

FORMULATION AND CONSTITUTION OF CONSTITUTIONAL BENCHES OF SUPREME COURT OF INDIA.

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ABSTRACT

Every state has a central structure that consists of three main parts that are the legislature, executive, and judiciary. These institutions are specialized in performing specific functions provided under the constitution like rule-making, rule application, and adjudication with a great deal of precision and caution. In India, no institutions are allowed to perform the duty of others, as our constitution provides a theory of separation of powers. The Supreme Court of India enjoys very wide power under the constitution and performs various functions. The main function is to review the legislative and executive actions of the state that should not violate the fundamental principles enshrined under the constitution. This right of constitutional review provides power to the Supreme Court to check upon the other organs of the government by ensuring the constitutionality of actions of the executive and the legislature. Along with the above functions Supreme Court performs some other functions also; it provides justice to the citizen against the process of the government and resolves disputes between the union and the states. If one state has a legal dispute with another state, then another state can approach the Supreme Court to decide the dispute. The Supreme Court can adjudicate upon civil and criminal matters also. Any person found guilty of a offenses can appeal to the Supreme Court of India. Further; it can review and cure its judgment if it is manifestly wrong. The Supreme Court of India can advise the President on point so flaw and fact if it is sought by the President. Apart from the judicial function the Supreme Court also performs administrative functions.

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INTRODUCTION

The Constitution of India provides that there shall be a Supreme court of India constituting of chief justice of India with seven other judges until parliament increases the by law, in 2008 it increases by thirty. The very foundation of the Republic of India has been constructed on the bedrock of justice, Liberty, Equality, fraternity, and assuring the dignity of the individual, so to safeguard the enshrined principles the Supreme Court of India has been constituted. In the Indian political system, the constitution of India is the supreme law of the land, and every organ of the country must confirm and respect the values, principles, and ethos of the Constitution of India. In the case of *Keshwan and a Bharti v. State of Kerala*, it was held that supremacy of the Constitution is amongst the basic features of the Constitution of India. It is expedient that the supremacy of the constitution must be protected by the independent judicial body which has been empowered by the constitution to interpret the distribution of powers enshrined under the Constitution. Justice is an important feature of every political system and government. It is considered a basic virtue of the country and the judiciary must deliver justice without fear and favor².

The Judiciary of any country is entrusted not only with maintaining justice but also with enforcing laws in the country. From these attributes, it is necessary and important that the judiciary must be independent and transparent. If the courts are not allowed to function independently then the rayon justice will disappear and the life of the peopleis jeopardized. In *S. P Guptav. Union of India*, it was held that the concept of independence of the judiciary must be borne in mind while interpreting the constitution. Judges should be very tough, unbending before power, and must uphold the core value of the Constitution which is rule of law, independence, and the integrity of the judiciary. The principle of independence of the judiciary is vital for the establishment of participatory democracy, rule of law maintenance, and securing social justice for the citizens of India. However, independence of the judiciary does

² ¹ArneMavčič, *The Constitutional Review* (Vandepias Publishing. Netherlands, 1stedn, 2013)

not mean independence from the executive and legislative wing of the state, it should

Also be independent internally, free from political ideologies, and prejudices, and also the independence of individual judges from their superior judges. It is the internal independence that reflects the personality of the judge.³

CONSTITUTIONAL ADJUDICATION: A BRIEF UNDERSTANDING

Constitutional Adjudication is regarded as the most troublesome and uneasy task for the judiciary when the interpretation of the Constitution is asked because constitutional adjudication tends to overturn or veto the enacted law and this exercise of power by the court is final and unchanged. Constitutional adjudication is authority possessed by the superior courts through which courts can check the validity and constitutionality of any administrative actions and legislation. The constitutional courts can adjudicate the dispute between different organs of the states and determine the constitutionality of the legislation on the foundations of the democracy. Legal jurists like Kelsen highlighted the importance of constitutional adjudication by saying “constitution without constitutional adjudication is not having a constitution at all”. A demand for constitutional adjudication arose only after experiences with the totalitarian regime which the world saw during the 20th century. One of the major constituent elements of the highest court in its jurisdiction to adjudicate upon the validity of the legislation against the constitution, this generally called constitutional review.

