

DIVIDED LAWS IN A UNIFIED NATION: TERRITORIAL APPLICATION OF HIGH COURT DECISIONS

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*The fate of the Naz Foundation decision, until the Supreme Court decides on the appeal before it, rests upon the territorial applicability of the Delhi High Court judgment. This paper argues that at present the question of territorial application of a High Court judgment is unsettled as the existing precedent of the Kusum Ingots case is not decisive on the point. The paper evaluates the merits and demerits of various solutions, such as reintroduction of hitherto repealed Articles 131A and 226A of the Constitution, or intervention by the legislature or the judiciary. The key problems with adopting solutions suggested hitherto would be the possibility of failure on part of the Supreme Court or the legislature to notice a situation where a disparity in the law exists in different states, increased delay in deciding an issue in case of an extra reference being made to the Supreme Court or the legislature for intervention, loss of a stage of appeal or possibly stripping the High Courts of jurisdiction to enforce Fundamental Rights when constitutionality of a Central legislation is in issue. The paper then suggests an interesting solution whereby High Courts, after granting interim relief where necessary, shall submit constitutional questions to Regional Benches of the Supreme Court for decision on the limited issue of constitutionality, and that the problem of delay caused by shuttling between the high court and the Supreme Court would be offset by the benefit of uniformity in the law.***

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** Abstract supplied by Editors.

I. INTRODUCTION

The recent decision of the High Court of Delhi in *Naz Foundation v. Government of NCT*¹ (hereinafter “*Naz Foundation*”) has caught the imagination of many for different reasons. Some are substantive and others technical. My engagement with this case in the ensuing note is on a technical issue, the territoriality of high court judgments. To put it in a perspective, the reach of the judgment by the Delhi High Court is beyond the court’s territorial limits. This note will also raise issues of homogeneity of laws in a unified judicial system and the distribution in allocation of judicial power at various levels in the judiciary.

The case was initially filed in Delhi High Court as a public interest litigation writ. The court rejected the petition finding only academic value in the petition and held that the case is without a proper cause-of-action. The court nevertheless was required to hear the case, as it was sent back to the court by the Supreme Court.

This time however, the Court allowed the petition declaring that Section 377 of the Indian Penal Code, 1860 has to be read as not to bring within its ambit ‘consensual sexual acts of the adults in private’ as it is violative of Articles 21, 14 and 15 of the Constitution.² The territorial reach of the judgment is not spelt out by the Court in the judgment. The Court but is very clear that its interpretation shall stand till the parliament decides to act on the issue. The Court also made its opinion how the parliament could deal with the subject. The Court further said that the judgment shall not affect the finality of any concluded trial involving Section 377. Interestingly, there are none involving lesbian, gay, bisexual and transgender community.³

¹ (2009) 160 DLT 277; W.P. (C) No.7455/2001 of 2009 (Delhi HC).

² *See id.*, ¶ 132. The operative part of the judgment reads:
[W]e declare that Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By ‘adult’ we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act. This clarification will hold till, of course, Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report which we believe removes a great deal of confusion. Secondly, we clarify that our judgment will not result in the re-opening of criminal cases involving Section 377 IPC that have already attained finality.

³ Bibek Debroy, *The Non-Enforceable Section 377*, INDIAN EXPRESS, July 10, 2009, available at <http://www.indianexpress.com/news/the-nonenforceable-section-377/487704/> (Last visited on September 25, 2009).

Still no inkling as to territoriality of the court is forthcoming from the decision. Let me add some clues here: (i) the Court has decided on the constitutionality of the statute and declared that it is unconstitutional to the extent it has prescribed (since the categories on which the application of the provision is distinct and severable, the court found that the unconstitutionality is in bringing within its fold certain prohibited categories);⁴ (ii) the unconstitutionality is of the provision of a central legislation which has national application with the expected exceptions; (iii) the central government is a party to the proceedings, though in a “Pushmi-pullyu”⁵ sculpt.

