essential legislative powers has been given the complete quietus. So long as this doctrine can be invoked to attack devolution of legislative power, confusion and uncertainty are bound to prevail in this domain. It seems to me that the American rule against delegation of essential legislative powers should not be imported into India and applied as a rule of constitutional interpretation, not only for the reason that it lacks precision, but also in view of the fact that, unlike the American Constitution where the executive and legislative powers are divorced, in India by the establishment of cabinet executives responsible to the legislatures both at the Centre and in the States there is a large fusion of the executive and legislative functions.

The rule applied by the Privy Council, with reference to legislatures set up under the British North America Act 1867 and to the Indian legislatures functioning under the authority of various British Parliamentary enactments during the British regime, that they were within the ambit of their powers as supreme and had as ample an authority as the Imperial Parliament itself appears to me to be a simpler rule to work with. The legislatures under the new Constitution must I think be regarded as having complete powers within the ambit of their authority to decide how and in what way they shall exercise their powers provided there is no complete abandonment by them of their authority. So long as a legislature retains intact its authority to recall the powers which it had delegated to another authority and so long as it does not create and endow with its own capacity a new legislative power not created by the Constitution to which it owes its existence, the legislature should not be regarded as having ab-

19 (1946) 329 U.S. 90, 91 Law. Ed. 103.

20 See for example *Currin v. Wallace*, (1939) 306 U.S. 1, 83 Law. Ed. 441; *United States v. Rock Royal Co-operative*, (1939) 307 U.S. 533, 83 Law. Ed. 1446; and *Carlson v. Langdon*, (1952) 342 U.S. 524, 96 Law. Ed. (Adv. Ops.) 413.

dicated its functions.[21] But short of complete abandonment there can be no logical limit to the quantitative or qualitative delegation of its own powers by the legislature to persons and bodies in whom it has confidence. It may be that in delegating power to executive authorities the legislature by the width or vagueness of the devolution of powers has failed to perform its legislative function with a due sense of responsibility. The corrective to this failure on the part of the legislature to live up to its responsibilities should be applied by the people at large and not by the courts. As Chief Justice Waite has observed in *Munn v. Illinois:*[22] "For protection against abuses by legislatures the people must resort to the polls, not to the courts."

It is necessary to observe that the Privy Council has supported very large delegations of legislative power by the Indian, Australian, and Canadian legislatures established under British Parliamentary enactments. Conditional legislation of the type involved in *The Queen v. Burah,*[23] logically speaking, is nothing more than the delegation of a fractional legislative power. In *Shannon v. Lower Mainland Dairy Products Board*[24] Lord Atkin speaking for the Privy Council upheld not only delegation but sub-delegation of legislative power of the widest amplitude by making the following observations:

> "The third objection is that it is not within the powers of the Provincial Legislature to delegate so-called legislative powers to the Lieutenant-Governor and Council, or to give him powers of further delegation. This objection appears to their Lordships subversive of the rights which the Provincial Legislature enjoys while dealing with matters falling within the classes of subjects in relation to which the constitution has granted legislative powers. Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament; and it is unnecessary to enumerate the innumerable occasions on which Legislatures, Provincial, Dominion and Imperial, have entrusted various persons and bodies with similar powers to those contained in this act."

The proper principle to apply in this matter is, I believe, to regard the Indian legislatures as possessed of plenary powers of delegation within the ambit of the authority conferred on them by the Constitution. If the power delegated is so wide as to create uncertain-

21 The Privy Council in *In re The Initiative and Referendum Act,* [1919] A.C. 935, held that such an abandonment had occurred by the Manitoba legislature having compelled the Lieutenant-Governor of the Province to submit a proposed law to a body of voters totally distinct from the legislature of which he was a constituent part, and rendering him powerless to prevent it from becoming an actual law after it had been approved by the voters, as this process involved the setting up of a new legislative authority not authorised by the Constitution.

22 (1877) 94 U.S. 113, 24 Law. Ed. 77.

23 (1878) 3 App. Cas. 889.

24 [1938] A.C. 708, at 722.

ties or if there is an abuse of its authority by the delegated agency the legislature is always there to deal with the situation. So long as the legislature has retained intact its powers of control over the delegated authority it cannot be contended that the legislature has effaced itself or abandoned its functions. Any other rule would not only lead to confusion but become unworkable.

