NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION

A
Consultation Paper*
on

CONSTITUTIONAL MECHANISMS FOR SETTLEMENT OF INTER-STATE DISPUTES

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CHAPTER 1

INTRODUCTION

1.1 Scope of the Study

This study deals with the constitutional mechanisms in India for the settlement of inter-State disputes. This assumes increasing importance with the increasing complexities of the enlargement of Inter-state engagements in the context of the widening international economic order. Constitutional provisions relevant to the subject (as will be indicated a little later in this study) are scattered over several articles. But all of them are designed to reduce the tensions and frictions that are bound to arise in the working of the Federal text.

1.2 Importance of the subject

In a constitutional set-up based on the federal principle, sovereignty is divided between the federation and the units. Division of sovereignty implies the creation of boundaries, and this is bound to raise disputes, as to on which side of the boundary the matter falls. The reason is, that neither geographical phenomena, nor social currents, nor political forces, are defined by the boundaries so drawn. Boundaries are drawn by the minds of men. But they are mere intellectual creations, whose actual application to external realities cannot always be the subject matter of unanimity. Differences become insertable in this sphere. And, where such differences do arise, it is desirable that there be a well thought out systemic mechanism, for inter-state dispute resolution.

1.3 Scheme of discussion

This paper proposes to deal, first, with the variety of mechanisms available under the Constitution for the settlement of inter-State disputes. It shall thereafter concentrate on the jurisdiction of the Supreme Court, under article 131 of the Constitution and shall also refer to certain other articles of the Constitution which can be utilised for the purpose. Position obtaining in certain other countries will also be dealt with, in brief.

CHAPTER 2

VARIETY OF MECHANISMS

2.1 Judicial and extra judicial mechanisms

The Constitution of India contemplates a variety of mechanisms for the settlement of inter-State disputes – taking the word "dispute" in a wide and comprehensive sense, so as to cover not only disputes that come up before the judiciary, but also disputes for whose resolution an extra-judicial machinery is contemplated by the Constitution.

2.2 The judicial mechanism : article 131

The principal provision creating the judicial mechanism for dealing with inter-State disputes involving a legal right is article 131 of the Constitution. It confers, on the Supreme Court of India, exclusive jurisdiction to deal with disputes involving legal rights. This article covers any dispute[1] –

(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 States,

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

2.3 Disputes relating to water

Under article 262 of the Constitution, it is permissible for Parliament, by law, to provide for the adjudication of disputes relating to inter-State rivers or river-valleys. The law so enacted can exclude the jurisdiction of the Supreme Court and other courts.[2]

2.4 Inter-State Council

Finally, in article 263 of the Constitution, there is provision for the formation of an inter-State Council. Although this Council has several functions, it is also competent to tender advice regarding the resolution of inter-State disputes.[3]

CHAPTER 3

THE SUPREME COURT AND ITS JURISDICTION

3.1 Original jurisdiction of the Supreme Court

The principal provision in the Constitution, that is relevant to the subject under discussion is contained in article 131 of the Constitution, quoted below. The article is based largely on its pre-decessor – section 204 of the Government of India Act, 1935. But the proviso (excluding the Court's jurisdiction in respect of certain treaties, etc.) is new.

The proviso itself was amended by the Constitution (7th Amendment) Act, 1956. The article (in its present form) reads as under :-

> **"131. Original jurisdiction of the Supreme Court. –** 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 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:
>
> Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, *sanad* or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides, that the said jurisdiction shall not extend to such a dispute.".

3.2 Parties (article 131)

Article 131 of the Constitution does not apply, if the other party is a public sector corporation. [*State of Bihar Vs. Union of India*, AIR 1970 SC 1446, 1449, 1452; (1970) 1 SCC 67, 69, 70].

3.3 Earlier proviso

It may be mentioned that article 131, proviso, before its amendment in 1956, read as under :-

> "Provided that the said jurisdiction shall not extend to–
>
> (i) a dispute to which a State specified in Part B of the First Schedule is a party, if the dispute arises out of any provision of a treaty, agreement, covenant, engagement, *sanad* or other similar instrument which was entered into or executed before the commencement of this Constitution and has, or has been, continued in operation after such commencement;
>
> (ii) a dispute to which any State is a party, if the dispute arises out of any provision of a treaty, agreement, covenant, engagement, *sanad* or other similar instrument which provides that the said jurisdiction shall not extend to such a dispute."

3.4 "Legal right" – decision under 1935 Act

Although article 131 of the of the Constitution[1] is very widely worded – covering, as it does, both questions of fact and of law it must be kept in mind, that it is applicable, only "if and in so far as the dispute involves any question, on which the existence or extent of a legal right depends". As to the meaning of the expression "legal right", the views of Salmond

[Salmond, Jurisprudence 10th Ed, page 230] is often quoted. According to him, it is an interest recognised and protected by a rule of legal justice – an interest, the violation of which would be a legal wrong done to him whose interest it is, and respect for which is a legal duty.

In this connection, it would be proper to refer to a judgment of the Federal Court, on section 204 of the Government of India, Act 1935. [*U.P. Vs. G. G. in Council*, AIR 1939 FC 58].