Having said this, what is the law relating to the territoriality of high court judgments? It could be traced in Article 226 of the Constitution of India, square and simple. The territorial application of the high court orders is coextensive with the jurisdiction of the court.⁶ It could be beyond the court’s territory, in cases where the cause-of-action, either in part or in full, falls within the territorial limits of the court but the seat of government or authority or the residence of such person to whom orders are issued is outside the court’s territory.⁷

A misgiving in the context of *Naz Foundation* is normal here, as to what help the cause-of-action of this case could offer a solution to the problem, especially when the existence of the same was in doubt, though initially. A complete reading of the judgment fails to reveal, as it could be in public interest litigations, any particular cause-of-action, but a larger problem, which has a national dimension. However, the national character of the issue in itself cannot be a legal rationale to fasten extra territoriality for a high court judgment though Article 226 says otherwise.

Often, the decision in *Kusum Ingots* case is misquoted as an authority in dealing with the extra-territorial reach of a judgment by the high court.⁸ Justice S. B. Sinha said that, “[a]n order passed in a writ petition questioning the

⁴ See *supra* note 1, ¶ 127. (The Court identified two aspects for the doctrine of severability; (i) where words, expressions or parts of the provision are severable (ii) severability in application or severability in enforcement. The present case has been found to one that falls in the second species).

⁵ HUGH LOFTING, *THE STORY OF DOCTOR DOLITTLE* 73 (1948) (The antelope with heads at both ends of the body from Hugh Lofting’s series of ‘Doctor John Dolittle’. The hint is towards the divergent positions of two ministries of the Central Government; namely the Ministry of Home Affairs and the Ministry of Social Justice and Family Welfare).

⁶ See Constitution of India, Article 226(1).

⁷ See Constitution of India, Article 226(2) (The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.)

⁸ *Kusum Ingots and Alloys Ltd. v. Union of India and Anr.*, (2004) 6 SCC 254.

constitutionality of a central legislation, whether interim or final, keeping in view the provisions contained in Clause (2) of Article 226 of the Constitution of India, will have effect throughout the territory of India, subject of course, to the applicability of the Act.”

I would argue that despite a clear indication, the issue remains unsettled for two reasons. One, the above observation does not form part of the ratio of the judgment. The case essentially was on a question whether the relevant high court had jurisdiction to entertain a petition. The single contention of the appellant was that the Delhi High Court had jurisdiction to entertain a petition challenging the vires of a central law under Article 226 for the reason that Delhi is the seat of the parliament. Even though court made the above observation it rejected the appeal. Second, the Supreme Court has given contrary opinions in two later cases—*Ambika Industries and Durgesh Sharma*.⁹

The *Naz Foundation* judgment has raised an interesting issue as to the applicability of the judgment across the nation.¹⁰ The differing views are: (i) applicable nationwide; (ii) operation of the judgment is limited within the territorial limits of the Delhi High Court; (iii) applicable nationwide until another high court comes up with a conflicting judgment; (iv) applicable nationwide until the Supreme Court reverses the decision. Another line of argument is based on the nature of the order that if it is a declaratory judgment it is applicable beyond the borders and if the order is for compliance by a definite authority, it is limited.

II. THE PROBLEM

There is need for homogeneity of law in different parts of the country, especially when inconsistencies due to judicial pronouncements are not a rare phenomenon.¹¹ High courts have jurisdiction to determine the constitutional validity of an enactment¹² and do interpret laws and decide on rights and liabilities there under, irrespective of whether it is a central or state legislation. The uniformity of law and thereby analogous rights and liabilities of citizens will be defeated if the

⁹ *Ambika Industries v. Commissioner of Central Excise* (2007) 6 SCC 769; *Durgesh Sharma v. Jayshree*, (2008) 9 SCC 648. See also Shivprasad Swaminathan, *All-India Permit*, INDIAN EXPRESS, July 10, 2009, available at www.indianexpress.com/news/allindia-permit/487413/ (Last visited on September 25, 2009).

¹⁰ *Id.* See also THE RIGHT THAT DARES TO SPEAK ITS NAME: DECRIMINALIZING SEXUAL ORIENTATION AND GENDER IDENTITY IN INDIA 28, available at <http://www.altlawforum.org/news/gender-and-sexuality/the-377-campaign/The%20right%20that%20Dares%20to%20Speak%20its%20Name.pdf> (Last visited on September 25, 2009).