Chief Justice Marshall expressed that “We must never forget that it is a constitution we are expounding intended to endure for ages to come and consequently to be adapted to the various crises of human affairs.” Adjudication is the process by which the judges try to understand and express the meaning of the legal text and the values enshrined in it. There are many instances of constitutional adjudication in India. After reading the constitutional jurisprudence, we should say that the primary job of the constitutional courts is to reduce the power of the government which might have the propensity to harm individual liberties, so constitutional adjudication not only confirms the validity of the legislation but also restrain the government all action

³ Dieter Grimm. “Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics”, 4 NUJS L. Rev 15 (2011).

which in fringes the individual liberties guaranteed by the Constitution. The constitutional

Adjudication or constitutional review or judicial review is presumed to be instrumental in declaring the legislation or governmental action unconstitutional. After reading the constitutional jurisprudence, the constitutional court has the evident authority to pass the constitutionality of the government actions and the legislation as final and decisive. Here one more pertinent question for discussion is how constitutional adjudication is developed. So, for this, we need to delve into the interrelation of politics and lawmaking. The existence of law is because of political decisions. Although in democracy role of politics comes to an end when the law is enacted. The application of the law is a matter of the legal system where political intention becomes illegitimate. This is why there must be a division between law application and politics. Certainly, constitutional adjudication is inevitably political because the effect and object of decisions of constitutional courts are political. The very function of constitutional law is to regulate political power whereas the function of constitutional courts is to enforce law vis-à-vis politics. Constitutional courts are a branch of the government and excluding political issues from judicial scrutiny would be the end of constitutional review⁴.

THE CONSTITUTIONAL BENCHES: MODUS OPERANDI

The constitution of India provides that the Supreme Court of India can operate the constitution of Constitutional benches for adjudication of different matters. It can also formulate the guidelines for the practice and procedure in the Supreme Court of India. It is the obligation of the Supreme Court to constitute the Constitutional bench for the matter involving a substantial question of law. Whereas the Supreme Court rules provide the constitution of a division bench and the power of a single judge. Further, in hearing of the matter placed before the division bench considering that it should be discussed by the larger bench, the bench shall refer the matter to the Chief Justice of India, who in consonance with their peers shall constitute such bench for adjudication of the matter. The Supreme Court rules prohibit the vacation judge to entertain the special leave appeal in which interim relief is prayed for. On the other hand, when a petition as been filed raising a substantial question of law, the bench can entertain

⁴ David L. Faigman, "Madison Balancing: A Theory of Constitutional Adjudication", 88 Nw. U.L. Rev. 641 (1993).

the petition under Article 32 of the Constitution. The Supreme Court of India can regulate the procedure for the composition and constitution of the benches also it can make formal rules of practice and procedures of the court. The Division bench of the Supreme Court while hearing any cause, appeal or other proceeding thinks that that matter should be heard by the larger bench, it shall refer the matter to the Chief Justice of India, who shall constitute such a bench for the hearing of it. But this rule prohibits the vacation judge from sitting singly during a vacation to entertaining applications for special leave to appeal in urgent cases where interim relief is prayed for. However, when such a petition involves a substantial question of law, the bench can entertain the petition. The Supreme Court Rules, 2013 make provisions for the enforcement of fundamental rights (Art. 32 of the Constitution of India)⁵.

IMPORTANCE OF CONSTITUTIONAL BENCH IN CONSTITUTIONAL ADJUDICATION

The legal commentators did not have laid great emphasis on how large the highest court of the land is required to adjudicate constitutional matters. The legal system across the world adopts the structure of the court according to the needs and suitability of the country. The Court may sit in multi-panel or en banc for the adjudication of cases relating to the interpretation of the constitution. In U.K Courts sits in a multi-panel in the House of Lords and also in the Supreme Court. However, in the U.S.A the Supreme Court sits en banc, also in the Constitutional Court of South Africa, and the Supreme Federal Court of Brazil. In India, Constitutional Courts sit in multipanellikeintheU.KandintheSupremeCourt of Canada. Certainly, the success of the courts in performing their tasks is dependent on their design and structure. The constitution of India cast a mandatory duty on the Supreme Court of India that a minimum of five judges shall sit on the constitution bench when the matter involves a substantial question of law such as the interpretation of the Constitution. However, The Supreme Court Rules, 2013 provides for the constitution of division courts and the power of the single judge. The Success of the court performing its functions is

⁵ ZoltanszenteandFruzsinaGardos–Orosz, *NewChallengestoConstitutionalAdjudicationin Europe: A Comparative Perspective* (Rutledge, new york, 1st 2018).

dependent on the particular assign of the court. The image of the courtier's fledged by

Its structure. The court is largely perceived as the combination by way of the apolitical people who are entrusted with the obligation to safeguard the rights of the citizen. The size of the court reflects the sense of expertise and also creates a populist image of the court at the same time.