In that case, the plaintiff brought a suit against the defendant for the recovery of certain sums of money, which, he alleged, were wrongfully credited to the Cantonment fund. The defendant, *inter alia*, pleaded that since no suit could be instituted by a Province against the Government of India under the law prevailing at the relevant period, the dispute was one which was not justiciable before the Federal Court in its original jurisdiction. The Federal Court held, that the suit would lie, because the dispute involved a question on which the existence or extent of a legal right depended. In the course of the judgment, Sulaiman, J. said:

> "The term 'legal right', used in section 204, obviously means a right recognised by law and capable of being enforced by the power of a State, but not necessarily in a court of law. It is a right of an authority recognised and protected by a rule of law, a violation of which would be a legal wrong to his interest and respect for which is a legal duty, even though no action may actually lie. The only ingredients seem to be a legal recognition and a legal protection. The mere fact that under the previous Act the Provincial Governments were subordinate administrations under the control of the Central Government and could only have made a representation to the Governor-General-in-Council or the Secretary of State, would not be sufficient, in itself, for holding that the former could not possibly possess any legal right, at all, against the Central Government, even in respect of rights conferred upon them by the provisions of the Act or the rules made thereunder".

3.5 Political disputes excluded

At the same time it is obvious that disputes which do not involve any questions of legal right, e.g. where the disputes have an exclusively political[2] dimension, are not covered by article 131. [*State of Bihar Vs. Union of India*, AIR 1970 SC1446: (1970) 1 SCC 67.

3.6 Cases which involve legal right

However, if a right arising, say, under the Constitution is at issue, then article 131 can be invoked, even if the subject matter might have provoked political controversy.

[(i) *State of Rajasthan Vs. Union of India*, AIR 1977 SC 1361; (1977) 3 SCC 592 (Rajasthan Assembly Dissolution Case).
(ii) *State of Karnataka Vs. Union of India*, AIR 1978 SC 68, paras 141-149, 159-165, 198-203 (1997) 4 SCC 608 [Case relating to Central Government's power to order a direct inquiry into State Chief Minister's conduct].

3.7 The scope of article 131 as to subject matter

At this stage, it may perhaps be proper to point out, that the jurisdiction of the Supreme Court under article 131 is not confined to disputes relating to specified or particularised controversies.

Subject to certain other provisions of the Constitution[3] (which expressly or by implication exclude this jurisdiction), article 131 confers on the Supreme Court's original jurisdiction "in any dispute" (between the federation and its units, or between the units themselves). The jurisdiction is extremely wide, provided the dispute is a justiciable one. The intention of the Constitution-makers is, that such disputes should not be subjected to several tiers of the judicial hierarchy, but should come, for once and for all, before the highest court of the land.

3.8 Limitation regarding parties

Of course, the dispute must be between the parties mentioned in the preceding paragraph. A claim by a private individual cannot be entertained under article 131, [*State of Bihar Vs. Union of India*, AIR 1970 SC 1446: (1970) 1 SCC 67, 69, 70][4].

3.9 Public law element

It further appears, that some element of "public law" should form a component of the dispute that can be brought before the Supreme Court under article 131. For example, disputes exclusively pertaining to ordinary business or commercial transactions are outside article 131. [*Union of India Vs. State of Rajasthan*, AIR 1984 SC 1675: (1984) 4 SCC 238].

3.10 Political matters

(a) In article 131, the words "any question (whether of fact, or of law) on which the existence or extent of a legal right depends", are words which seem, on the one hand, to amplify the scope of the article and, on the other hand, to qualify its scope.

(b) Thus, on the one hand, these words indicate that factual controversies are not excluded, provided that ultimately, on the outcome of a determination of the factual controversy, there emerges a decision on a question relating to the existence or extent of a legal right.

(c) At the same time, the controversy to be brought before the court must relate to a legal right. It is for this reason, that purely political questions are outside the scope of article 131. [*State of Bihar Vs. Union of India*, AIR 1970 SC 1446 : (1970) 1 SCC 67].[5]

3.11 "Legal right" – the crucial expression

The crucial expression in article 131, is the expression "legal right". This expression has the effect of excluding all controversies involving only non-legal issues[6] from the jurisdiction of the Court. However, unlike the scheme of the Code of Civil Procedure, which requires (*inter alia*) that the person coming to court (i.e. the plaintiff) must have a cause of action in his favour, article 131 does not prescribe that the legal right, asserted or denied in the proceeding in question, must be that of the party invoking the jurisdiction of the court or of the party against whom such jurisdiction is invoked – as the case may be.[7]

This aspect is illustrated by the following two decisions of the Supreme Court, noted below –

(i) *State of Rajasthan Vs. Union of India*, AIR 1971 SC 1361.[8]
(ii) *State of Karnataka Vs. Union of India*, AIR 1978 SC 68: (1977) 4 SCC 608.[9]

In the first case mentioned above, the main question at issue related to the scope of the President's powers (under article 356 of the Constitution), to suspend the constitutional machinery of the State.

In the second case mentioned above, the question mainly related to the existence of a power, in the Central Government, to appoint a Commission of Inquiry to inquire into the conduct of Ministers of the State in the discharge of their official functions.[10] In both the cases, the jurisdiction of, the Supreme Court was held to have been properly invoked.

3.12 The Karnataka Case

In fact, in this context, it may be worthwhile to examine in some detail the facts of the case from Karnataka –

[*State of Karnataka Vs. Union of India*, AIR 1978 SC 68 para 53: (1977) 4 SCC 608].