(B) Fundamental Rights

Following the American model, but with considerable deviations from it to suit local conditions, the Indian Constitution has embodied a code of Fundamental Rights in Part III of the Constitution. In England the safeguard for the basic rights of the individual rests on the force of public opinion and not on any external restrictions imposed in that behalf on the law-making process of the British Parliament, that authority being supreme in the legislative field. In India we have followed the American precedent by providing in our Constitution that executive and legislative organs though set up under a people's Constitution should operate subject to defined limitations so as to secure certain basic rights like freedom of expression and religion and equal protection of the laws. The Courts under this system have the responsibility of deciding whether any infraction of the guaranteed rights has occurred in any particular case. The United States Supreme Court has done significant work in this field not only by safeguarding individuals from becoming the victims of majority oppression or discrimination but also by setting up through the persuasive force and broad sweep of their opinions patterns of conduct and rules of behaviour for both individuals and government in a civilized community.

The Supreme Court of India has already done good work in this field. A few examples of the protection afforded by the Supreme Court to persons to safeguard their fundamental rights will now be given. In *Romesh Thappar v. State of Madras*[25] the banning of the entry by the Government of Madras into its territory of a weekly Bombay journal called the *Cross Roads* in pursuance of the authority conferred upon it by the Madras Maintenance of Public Order Act was declared void as a contravention of the fundamental right of free expression guaranteed by Article 19 (1) of the Constitution, and in *Brij Bhusan v. State of Delhi*[26] the imposition of a pre-censorship on an English weekly by the Commissioner of Delhi acting

[25] (1950) 5 D.L.R. Supreme Court 42, 13 Supreme Court Journal 418.
[26] (1950) 5 D.L.R. Supreme Court 48, 13 Supreme Court Journal 425.

under the powers conferred upon him by the East Punjab Safety Act was condemned as a violation of the constitutional right of freedom of expression. The discrimination sought to be made by a State government under an executive order against the members of a particular community in the matter of appointments to government posts was declared to be void as infringing the guarantee against such discrimination embodied in Article 16 of the Constitution in *B. Venkataramana v. State of Madras.*[27]

The Indian Constitution arms the Central Legislature with exclusive authority to make laws for preventive detention of persons "for reasons connected with defence, foreign affairs or the security of India."[28] The Constitution also confers upon both the Central and State legislatures concurrent power to pass laws for the preventive detention of ersons "for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community."[29] In order to prevent the Central and State legislatures from abusing their powers in this matter Article 22 of the Constitution has embodied certain valuable safeguards. For instance, it provides that no law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless an advisory Board consisting of persons who are, or have been, or are qualified to be appointed as judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention. It also provides that any person detained in pursuance of an order made under any law providing for preventive detention shall have the grounds of detention communicated to him and be afforded the earliest opportunity of making representations against the order. There are also other conditions imposed so that Preventive Detention Laws observe elementary standards of fairplay. A number of cases involving interesting points of law have come up for consideration in connection with such preventive detention laws, the most important of these being *Goplan v. State of Madras.*[30]

Already cases involving the interpretation of the provision contained in Article 14 of the Constitution that "the State shall not

27 (1951) 6 D.L.R. Supreme Court 260, 14 Supreme Court Journal 318.

28 List 1, Section 9, in Schedule VII.

29 List III, Section 3, in Schedule VII.

30 (1951) 6 D.L.R. Supreme Court 313. See also *State of Bombay v. A.S. Vaidya,* (1951) 6 D.L.R. Supreme Court 216, 14 Supreme Court Journal 208; *Ram Singh v. State of Delhi,* (1951) 6 D.L.R. Supreme Court 245, 14 Supreme Court Journal 374; and *Krishnan v. State of Madras,* (1952) 7 D.L.R. Supreme Court 1, 14 Supreme Court Journal 453.

deny to any person equality before the law or the equal protection of the laws within the territory of India" have brought serious issues for decision at the hands of the Supreme Court. I shall deal with two important cases decided by the Supreme Court in which contentions founded upon this clause were raised.