IMPACT OF THE SIZE OF THE COURT

Efficient and Expedite

It is undisputed fact that a large court may accelerate the decision of the court but on the other hand, more judges would mean more opinions at once and it may lead increase in delays. An increase in the number of judges of the court should produce efficiency in decision-making because norms of productivity and group commitment enhance group performance. Though courts with a greater number of judges have one advantage of collegiality and coherence in decision-making, it reduces the individual judge's active participation and they become silent spectators on the Bench. The individual judge has no more opportunity to raise questions and express their minority opinion in the judgment of the case. Therefore, the large number of benches has an opportunity to enhance the collegiality among the fellow judges but it may produce a reduced amount of efficient Participation in the decision-making Participation of judges in the decision-making is one the most important requirement and when participation increases multiplicity of views of judges come out, representation of judges increase, and also the collegiality between the judges would increase. The size of the court has a great influence on the court's ability to satisfy the public sentiment. A smaller size of court has a great tendency to provide a greater chance of participation and representation of judges in the decision making and it would result in greater diversity. Greater diversity may increase the public trust in the court and also convey the sense of representation of the unrepresented groups which would increase public confidence in the court.⁶ Predominantly, Indian society is diverse, and the diver second situation of bench promotes the unity in the society and

⁶ Tom Ginsburg, *Judicial Review in New Democracies* (Cambridge University Press, 2009).

Also builds the confidence of the people in the court. The Diverse participation of judges in the bench produces diverse opinions and views on the bench concerning the disputed subject matter which will certainly result in to better decisions. One thing is contrary to this large court does not guarantee diverse judgment, if there are homogenous groups then it has an adverse effect in the decisional outputs. Therefore, for the diverse outcome of the large court, it is necessary that the groups must be heterogeneous and have diverse opinions. Illustratively regional imbalance could result in barriers to communications and hovering typecasting. As Justice Cardozo in his book tries to emphasize that people coming from different backgrounds can balance the bench in the decision making. When the group is expanded then restriction in the communication is also increased, it has been rightly observed that large groups have a greater tendency to segregate in the smaller groups which is again communication barriers. Thus, it is true that large groups bring demographic and informational diversity; even then large group suffers if the barriers are created to make it more difficult to communicate information aides. The other well-known difficulty in the working of large group is in aptitude in extracting and integrating the diverse perspective of the members of the group. This significant problem of ineptitude is related to the group size because when the group is large the average participation is declined and nonnative members are increased in the group which hampers the final output of the group⁷.

However, many problems and obstacles develop in the large group and these could be sorted out through collegiality and sound and impartial leadership. Therefore, collegiality promotes participation in the group by avoiding stereotyping and communication break downs that come with demographic diversifications. In the same way, effective leadership also promotes participation in the group and fosters responsibility for shared values about the group's goals. But one thing worth mentioning here is that both collegiality and leadership become very difficult to achieve when the group size is increased. Accordingly, Size and collegiality are related both may affect the coherence of large groups in decision-making. One thing

⁷ Harry H. Wellington, *Interpreting the Constitution - The Supreme Court and the Process of Adjudication* 20 (Universal Law Publishing Co., Yale University Press, 2008).

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But less chance of possibility to reach on a decision because more diverse opinion may create a difficult situation where consensus among the decision-makers cannot arrive and a lack of consensus may have an adverse impact on its coherence.

Infusion of Expertise in the Judgment

Given the fact that the judges of the Supreme Court are unbiased and less partisan, it is because of their appointing process. In the appointment of judges, there is no influence of politics; it is governed by the constitutional provision envisaged under the Constitution of India. The Supreme Court of India through panel structure prevents ideological leanings from the perspective of the public. Whereas, a larger size bench could easily be defended that the inclusion of judges on the bench should bring different ideologies and expertise that be utilized. Highlighting the importance of the larger bench Pundit Sharma in 1966 advocated that “It is not possible for a Judge to know everything” and so more judges would ensure “the final law for the land is to be laid down by Judges specialized in a particular branch of law.” it has been experienced those judges having some sort of expertise in a particular matter, produces more acceptable and legitimate judgments⁸.