In that case, the Central Government had issued a notification under section 3 of the Commissions of Inquiry Act, 1952, to inquire into the conduct of certain Ministers of the State Government of Karnataka (including the Chief Minister). The State Government challenged the legality of this notification, mainly raising a constitutional issue connected with federalism. The principal point raised was, that the scheme of the Constitution was that the State Cabinet was collectively responsible to the State Legislative Assembly [article 164 (2) of the Constitution]. The Constitution did not contemplate a parallel overseeing of the State Cabinet (or its members) by the Centre. In the end, the contention of the State Government failed. But the jurisdiction of the Supreme Court (under article 131) to go into the above question was upheld. The point that is relevant for the present purpose, is the fact that by a majority judgment, the proceeding was held to be maintainable and it was specifically held, that in this context, the supposed distinction between the State (an abstract entity) and the State Government (its concrete representative), was immaterial.

3.13 The case from Rajasthan

The facts of the case from Rajasthan – *State of Rajasthan Vs. Union of India*, AIR 1977 SC 1361: (1977) 3 SCC 592, are equally interesting. In 1977 (after 19 months of the Emergency), a peculiar situation arose. In the country as a whole, one party was voted to power (through Parliamentary election) by an overwhelming majority. At the same time, in nine States, another party was already in power. The Central Government was of the view, that in these States, the Government should seek a fresh mandate from the electorate. A letter to that effect was addressed by the Home Minister to the Chief Ministers of the States. Apprehending that the letter would be followed by the issue of a Presidential Proclamation under article 356 of the Constitution, the States moved the Supreme Court, questioning the validity of such a Proclamation in the circumstances of the case.

The Supreme Court held that it had jurisdiction to entertain the proceeding. In the end, however, the court decided that the apprehended Proclamation would be valid [Incidentally, the judgment also contains a detailed discussion of the scope of judicial review, in regard to Presidential action under article 356].

3.14 Parties to the dispute

The language of article 131 makes it clear, that the dispute to be brought before the court must be between Government of India and a State/s or between two or more States.

This is, in fact, evident from the very terms of clauses (a) (b) and (c) of article 131, itself.[11]

The nature of issues in respect of certain original suits under article 131 pending before the Supreme Court is indicated at Annexure.

3.15 Denial of legal right

Of course, it is not necessary that the Government coming to the court must have a legal right vested in itself. It is sufficient, if it denies the legal right asserted by the opposite party – (which also must be a Government) [*State of Rajasthan Vs. Union of India*, (1977) 3 SCC 592, 634, 635 (Beg CJ), 637-642, (Chandrachud, J) 647 – 649, (Bhagwati & Gupta JJ); AIR 1977 SC 361].[12]

3.16 Questions excluded from the jurisdiction of the Supreme Court

By specific provisions or implications of the Constitution, certain matters are excluded from the scope of article 131 -

(a) either by specific provision, e.g. article 262; or
(b) implicitly (see articles 280 and 290); or
(c) by judicial interpretation.

[*State of Bihar Vs. Union of India*, AIR 1970 SC 1446, 1449, 1452] (Matters within advisory jurisdiction).[13]

3.17 Validity of central laws

Where the dispute is not between the Federation and a State or between States *inter se*, the matter goes to the competent civil court (including the High Court). It may be mentioned that by the Constitution (42nd Amendment) Act, 1976 (effective from 1st February, 1977), article 131A was inserted, which conferred on the Supreme Court exclusive jurisdiction in regard to the constitutional validity of Central laws. But this article was repealed by the Constitution (43rd Amendment) Act, 1977, section 4 (w.e.f. 13-4-1978).

3.18 Validity of laws and lower courts

Article 131 of the Indian Constitution is confined to inter-Government disputes. The question may arise as to the position where a question involving the validity of a Central or State law arises before a court (other than the Supreme Court) between Government and a third party.

Of course, the Code of Civil Procedure[14] in India does provide, that where the constitutional validity of a law (or of a statutory instrument) is in issue in a civil suit, then notice must be given to the Attorney General (of India) or the Advocate General (of the State) as the case may be. Further, the (concerned) Government may be made a party, if the court so orders. But the jurisdiction of the court (if the court is otherwise competent) is not affected.

Now, it needs to be pointed out, that a question about the constitutional validity of a law may arise, *inter alia* –

(a) if the law violates the constitutional provisions as to fundamental rights, or

(b) if the law is beyond the legislative competence of the Centre or the State (as the case may be), as per the scheme of distribution of legislative powers, or

(c) if the law is otherwise in conflict with the Constitution.

3.19 Question for consideration

The situations at (a) and (c) above[15] do not necessarily possess a federal element. But the situation at (b) above can arise, only in a federation. Now, what needs to be considered is this. If such a question arises in a civil suit (or, for that matter, in any proceeding), where (i) only one Government (Central or State) is a party, but the other is not, or (ii) both the Governments are parties, but, at the same time, there is a non-Governmental party also, then, does article 131 of the Indian Constitution apply, so as to deprive all other courts (except the Supreme Court) of jurisdiction?[16]

3.20 Spirit of the Constitution

Article 131 of the Constitution, so far as its text goes, is silent on the subject. But the spirit of the Constitution might demand, that the Supreme Court's jurisdiction should be exclusive in such matters. It is not proper, that a court lower than the Supreme Court should decide such questions. The Supreme Court should be given exclusive jurisdiction in controversies concerning the distribution of legislative powers, which have an all-India repercussion. For example, if a State law imposing a tax on, say, the assignment of copyright, is challenged by a publisher, the decision (of a court other than the Supreme Court) upholding or invalidating the State law, may have an impact which far transcends the frontiers of the particular State in which the decision is pronounced. Similar questions can arise in other States. Uniformity of approach is the first desideratum in regard to such questions. Besides this, if the matter is allowed to be decided by, say, the High Court and thereafter taken (if necessary) by appeal to the Supreme Court, the process would be time-consuming and most inconvenient. In the intervening period, there is bound to prevail considerable confusion and uncertainty; and serious inconvenience would be occasioned thereby.