In the important case of *Charanjit v. Union of India*[31] a shareholder of a company called the Sholapur Spinning and Weaving Company which operated a textile mill had filed an application under Article 32 of the Constitution for a writ of mandamus and other relief. The case arose in this way. Following serious disputes between the management and the employees of this textile mill, which up to the time of these disputes was in a flourishing condition, all production in the mill had been halted. The Central Government wanted to break this deadlock by taking the management of the mill through its own officers and restart production in the general interests of the country. With this object in view it passed an Act to take over the management and control of the mill and it was the validity of this enactment that was challenged in this case. A large number of pleas were put forward on behalf of the petitioning shareholder. I shall deal here with only one of these, namely, that the Act constituted a denial of the equal protection of the laws as the Sholapur Mill had been singled out for discriminatory treatment. The Court by a majority overruled this contention. Mr. Justice Mukherjea in a leading judgment for the majority view ruled that the petitioner had placed no materials on the record for holding that there were other mills in India in the same category as the Sholapur Mill requiring governmental interference in their management and that, further, the mere fact that the legislation impugned was passed with reference to one mill only could not by itself make it repugnant to the constitutional provision guaranteeing equal protection of the laws. As Mr. Justice Mukherjea observed (page 449):

> "It must be admitted that the guarantee against the denial of equal protection of laws does not mean that identically the same rules of law should be made applicable to all persons within the territory of India in spite of the differences of circumstances and conditions. As has been said by the Supreme Court of America, 'equal protection of laws is a pledge of the protection of equal laws' (see *Yick Wo v. Hopkins,* 118 U.S. at 369), and this means 'subjection to equal laws applying alike to all in the same situation' (vide *Southern Railway Co. v. Greene,* 216 U.S. 400, at 412). In other words, there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is the same. I am unable to accept the argument of Mr. Chari that a legislation relating to one

31 (1951) 6 D.L.R. Supreme Court 432, 14 Supreme Court Journal 29.

individual or one family or one body corporate would *per se* violate the guarantee of the equal protection rule. There can certainly be a law applying to one person or to one group of persons and it cannot be held to be unconstitutional if it is not discriminatory in its character (Willis: Constitutional Law, p. 580). It would be a bad law 'if it arbitrarily selects one individual or a class of individuals, one corporation or a class of corporations and visits a penalty upon them, which is not imposed upon others guilty of like delinquency' (see *Gulf C. & S.F.R. Co. v. Ellis*, 165 U.S. 150, 159). The legislature undoubtedly has a wide field of choice in determining and classifying the subject of its laws, and if the law deals alike with all of a certain class, it is normally not obnoxious; but the classification should never be arbitrary. It must always rest upon real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made; and classification made without any substantial basis should be regarded as invalid (see *Southern Railway Co. v. Greene*, 216 U.S. 400, 412)."[32]

In the case of *State of West Bengal v. Anwar Ali*[33] the validity of certain provisions of the West Bengal Special Courts Act 1950 was challenged as violating the constitutional guarantee of the equal protection of the laws. This Act had been enacted as its preamble showed for the purpose of "providing for the speedier trial of certain offences." Section 3 of the Act empowered the State Government by notification in the official Gazette to constitute special courts and section 4 made provision for the appointment of special judges to such courts. Sect. 5 (1) of the Act, the constitutionality of which was strongly attacked, provided that "a special court shall try such offences or class of offences or cases or classes of cases, as the State Government may by general or special order in writing direct." It will be noticed that this provision did not lay down any yardstick or measure for the grouping either of persons or of cases or of offences by which they could be selected for trial by the special courts from those other groups with respect to whom or which the trial had to proceed in the ordinary courts. The consequence of this arbitrary entrustment of the discretion to refer cases for trial to the special courts was that discrimination could be made between persons similarly situate in what court they should take their trial. It was also possible for the State Government, if it so chose, to hand over a trivial matter like a case of a simple hurt for trial to the special tribunal while a graver case of dacoity with murder might be tried by an ordinary court.

By other provisions made in the Act (sections 6 to 15) substantial deviations from the normal procedure sanctioned by the

[32] 14 Supreme Court Journal 53.

[33] A.I.R. (39) 1952 Supreme Court 75, 15 Supreme Court Journal 55 (sub nom. *State of West Bengal v. A. A. Sarkar*).