Therefore, we can say that the more judges on the panel would infuse more expertise on the bench. The judgments delivered by the larger benches carry more weight both in terms of precedent value and the authority of the Court in the eyes of the general public. A great example of infusion of expertise in the judgment is the Keshwan and a Bhatia, perhaps the largest bench (thirteen judges sat on the constitutional bench) in the judicial history of the Supreme Court of India. This judgment historically laid down the basic structure doctrine which later on becomes the fundamental principle of Indian constitutional jurisprudence. So many judges not only sat on the bench to overrule the earlier precedent but to provide greater legitimacy to a judgment that challenges the sovereign power of the Parliament. The image of the Supreme Court of India is the guardian and the protector of the fundamental freedom of the individual. It is the group of apolitical and judicially ignited minds which checks the functioning of

⁸ Supranote17, OrderVI, Rule2.

the other organ so Of the governments. Therefore, it slargesize gives an impression of

Independent and impartiality that enhance the sense of expertise and thereby creates the populist image of the court at the same time⁹.

THE IDEAL SIZE OF THE COURT OF 'FIVE JUDGES' FOR CONSTITUTIONAL ADJUDICATION

It is very difficult to determine what number of judges on the bench is beneficial to get the maximum possible outcome. A bench of six judges would have maximum deliberation; on the other hand, a bench of eight might deliver a great amount of accuracy. It is quite obvious that setting the size of the bench might undermine another size of the bench, on the other hand, reducing the size of the bench to get maximum participation, and accuracy would hamper diversity. Therefore, the size of the court is dependent on how we prioritize the goals of the court. It is very important to know what the constitutional makers had in their mind about the size of the Constitutional bench, not fixing less than five judges in constitutional adjudication. In this regard, we could find one instance in the constituent assembly debate, on 6th June 1949, Shri Allude Krishna swami Ayyar, introduced clause (2a) of Art. 121, now Art. 145 (3). Dr. Ambedkar accepted this proposal with a full heart and extended the jurisdiction of the Supreme Court to criminal matters as well.¹⁰

The Constituent assembly had no deliberation regarding the minimum of five judges' bench for the hearing of substantial questions of law or the interpretation of the Constitution. They had no view expressed regarding the en banc sitting of the bench like the US Supreme Court. The constitutional makers were of opinion that the larger bench has some significant problems so they reject the sitting with eight judges including the Chief Justice. In the Year 1950, they sat en banc with eight sanctioned judges but due to the rise in the number of cases, it started hearing cases in panels of three, five, etc. Very soon the Supreme Court started to sit in panels of two, three, and five, etc. The Apex Court very early starts its hearing on a two-judge bench and

⁹ F. Andrew Hessick and Samuel P. Jordan, "Setting the size of the Supreme Court" 41 *Arizona State Law Journal* 645, 47 (2009).

¹⁰ John A. Ferejohn and Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*. 77 *NYU Law Review*, 962, 2018.

occasionally a five-judge bench or more. The five-judge bench is chosen from the

Available strength of the Supreme Court, it is neither small nor large size for constitutional adjudication rather it is an optimal size.

CONCLUSION

Judiciary can protect the rights of individuals and can provide equal justice without fear and favor. For this purpose, the Constitution of India provides many privileges to the judiciary to maintain its independence, impartiality, and integrity. With this aim, the constitution makers put the words justice, social, economic, and political in the Preamble of the Constitution of India. It is expected from the independence of the judiciary that the people howsoever high, must conform to the discipline of law. Judicial independence is not meant only for the judges but for the people also. The judicial system of our country is an instrument protecting the rights of the weak and oppressed. The Supreme Court of India through its interpretative capacity protected the rights of oppressed and weak people. The Constitution of India has conferred various kinds of jurisdiction to the Supreme Court and by exercising its jurisdiction court protected and preserves the rights of the people of India. The Supreme Court of India employed various kinds of tools Such as public interest litigation that focussed on policy-oriented cases which affect a large number of people. Another instrument is a judicial review which enhances the importance of the judiciary. It ensures the proper check on the exercise of public power. The Supreme Court of India through its constitutional interpretation expands the horizons of fundamental rights. It expands the amplitude of the Art.21 of the Constitution of India not only to the right to life but it also includes the right to travel abroad, free legal aid, protection of prisoners languishing in jail suffering inhuman treatment, etc. The Supreme Court of India is instrumental in the protection of the aims and aspirations of the Constitution which set up a republic of the people who were guaranteed "justice- social, economic and political"¹¹

¹¹ F.AndrewHessickandSamuelP.Jordan, Supranote29.

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