3.21 Suggestion as to article 131

A reasonable interpretation should, therefore, be placed on article 131 of the Constitution and the Supreme Court should be regarded as having exclusive jurisdiction, if a question involving the distribution of power arises, and at least one of the parties is a Government. The accidents of litigation, and the question whether the point arises between two Governments or between Government and other parties, should not be regarded as conclusive.[17]

3.22 Would an Amended Article 139A be an answer ?

It may be suggested that as the Supreme Court has already the power under article 139A to withdraw cases involving the same or substantially the same question of law which are pending in Supreme Court and one or more High Courts. In so far as cases pending in other courts where

legislative competence of Central legislature is questioned, this would provide a suitable remedy if article 139A is appropriately amended to delete the specific conditions for the exercise of the power to withdraw of cases.

3.23 An issue would bear upon the larger question of distribution of legislative powers between the Union and the States. It would be possible that a Central law has been challenged only in one High Court on the ground of lack of legislative competence. The Constitution may be amended so as to enable withdrawal of the case to the Supreme Court so that the question could be decided by the apex court.

CHAPTER 4

ARTICLE 262 AND INTER-STATE DISPUTES RELATING TO WATER

4.1 Disputes relating to waters, etc.

The Constitution makes a special provision regarding disputes relating to inter-State waters. Article 262 of the Constitution provides as under:

> "262. Adjudicatation of disputes relating to waters of inter-state rivers or river valleys.
>
> (1) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley.
>
> (2) Notwithstanding anything in this Constitution, neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute as is referred to in clause (1).

4.2 Legislation

The Inter-State Water Disputes Act, 1956 (33 of 1956) has been enacted to implement article 262. Its principal features are as follows:

(a) The Central Government is empowered to constitute a Tribunal, on a complaint received from a State Government that a water dispute has arisen (or is likely to arise) in relation to the waters of an inter-State river or river-valley. [Section 3]

(b) The Tribunal consists of a Chairman and two other members, nominated in this behalf by the Chief justice of India, from judges of the Supreme Court or of a High Court. [Section 4, as amended 1980].

(c) The decision of the Tribunal is final and binding on the parties. The parties must give effect to it.

(d) Jurisdiction of other courts is barred.[1]

4.3 Separate study

The Commission proposes to prepare a separate study of such disputes, having regard to their importance.

CHAPTER 5

ARTICLE 263 AND RESOLUTION OF DISPUTES BETWEEN STATES

5.1 Scope of article 263

The Constitution has, through article 263, made a comprehensive provision relating to the discharge of certain functions on matters having an inter-State dimension. One of the functions to be discharged by the Council contemplated by the article is that of inquiring into and advising upon disputes which may have arisen between States, [under article 263 (a)]. The article (which appears under the sub-head : States "Co-ordination between States) reads as under –

> "263. Provisions with respect to an inter-State Council.
>
> If at any time it appears to the President that the public interest would be served by the establishment of a Council charged with the duty of –
>
> (a) inquiring into and advising upon disputes which may have arisen between States ;
> (b) investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States, have a common interest or
> (c) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination or policy and action with respect to that subject, it shall be lawful for the President by order to establish such a Council and to define the nature of the duties to be performed by it and its organisation and procedure".

5.2 J.P.C. Report (1934)

In this context it may be appropriate to deal with the genesis of the corresponding provision (section 135) in the Government of India Act, 1935.

The Joint Parliamentary Committe, (Report, pages 123, 124), observed as under –

> "It is obvious that if departments or institutions of co-ordination or research are to be able to rely on appropriations of public funds sufficient to enable them to carry on their work, the joint interests of the Provisional Governments in them must be expressed in some regular and recognised

machinery of inter-governmental consultation. Moreover, we think that it will be of vital importance to establish some such machinery at the very outset of the working of the new Constitution, since it is precisely at that moment that institutions of this kind may be in most danger of falling between two stools, through failing to enlist the active interest either of the Federal or the Provincial Government, both of whom will have many other more immediate occupations".

The idea in the last sentence of report as to the 'vital importance' of establishment of such institutions 'at the very outset of the working of the Constitution' seems to have been misused. The Inter-state Council was established in 1990, 40 years after the Constitution and what is more significant is that despite its establishment in 1990, it met for the first time in 1996.

5.3 Zonal Councils

In this connection, it may also be proper to mention that under the States Re-organisation Act, 1956, five Zonal Councils have been set up. Besides this, a North Eastern Council has been set up under the North Eastern Council Act, 1971.

5. 4 The Inter state Council, and its functions

Reverting to article 263 (dealing with the Inter-State Council), it is not proposed at this place to present a detailed discussion of its text. Limiting ourselves to the relevance of article 263 to the settlement of disputes, we would like to draw attention to the following features of the article[1].

(a) Where article 263 contemplates inquiry into, and advice upon, disputes between States, it does not bring within the scope of the article disputes between the Union and a State – see clause (a) – though it does authorise investigation and discussion of subjects of common interest and the making of recommendations upon such subjects - see clause (b).

(b) The functions of the Inter-State council (contemplated by the article are advisory and recommendatory.