Code of Criminal Procedure for trials before ordinary tribunals were made with respect to the trials to be held before the special courts. The main features of the departure from the ordinary procedure for criminal trials made by the West Bengal Act were the elimination of the committal procedure for sessions cases and the substitution of the procedure laid down in the Code for trial of warrant cases by a magistrate, trial without jury or assessors, restriction of the court's power in granting adjournments, and the elimination of *de novo* trial on transfer of a case from one special court to another.

The respondents in this case had been tried and convicted by a special court functioning under the impugned Act for serious offences committed in the course of an armed raid made by them on a factory known as the Jessop Factory at Dum Dum and sentenced to various terms of imprisonment. The High Court of Calcutta on appeal by the respondents had set aside the conviction and ordered a retrial on the ground that their trial under the West Bengal Special Courts Act had denied the constitutional guarantee of equal protection of the laws. The State of West Bengal thereupon appealed to the Supreme Court against the decision of the High Court. The Supreme Court by a majority held that the Act, by giving arbitrary powers to the Government to select what cases to refer to the special courts, by completely ignoring the principles of classification followed in the Criminal Procedure Code, and by laying down a new procedure without any attempt to particularize or classify the offences or cases to which it was to apply, was unconstitutional. Some of the anomalous consequences which would flow from the existence of the two procedures, one sanctioned by the Criminal Procedure Code applying to trials before ordinary courts and the other the special procedure made by the challenged Act for trials by the special courts, were pointed out by Mr. Justice Fazl Ali in his judgment. He observed (at p. 84):

> "(1) A grave offence may be tried according to the procedure laid down by the Act, while a less grave offence may be tried according to the procedure laid down by the Code.
>
> (2) An accused charged with a particular offence may be tried under the Act while another accused person charged with the same offence may be tried under the Code.
>
> (3) Certain offences belonging to a particular group or category of offences may be tried under the Act while other offences belonging to the same group or category may be tried under the Code."[33a]

[33a] At 67 in 15 Supreme Court Journal.

While the legislature has the right to make reasonable classifications it must take care to see that all persons similarly circumstanced shall be treated alike both in regard to the privileges conferred and liabilities imposed. The impugned Act, in my opinion, fails to pass this test and was rightly condemned as unconstitutional by the Supreme Court.[34]

Large-scale agrarian reform has been undertaken by various State governments with the primary object of preventing the concentration of big blocks of land in the hands of a few zamindars and to distribute such land among the actual cultivators. The States of Bihar, Madhya Pradesh, and the United Provinces have all passed legislation with this objective in view. The constitutional validity of these enactments has been challenged by the zamindars in the courts on various grounds, chief among them being that there was no public purpose behind the acquisition of the zamindari interests, that there was denial of equal protection of the laws as discrimination was made in fixing compensation for acquisition of the zamindari interests, the smaller zamindars being entitled to higher rates of compensation on a graduated scale than the bigger ones by classifying the zamindars into several categories, that the compensation awarded was illusory and a violation of the constitutional guarantee contained in Article 31 of the Constitution. The High Court at Patna had held that the Bihar legislation was unconstitutional, while the High Courts at Allahabad and Nagpur had upheld the validity of similar legislation in the United Provinces and Madhya Pradesh respectively. Appeals from these decisions had been lodged in the Supreme Court. At this stage, the Union Government, which was deeply interested in this important social legislation brought forward a bill to amend the Constitution by inserting two new provisions, Articles 31A and 31B, specifically preventing such legislation being challenged in the courts as violating any of the fundamental rights guaranteed by Part III of the Constitution. I might mention here that the bill to amend the Constitution covered a few other matters also. The bill, with some alterations, was passed by the Provisional Parliament as

[34] The Supreme Court on the principle of the *West Bengal Case* has recently set aside the conviction by a Special Court established under the Bombay Security Measures Act 1947, on the ground that section 12 of the Act which authorised the State Government to refer specific cases to be tried by a special judge was unconstitutional as offending against the fundamental right guaranteed by Article 14 of the Constitution: *Lachmandas v. State of Bombay*, A.I.R. 1952, Supreme Court 235.