¹¹ See LAW COMMISSION OF INDIA, 136th Report, *Conflicts in High Court Decisions on Central Laws-How to Foreclose and How to Resolve* (1990) (The Law Commission has also devoted its 144th report titled *Conflicting Judicial Decisions Pertaining to the Code of Civil Procedure, 1908* to deal with the conflicting decisions of High Courts relating to issues arising in the Code).

¹² See Constitution of India, Article 228.

courts decide diversely on an issue. However, the judgment of a high court does not have a precedential value over the other. At the most, it can have persuasive significance.

III. LEARNING FROM THE PAST

Since the inconsistencies owing to judicial decisions is an existing reality, it is important to explore the reasons for it and to make enquiries as to how such situations could be resolved. If the current practices of resolution are acceptable, well, the quest is over, or else the enquiry endures.

A. 136TH REPORT OF THE LAW COMMISSION OF INDIA

The Law Commission of India has devoted its 136th Report to study this problem. It has mapped the existing mechanisms of resolution and evaluated the worth of each. The existing methods of resolution are twofold; judicial pronouncement by the Supreme Court and legislative clarification.¹³ The indication is that there should either be an intervention by the Supreme Court in an appropriate proceeding or by the legislature. The Supreme Court by its order would determine the differences and handout the correct position of law. The legislative intervention, on the same line, would sort out the confusion by the legislative action of amendment, repeal or explanation.

The problems of the intervention by the judiciary are the following:¹⁴

- a) Delay;
- b) Cases may or may not reach the Supreme Court;
- c) The case may not attain the desired culmination of determination of the problem. It could be settled, withdrawn or disposed off without a decision;
- d) Court may decide on some issues and not on the crucial issue, which requires determination.

The conclusion of the Commission is that, though a decision of the Supreme Court could be a solution, it is of suboptimal nature. The Supreme Court is not designed to deal with the problem.¹⁵

The issues in legislative intervention as identified by the Commission are highlighted below:¹⁶

¹³ *Supra* note 11.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

- a) Delay;
- b) Failure of the legislature to take notice;
- c) The legislature not resolving the matter, as it has not taken time out to deal with the issue;
- d) The legislature may even propose a change but there is no guarantee that it will be enacted to resolve the conflicts.

The imperfect nature of the solution plagues this model. In addition, the legislature is not designed to deal with such situation quickly and effectively.

The focus of the Law Commission diverts here to solving of specific issues of conflicts, that have thus far surfaced, and in figuring out appropriate legislative changes to fix those problems.¹⁷ The second set of recommendations attempts to ‘nip in the bud’ the problems of non-uniformity.¹⁸

The first part of the suggestion is that where High Court ‘A’ holds a divergent opinion about a central legislation than that of another High Court ‘B’ which has already given its opinion, High Court ‘A’ instead of deciding the matter should refer it to the Supreme Court.

A wider analysis of the recommendations points to the following:

1. High Court ‘B’ gets the first mover advantage eschewing the jurisdiction of all other high courts when they are coequals;
2. Until the Supreme Court steps-in and finally determines the issue, the law will continue to differ in different parts of the country;
3. The issue will reach the Supreme Court in the form of a reference, which will settle only the deadlock. The respective high courts then will have to dispose off the matter;
4. The high court is to decide the matter based on the Supreme Court’s holding. The issue could once again get to the Supreme Court in the form of appeal. This would result in multiplicity of proceedings;
5. The possibility of further delay due to the intermediate intervention of the Supreme Court;
6. The second set of parties have no option but to follow the reference to the Supreme Court, which may be ‘far and distant’ in all senses of the expression.

The recommendations though addresses majority of the problems, still retains certain issues like delay and multiplicity of proceedings. The consequent inquiry then should be the insurmountability of the problems involved in this suggestion and the availability of efficient alternatives. Let us first figure out the alternatives to test its potential.