5. 5 Scope for enlargement of article 263

Even as article 263 stands at present, it possesses considerable width and utility in regard to the matters dealt with in it. However, this Chapter is principally concerned with one particular question arising out of the treaty-making function of the Union. Legislation enacted (under article 253) to implement international treaties can cover any subject – irrespective of the general scheme of distribution of legislative functions – and can thus cover *inter alia* subjects in the State List also.

The context in which Article 253 came to be contemplated. Refer to A.G. Antan Vs. A.G. Canada (AIR 1937 PC 82)

Now, this particular situation may create tensions or friction between the Union and the States. To reduce such tension or friction, a possible device may be to consult the Inter State-Council, before the treaty is signed, which may vitally affect the interests of States regarding matters in the State list. Either a constitutional convention can be evolved to that effect, or, if necessary, article 263 could be enlarged or clarified, to permit consultation on the above point.

CHAPTER 6

ARTICLE 293 : BORROWING BY THE STATES

6.1 Provision as to borrowing

Article 293 of the Constitution makes certain provisions as to borrowing by the Centre and the States. While clauses (1) and (2) of the article make general provisions empowering the respective Governments to borrow money, clauses (3) and (4) of the article raise certain interesting issues which deserve consideration for the present purpose.

6.2 Articles 293(3) and 293 (4)

Article 293 (3) prohibits a State Government from incurring a loan, where an existing loan is already outstanding against the State Government, unless the Central Government gives its consent. Article 293 (4) further provides, that while giving consent under article 293(3), the Central Government may impose such conditions as it think fit.

6.3 Likelihood of disputes

It has been suggested that the question should be examined whether the provisions referred to above, may raise any legal disputes and, if so, which existing mechanism should be utilised or a new mechanism should be created, for the settlement of such disputes.

Primarily, it appears that such a dispute can possibly arise where –

(a) the Central Government refuses its consent to a loan contemplated by the State Government [article 293(3)]; or

(b) the Central Government imposes certain conditions, while granting its consent, and the conditions are not acceptable to the State Government [article 293(4)].

6.4 Nature of disputes

(a) Generally, such refusal of consent, or imposition of conditions to be linked with a loan, would not raise justiciable issues, as the decision of the Central Government would, in most cases, be governed by financial and economic considerations. However, it is not inconceivable that a State Government may harbour a plausible grievance, that the consent has been unreasonably refused or that unreasonable conditions have been suggested by the Centre Government. Such a situation could possibly be regarded as involving a justiciable dispute.

(b) If so, there should be available a mechanism for the settlement of such disputes. It appears to us, that instead of creating a new mechanism for the resolution of such disputes, the matter could be appropriately dealt with by the Supreme Court under

article 131 of the Constitution. In fact whenever a justiciable issue is involved, the situation would necessarily be one where a question as to the "existence or extent of a legal right" is at issue within the meaning of article 131. However, the matter could, if necessary, be dealt with by a clarificatory amendment of article 131 to cover such disputes.

(c) At the same time, it may be observed that if a justiciable issue is not involved, then it would be appropriate if the matter is settled by negotiations, rather than by a judicial or quasi judicial mechanism.

CHAPTER 7

TRADE AND COMMERCE

7.1 Articles 301-307

Articles 301-307 of the Constitution contain certain provisions as to the freedom of trade, commerce and intercourse throughout India. The provisions are somewhat complex; and, because of the vital importance of economic activities in modern times, their application and interpretation could conceivably lead to disputes between the Union and States or between States *inter se*.

7.2 Separate study

The Commission has, on a preliminary study of the relevant provisions formed the view that it would be more convenient to deal with the subject separately.

CHAPTER 8

POSITION IN CERTAIN OTHER COUNTRIES[1]

8.1 Introductory

The need for a machinery for the adjudication of disputes between the federation and a State, or between the States of a federation *inter se*, was demonstrated by Dicey in his inimitable style. This is no longer a matter of controversy. But the jurisdiction and pattern of the judicial organ, created for the adjudication of such disputes, can still vary, from federation to federation. Even the nomenclature of the organs can vary – it may be described as "Supreme Court", "High Court", or "Federal Court", or "Tribunal", or in any other manner. This Chapter does not profess to deal exhaustively with the federal judiciary in other countries in all its aspects. But a few important features will be noted.

8.2 U. S. A : the Supreme Court

(a) In the United States, disputes under federal laws are adjudicated by federal courts, while those under State laws will be adjudicated by State courts, subject to appeal to the U.S. Supreme Court in certain cases. The federal judiciary in the United States is supreme in the execution of the Constitution.[2]

(b) The Constitution of the United States, in Article III, section 2, defines the jurisdiction of the Supreme Court. This includes –

(i) cases in law and equity, arising under the Constitution, the laws of the United States and treaties made under its authority;
(ii) cases of admiralty and maritime jurisdiction;
(iii) controversies between two or more States;
(iv) controversies between a State and citizens of another State; and
(v) controversies to which the United States is a party.

(c) Judicial power of the U.S. Supreme Court covers any case in which the United States is a party plaintiff, where the defendant is a State.

(d) Federal jurisdiction in respect of disputes between citizens of different States is wholly independent of the nature of the subject matter of such disputes. For jurisdictional purposes in the United States, a corporation is treated as a citizen of the State of its incorporation. Corporations organised under a federal statute are not regarded as citizens of any State, unless the Congress specifically so provides.[3]

8.3 Constitutional Courts in U.S.A.

Besides the U.S. Supreme Court, there are other courts created directly under the Constitution. These are known as "Constitutional Courts". Article III, section 1 of the U. S. Constitution vests the judicial power of the United States in "one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish". In exercise of this power, the Congress has established in following constitutional courts:-

(a) Courts of Appeal for each of the eleven judicial circuits plus one for District of Columbia.
(b) District Courts (89 + 1 in District of Columbia + 1 in Costa Rica).
(c) Court of Appeals for the Federal Circuit (newly created). In it are merged (I) the previous Court of Claims, (ii) the previous Court of Customs and Patent appeals. It hears appeals in patent etc. cases from any District, as well as appeals from the Claims Court and the Court of Trade.