the Constitution (First Amendment) Act 1951, and the validity of this Act was upheld by the Supreme Court in *Shankari Prasad v. Union of India.*[35] The zamindars had practically lost their battle when the constitutionality of the Constitution Amendment Act had been upheld by the Supreme Court. But they continued to press the attack. And when the appeals pending in the Supreme Court were finally heard the various contentions put forward on behalf of the zamindars to challenge the validity of the enactments aforesaid were all disallowed, except on one or two minor matters.[36]

(C) Amendment of the Constitution

I have already referred to the passing by the Provisional Parliament of the Constitution (First Amendment) Act 1951. I do not propose to deal here with the debatable question whether the amendments made by this Act to the Constitution were really necessary. The constitutional validity of the Amending Act was called into question in *Shankari Prasad v. Union of India*[37] and Mr. Justice Patanjali Sastri speaking for a unanimous Court ruled that the Act was *intra vires* the Provisional Parliament. The main argument put forward against the validity of this Act was that Article 368 of the Constitution, which prescribed the mode of amendment, contemplated the co-operative action of both Houses of the Union Parliament to effect changes in the Constitution, and that the Provisional Parliament (which sitting as a Constituent Assembly had passed the Constitution) which consisted of a single chamber was incompetent to deal with this matter. It is necessary to draw attention to the important fact that in pursuance of the power given by Article 392 of the Constitution to the President to make necessary adaptations in the Constitution in order to remove any difficulties that may be experienced in working it during the transitional period, the President had by the Constitutional (Removal of Difficulties) Order made necessary changes in Article 368 of the Constitution enabling the Provisional Parliament to exercise the powers of the full-fledged double-chamber Parliament which after the first elections would come into existence. The Supreme Court ruled that the adaptation of Article 368 made by the President

35 (1952) 7 D.L.R. Supreme Court 42, (1951) 14 Supreme Court Journal 775.

36 The Zamindari abolition cases are reported as *State of Bihar v. Kameshwar Singh,* (1952) 15 Supreme Court Journal 354; *Visheshwar Rao v. State of Madhya Pradesh,* (1952) 15 Supreme Court Journal 427; and *Raja Suriya Pal Singh v. State of Uttar Pradesh,* (1952) 15 Supreme Court Journal 446.

37 (1952) 7 D.L.R. Supreme Court 42, (1951) 14 Supreme Court Journal 775.

was within the powers conferred upon him by Article 392 of the Constitution and that the Constitution Amendment Act was constitutionally valid.

IV.

Conclusion

Though my survey of the work of the Supreme Court of India has been brief, I hope the reader has been afforded a glimpse, at least of the variety and importance of the constitutional issues which have come up before the Court during the short period it has been in existence. It has not been possible for me to deal here with its work in the fields of ordinary civil and criminal litigation. In both these fields it has done fruitful work.

Judicial functions can be discharged properly only in a society which is willing to accept the judicial process to solve its disputes and to place reason and good sense above power and force. The Supreme Court of India which is specially charged under the Constitution with the high task of protecting fundamental rights can accomplish little unless the society in which it functions retains a sense of moderation and fairness in the daily concerns of life. The nurture of these supreme values is the primary responsibility of society. The Court's influence in promoting them may be important but it cannot be and is not decisive. The Indian Constitution upholds these values by stating prominently in its preamble that among the objectives of the Constitution is the securing to its citizens of justice, social, economic and political, liberty of thought, expression, belief, faith, and worship, and equality of status and opportunity. Speaking of the American scene where also similar objectives are proclaimed in the Federal and State Constitutions, Judge Learned Hand has reminded us that these great objectives can be made living principles only by the constant striving of the people and that the Court's part in this great task is relatively minor. As he has observed:

> "You may ask what then will become of the fundamental principles of equity and fairplay which our constitutions enshrine and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not know that anyone can say. What will be left of those principles; I do not know whether they will serve only as counsels, but this much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where

the spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon courts the nurture of that spirit, that spirit in the end will perish.''[38]

M. RAMASWAMY*

[38] L. Hand: *The Contribution of an Independent Judiciary to Civilization,* in The Supreme Judicial Court of Massachusetts 1692-1942, 59, 66 (Mass. Bar Ass'n., 1942) quoted by Paul A. Freund in his article *The Supreme Court and Civil Liberties* in (1951) 4 Vanderbilt Law Review 551.

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