¹⁷ *Id.*, CHAPTER IV, *Identification of some problems arising out of conflicting decisions of different High Courts and suggestions of remedial measures*, 8-24).

¹⁸ *Id.*

B. RE-INTRODUCTION OF ARTICLE 131A OR A SIMILAR ARTICLE IN THE CONSTITUTION

Article 131A¹⁹ was introduced to grant exclusive jurisdiction of deciding the constitutional validity of central laws to the Supreme Court.²⁰ The implication was the reduction of jurisdiction of high courts. Though part of a unified judiciary, the jurisdiction aspect of the High Courts has a position of importance in the federal structure of the country.²¹ Article 131A, read with Article 226A²² had virtually carted off the high courts' power to grant relief in cases of violation of fundamental rights by central legislations. The statement of object and reasons of the 43rd Amendment Act points out this as the rationale for the repeal of the Articles.

A reintroduction of the Article therefore might not be all that wise an idea, especially because, there may be situations where the constitutionality of the central legislation may not be under challenge but divergent interpretation of the provisions of the statute may still create differential positions. It is also imperative to appreciate the reason for its introduction by the infamous Forty-Second

¹⁹ See Constitution of India, [*Repealed*] Article 131A. - (Exclusive jurisdiction of the Supreme Court in regard to questions as to Constitutional validity of Central laws.- (1) Notwithstanding anything contained in any other provision of this Constitution, the Supreme Court shall, to the exclusion of any other court, have jurisdiction to determine all questions relating to the constitutional validity of any Central law. (2) Where a High Court is satisfied- (a) that a case pending before it or before a court subordinate to it involves questions as to the constitutional validity of any Central law or, as the case may be, of both Central and State laws; and (b) that the determination of such questions is necessary for the disposal of the case, the High Court shall refer the questions for the decision of the Supreme Court. (3) Without prejudice to the provisions of clause (2), where, on an application made by the Attorney-General of India, the Supreme Court is satisfied,- (a) that a case pending before a High Court or before a court subordinate to a High Court involves questions as to the constitutional validity of any Central law or, as the case may be, of both Central and State laws; and (b) that the determination of such questions is necessary for the disposal of the case, the Supreme Court may require the High Court to refer the questions to it for its decision. (4) When a reference is made under clause (2) or clause (3), the High Court shall stay all proceedings in respect of the case until the Supreme Court decides the questions so referred. (5) The Supreme Court shall, after giving the parties an opportunity of being heard, decide the questions so referred, and may (a) either dispose of the case itself; or (b) return the case to the High Court together with a copy of its judgment on such questions for disposal of the case in conformity with such judgment by the High Court or, as the case may be, the court subordinate to it. Rep. by the Constitution (Forty-third Amendment) Act, 1977, § 4 (w.e.f. 13-4-1978)).

²⁰ Critiques would be quick to add the ulterior motive of this amendment as clipping the judiciary, viewed against the background of emergency.

²¹ The entrenched position of the jurisdiction of High Court in Article 368 is an indicator.

²² See Constitution of India, Article 226A:

Constitutional validity of Central laws not to be considered in proceedings under Article 226 -Notwithstanding anything in article 226, the High Court shall not consider the constitutional validity of any Central law in any proceedings under that article.

Amendment²³ and its repeal by the Forty-Third Amendment²⁴ to the Constitution to consider this suggestion as a part of the solution. The same does not inspire confidence in its reintroduction.

C. SEPARATE COURT/BENCH TO DECIDE ON THE ISSUES RELATING TO CENTRAL STATUTES AT THE APEX LEVEL

Apparently promising, yet the same problem of tampering with the jurisdiction of the high courts persists. Accessibility issue would be the question mark as also the loss of an opportunity to appeal.

The latter issues can be resolved by having regional benches and these forums deciding only the constitutionality/interpretation question and remands the matter back. Then the courts of appropriate jurisdiction dispose the *lis* according to the declared interpretation of law. The jurisdiction aspect but lingers on.