All these are "Constitutional Courts", under Article III, section 1, of the U. S. Constitution.

8.4 Legislative Courts

Under other clauses of the Constitution, Congress has set up Legislative Courts, such as U. S. Tax Court (hearing appeals from Treasury rulings on tax) and Court of Military Appeals.

8.5 Supreme Court: appellate jurisdiction

Under Article III, section 2(2) of the U. S. Constitution, the Supreme Court has appellate jurisdiction with respect to law and fact and in other cases, subject to such limitations as Congress may lay down.

8.6 Courts of Appeal

Courts of Appeal (federal) hear appeals from federal District Courts sitting in their respective circuits, and from also tax courts and certain other courts.

8.7 District Courts in USA

(a) District Courts in the United States have original jurisdiction in (i) all cases involving more than 10,000 dollars, where the parties are citizens of different States, or (ii) the case raises a "federal" question.

(b) A "federal" question arises, where a correct decision depends on the construction of the Constitution, a law of the U. S. or a treaty entered into by the United States or where the case is an admiralty or maritime one. They have also jurisdiction to try civil actions in which States are parties, cases against the federal government and cases involving federal criminal laws relating to serious crimes.

8.8 Australia

(a) In Australia, disputes between the Commonwealth and a State, or between States *inter se*, are exclusively within the original jurisdiction of the High Court of Australia[4] (which is a national court and not a State court). It appears that the jurisdiction of the High Court of Australia in disputes between the two Governments is not limited to disputes involving public law. It is as wide as that of the Supreme Court of India and covers all justiciable disputes.

(b) There has been established the Federal Court of Australia. But this Court does not entertain disputes involving a question concerning federal-State relations, as such. Its jurisdiction covers certain controversies in administrative law and a few other disputes of a specialised character.[5]

8.9 Federal Court (Australia)

(a) Australia has, since 1976, for the first time, a federal Court of generalised jurisdiction and structure, that is to say, a court which is structurally capable of exercising any federal jurisdiction below the High Court which may be conferred upon it.[6] The Commonwealth Government, under Mr. Malcolm Fraser as Prime Minister, made it plain that it favoured conferring jurisdiction on that Court, only in relation to particular matters of federal jurisdiction which (for policy or other reasons) were particularly suitable for exercise by a federal court, and, at the same time strengthening State Supreme Courts by adding to their federal jurisdiction in certain areas.

(b) Following the setting up of the Federal Court of Australia, various Commonwealth statutes have conferred, on that court, jurisdiction in a range of areas. It took over the work of the former Federal Court of Bankruptcy and of the former Industrial Court. In addition, jurisdiction was conferred on it in regard to restrictive trade practices and consumer protection, administrative law, and a number of other matters.

8.10 Canada

(a) In Canada, the Supreme Court has (besides its appellate jurisdiction) exclusive original jurisdiction in disputes between the Federation and a Province, or between one Province and another.

Section 101 of the British North America Act authorised the establishment of "a general court of appeal for Canada" and "any additional courts for the better administration of the laws of Canada". Under the first power, the Canadian Parliament established the Supreme Court of Canada, with civil and criminal appellate jurisdiction throughout Canada. The present governing statute relating to the Canadian Supreme Court is the Supreme Court Act (Revised Statutes of Canada, 1970, Section 19).

(b) It may also be mentioned that since 1949, jurisdiction of the Privy Council by way of appeal from Canada has been abolished.[7]

(c) The Canadian Supreme Court has some original jurisdiction, of which the most important component is the power to determine questions posed in "references" made to the Court by the Federal Government. The reference procedure is not confined to constitutional questions, though it is chiefly resorted to, for that purpose. This is in contrast with the position in the United States and Australia, where there is no advisory jurisdiction. Validity of the Canadian provision relating to reference has been upheld.[8]

(d) Since 1978, in civil cases, an appeal to the Supreme Court of Canada lies, only with the leave of the Supreme Court of Canada or with the leave of the Provincial Court of Appeal or the Federal Court of Appeal for Canada.

(e) In criminal cases, appeal to the Supreme Court is mainly limited to questions of law. Leave is required in a criminal case, where there was no dissenting opinion in the Provincial Court of Appeal.[9]

(f) In general, a full court is of the Supreme Court of Canada, though there is power to sit in benches of three.[10]

8.11 Malaysia

(a) Malaysia does not have a system of dual courts for disputes under federal and State laws.

(b) The Supreme Court of Malaysia has[11] -

(i) exclusive original jurisdiction in disputes between the Federation and a State and in regard to disputes between States,

(ii) reference jurisdiction;

(iii) appellate jurisdiction over the High Courts; and

(iv) advisory jurisdiction.

(c) High Courts in Malaysia have original jurisdiction in other cases under federal or State law.

(d) Inferior courts may be established by federal law.

8.12 Supreme Court (Malaysia)

(a) From the angle of federalism, the most important jurisdiction of the Supreme Court of Malaysia[12], is its jurisdiction to decide disputes (i) between the Federation and a State or (ii) between two or more States.

Where the dispute is between parties mentioned in (i) and (ii) above, the jurisdiction of the Supreme Court is exclusive.

(b) But, where the dispute is between other parties and involves a question whether [13] a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, (as the case may be), the Legislature of a State has no power to make laws, then proceedings for a declaration of invalidity of the law shall not be commenced, without the leave of a judge of the Supreme Court.

(c) The object in giving exclusive jurisdiction to the Supreme Court of Malaysia "is to ensure that a law may be declared invalid on this very serious ground, only after full consideration by the highest court in the land".[14]

8.13 Switzerland

In Switzerland, the Federal Tribunal decides disputes between the federal authorities and the authorities of the Cantons and also adjudicates upon allegations of violation of the Constitution.

8.14 The Federal Constitutional Court in Germany

The Basic Law for the Federal Republic of Germany – the Bonn Convention of 1949 – was drafted and formally adopted at a time when the influence of American constitutional ideas and practice in (West) Germany were still very strong. The Basic Law stipulates, in terms, for the institution of judicial review in West Germany.[15] Article 92 of the Basic Law provides for the creation of a Federal Constitutional Court (Bundesverfassungsgericht), and Article 93 goes on to define the Court's jurisdiction in the following terms :-[16]

"93(I) The Federal Constitutional Court shall decide:

1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of the highest federal organ or of other participants accorded independent rights by this Basic Law or in the Standing Orders (Rules of Procedure) of the highest federal organ;

2. in cases of differences of opinion or doubts on the formal and material compatibility of federal law or Land law with this basic law, or on the compatibility of Land law with some other federal law, on the application of the Federal Government, of a Land Government or of one-third of the members of the Bundestag;

3. in cases of differences of opinion on the rights and duties of the Federation and the Laender (States), particularly in the execution of federal law by the Laender (States) and in the exercise of federal supervision;

4. on other public law disputes between the Federation and the Laender (States), between different Laender (States), or within a Land, in so far as appeal to another court is not provided for;

5. in all other cases provided for in this Basic law.

(II) Furthermore, the Federal Constitutional Court shall act in cases otherwise assigned to it by federal legislation."[17]

8.15 Detailed organization

The detailed organisation, and also the regulation of the mode of operation and procedure of the Federal Constitutional Court in (West) Germany were left, according to Article 94 of the Basic Law, left to be settled by later federal legislation. This object was, in fact, achieved by the enactment of the special statute concerning the Federal Constitutional Court (12 March 1951).

VIEWS INVITED

6.1 Views invited

Views are invited from interested persons and bodies on the subject matter of this study, as per the Questionnaire annexed.[1]

QUESTIONNAIRE
ON
CONSTITUTIONAL MECHANISMS FOR
THE SETTLEMENT OF INTER-STATE DISPUTES

1. Do you agree with the suggestion that where the validity of a Central law is questioned (even in a dispute to which is not between the Union and a State or between States *inter se*) the Supreme Court should be vested with exclusive jurisdiction, by expanding the scope of article 131 of the Constitution?[1]

Yes ☐ No ☐

Or

Are you of the opinion that the purpose would be served by an appropriate amendment to Article 139A enabling the Supreme Court to withdraw, cases in which a Central legislation is questioned on grounds of lack of legislative competence.

Yes ☐ No ☐

2. Do you have any other suggestion to make regarding article 131 of the Constitution? If so, please give suggestions.

3. Do you consider it desirable[2], that where a treaty entered into by the Central Government concerning a matter in the State list, vitally affects the interests of States, the Inter-State Council (article 263 of the Constitution) should be consulted?

Yes ☐ No ☐

4(a). What kind of inter-state issues, you would envisage, are likely to arise in future having regard to the multi-lateral international trade treaties entered in to by the Union Government and the context of the World Trade Organisation?

(b) What mechanisms would you contemplate for resolution of such inter-state issues ?

(c) Do you share the opinion that Article 263 even as it now stands is comprehensive enough to accommodate and permit the establishment of the dispute resolution mechanisms which are likely to arise in future?

Yes ☐ No ☐

5(a). Would you agree with the suggestion[3] that in cases where, with reference to article 293(3) and article 293(4) of the Constitution, the Central Government refuses its consent to a loan requested by a State or seeks to impose conditions which are not agreeable to the State and the grievance of the State, is that the action of the Central Government is unreasonable, the disputes (between the two Governments), should be within the jurisdiction of the Supreme Court and that the scope of article 131 of the Constitution should be amplified, to achieve that result?

Yes ☐ No ☐

(b) What should be the time-frame for resolution of such disputes?

(c) Or should there be a separate mechanism under Article 263 of the Constitution for the purpose?

Yes ☐ No ☐

6. Have you any other suggestion to make, regarding constitutional provisions for the adjudication of disputes between the Union and the States or States *inter se*, (not being suggestions relating to articles 262 or articles 301-307 of the Constitution)? Please give details.