An analogous thought can be observed in the latest report of the Law Commission of India, the 229th Report.²⁵ The report suggests the formation of a Constitution Bench and Four *Cassation Benches* at four regions. The illustrative list of issues that would come before this proposed constitution bench includes ‘references made by the zonal benches to larger benches *due to conflict of authority* or any other reason’.²⁶ This indicates, if nothing else, the existence of a thought stream, which considers it to be beneficial to have a committed branch to deal with specific issues.

D. CONTEMPLATIONS BY THE FRAMERS OF THE CONSTITUTION

The framers of the Constitution had considered alternatives like confining the jurisdiction of Supreme Court only to federal issues, dual system of courts in line with the U.S system, and the advisability of centralised character of judiciary.²⁷ The overall concern then seemed to be preserving national unity while not endangering the independence of the high courts.²⁸

²³ See The Constitution (Forty-Second Amendment Act), 1977.

²⁴ See The Constitution (Forty-Third Amendment Act), 1976.

²⁵ See LAW COMMISSION OF INDIA, 229th Report, *Need for division of the Supreme Court into a Constitution Bench at Delhi and Cassation Benches in four regions at Delhi, Chennai/ Hyderabad, Kolkata and Mumbai* (2009).

²⁶ *Id.* Emphasis added.

²⁷ GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 165 (1999).

²⁸ *Id.*

One specific question that sought resolution in the Union and Provincial Constitution Committees was the desirability of separate chain of courts to administer central laws. The opinions of the members converged in the negative.

IV. SYNTHESIS FOR A FEASIBLE SOLUTION

Legislative intervention has always been and will remain to be a means of solution as it is legitimately expected of them to intervene with legislative action where the basis of law is misunderstood, misapplied and misinterpreted. However, this being an action after conflicts have arisen, cannot solve the problem from occurring, rather, it can address when the problem has already occurred.

Assessment of the other available options reveals a clear inclination towards bestowing the Supreme Court with the duty to deal with central legislations. Two alternatives seem to be the probable course of action. One, not to disturb the existing jurisdiction of the high court and as and when another high court finds the potential of difference, refer it to Supreme Court (the same as 136th Report of the Law Commission of India). Second, take away the jurisdiction to deal with central laws from high courts altogether and have a separate bench of the Supreme Court to deal with the matter.

The second option takes away a level of appeal but could be a gain on a cost-benefit analysis. Sufficient regional benches could resolve the accessibility hitch. However, it is not easy to brush aside the fallibility aspect as a justification for appeal process. The downside of the first option has already been discussed.

The answer seems to be in merging the beneficial aspects of the above two attempting to minimise the negatives. Having dedicated benches of the Supreme Court at regional levels to deal with the references from high courts in a time bound mode and the duty of disposing of the case in tune with the directions remaining with the high courts could be a solution. This will save the jurisdiction of the high court and maintain the levels of appeals, the drawback of it being the inevitable delay. The delay could be offset by a potential benefit that since it is the Supreme Court, which through its regional bench determines the question of law, there need not be any more appeal to the Supreme Court on the same issue. This could save the time which otherwise would have been used for appeal after determination of the issue by the high court. At the same time, the parties are free to appeal to the Supreme Court if there are any other disserving issues.

V. SUGGESTED COURSE OF ACTION

1. High courts dealing with a question of law relating to a central legislation, inevitably have to refer the matter to the Regional Bench for determination;
2. Meanwhile, if it is question relating to the violation of fundamental rights or require immediate action, failing which

there could be frustration of justice, the high court may grant interim relief;

3. The parties need not appear before the Regional Bench as it is a question of law or interpretation, but at the same time parties should be free to submit their statement for the consideration of the Regional Bench;
4. It should be the duty of the state attorney to represent the high court at the Regional Bench to get the clarification and dispatch the same to the high court;²⁹
5. The respective high court then to dispose of the matter as per the direction of the Supreme Court. Interim relief to be modified or affirmed according to the clarification of the Supreme Court;
6. Later high courts are also bound to follow the same as it is an order of the Supreme Court;
7. Then possibility of appeal lies now to Supreme Court, not on the same question of law but on other issues, if there is any, as per the existing laws and procedures.

²⁹ See LAW COMMISSION OF INDIA, 136th Report (also suggesting the same).