Not more than 200 words

ANNEXURE

ORIGINAL SUITS UNDER ARTICLE 131 OF THE CONSTITUTION OF INDIA AS ON 14.06.2001 (see paragraph 3.14)

S.No.	Matter No. & C/T	Subject Matter	Present Status
1-2	OS 10-11/68 State of Orissa Vs. State of A.P.	Dispute between State of Orissa and State of A.P. with regard to boundary/Territory.	The Hon'ble Court vide its Order dt. 30-10-2000 directed to list after six months, Listed on 11.07.2001.
3.	OS 2/88 State of Assam Vs. Union of India	Dispute between State of Assam and State of Nagaland in regard to encroachment or reserved forests within the Constitutional boundary of the Plaintiff by the Defendant (i.e. State of Nagaland).	Listed on 18.7.2001
4.	OS 1/89 State of Assam Vs. Union of India & ORS.	Dispute is about boundaries between State of Assam & Arunachal Pradesh.	Listed on 18.7.2001
5.	OS 2/89 State of Sikkim Vs. Union of India	Dispute between State of Sikkim and Union of India with regard to the legal rights of the State of Sikkim based upon State of Sikkim Income Tax Manual 1948 which is protected by Clause (k) of Article 371(1) of the Constitution of India.	Constitution Bench Matter Shown in TL of 2001. Page 653/Item 16
6.	OS 3/94 State of Orissa Vs. Union of India	Dispute between the State of Orissa & Union f India in regard to the decision of the Union of India o sign the GATT treaty on 15th April, 1994 arising out of Uruguay Round on	The Hon'ble Court vide its Order dated 13.3.2001 referred the Suit to CB. Page 666/Item 39 of T.L. 2001

S.No.	Matter No. & C/T	Subject Matter	Present Status
		Negotiation of GATT.	
7.	OS 2/96 State of H.P. Vs. Union of India	Dispute between State of Himachal Pradesh and Union of India, Punjab, Haryana and Chandigarh and Rajasthan with regard to the Plaintiffs share in Bhakra Nangal and Beas Projects.	The Hon'ble Court vide its Order dt. 20-11-2000 directed to list the matter after 24 weeks to be listed after Summer Vacation.
8.	OS 6/96 State of Haryana Vs. State of Punjab & ANR.	Dispute between State of Haryana and Punjab with regard to re-starting and completion of STL Canal Project by the State of Punjab and to enable the State of Haryana to receive its share in Ravi and Beas Waters.	Shown in TL 1/2001. Page 32/Item 22 of TL 2001
9.	OS 1/99 State of M.P. Vs. Union of India & ORS.	Dispute between State of M.P. and Union of India, Gujarat, Maharashtra, Rajasthan with regard to utilization of Narmada Water.	The Ld. Registrar vide his Order dt. 25.4.2001 directed to send the file to him after Summer Vacation.
10.	OS ……/2001 State of Karnataka Vs. State of A.P.	Krishna Water Dispute.	Defective matter (Filed on 6/6/2001)

[1] See paragraph 3.1, infra.
[2] See Chapter 4, infra.
[3] Chapter 5, infra
[1] Paragraph 3.1, supra.
[2] See para 3.10(c), infra.
[3] Article 131, proviso and articles 262, 280, 290 etc. See also para 3.16, infra.
[4] See also para 3.2, supra and 3.14, infra.
[5] See para 3.5, supra.
[6] Cf. para 3.10, supra.
[7] See also para 3.15, infra.
[8] See para 3.13, infra.
[9] See para 3.12, infra.
[10] See further para 3.13, infra.
[11] See also paragraphs 3.2 and 3.8, supra.
[12] See also para 3.11, supra.
[13] See also para 3.7, supra.
[14] Order 27 A, CPC.
[15] Para 3.9, supra.
[16] Judicial decisions seem to take a negative view. State of Bihar Vs. Union of India, AIR 1970 SC 1446.
[17] Cf. para 8.12, infra.

[1] Cf. (a) In the matter of Cauvery Water Disputes Tribunal, AIR 1992 SC 522, para 11.
(b) Re. Cauvery Water Disputes Tribunal, AIR 1992 SC 1183; (1993) Suppl 1 SCC 96 (II).

[1] Cf. Setalvad, Union and State Relations under the Indian Constitution (1974), Page 100.
[1] In preparing this Chapter the material contained in Mr. Justice Venkataramiah and P.M. Bakshi. Federalism in India (1992), pages 141-154, has been utilized.
[2] Cooper Vs. Haron, (1958) 358 U.S. 5.
[3] Mason and Stephenson, American Constitutional Law (1986), pages 14,15.
[4] Section 75, Commonwealth of Australia Act.
[5] Para 8.9, infra.
[6] See papers presented at the 21st Australian Legal Convention, (1981) 55 Australian Law Journal.
[7] Hogg, Constitutional Law of Canada, (1977) pages 40,121, 122.
[8] *A. G of Ontario Vs. A. G. Canada*, (1912) AC 571 (PC).
[9] Section 338, Criminal Code, Canada (as amended 1974 – 1976).
[10] Bora Laskin, in (1975) 33 Canadian. Bar Review 469, 470.
[11] Articles 121, 128 and 130, Malaysia (1957).
Recently, there has been some re-naming of the Courts.

[12] Articles 128 (1) and 128 (2), Malaysia.
[13] Articles 4(3), 4(4), Malaysia.
[14] *Ah Thien Vs. Government of Malaysia*, (1976) 2 Malaysia Law Journal 112, 113 (Suffian, Lord President)
[15] Articles 92, 93, and 94, Basic Law (West Germany).
[16] MC Whinney, Constitutionalism in West Germany (1962), pages 17-19. Cf. M. Singer, "The Constitutional Court of the German Federal Republic", 31 ICLQ 331, 338.
[17] See G. Brinkman, "The West German Federal Constitutional Court" (1981) Public law 83.
[1] See Questionnaire annexed to this study.
[1] Para 3.17 to 3.20, supra.
[2] Paragraph 5.5, supra.
[3] Para 6.4, supra.