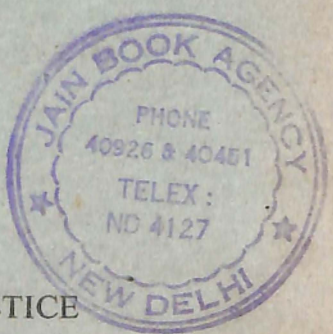
LAW COMMISSION OF INDIA

FORTY-FIFTH REPORT

CIVIL APPEALS TO THE SUPREME COURT ON A CERTIFICATE OF FITNESS

October, 1971



GOVERNMENT OF INDIA
MINISTRY OF LAW AND JUSTICE

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GOVERNMENT OF INDIA,
MINISTRY OF LAW AND JUSTICE

LAW COMMISSION,
Shastri Bhawan, New Delhi-1.

28*th October*, 1971.

P.B. GAJENDRAGADKAR,
CHAIRMAN

Shri H. R. Gokhale,
Minister of Law and Justice
Government of India
New Delhi.

My dear Minister,

I am sending herewith the Forty-fifth Report of the Law Commission on Civil Appeals to the Supreme Court on a certificate of fitness under Article 133 of the Constitution.

2. The first paragraph of the Report sets out the circumstances under which the Commission took up this matter for its consideration and report.

3. The previous Commission had considered the same question and made the Forty-fourth Report dealing with it; before submitting the said Report, the Commission had elicited public opinion and had examined the same. Therefore, we did not think it necessary to ascertain public opinion on the same point once again. Accordingly, we carefully considered the earlier Report, examined the merits of the problem and have made our present Report.

4. It is unnecessary to add that the present Report should be read along with the Forty-fourth Report. Nevertheless, we have attempted to make our Report self-contained, and have included in it our recommendations for the revision of Article 133 of the Constitution in a modified form.

5. Before I conclude, I wish to place on record the Commission's warm appreciation of the valuable assistance received from the Secretary Shri P. M. Bakshi in discussing the problem, formulating its conclusions and preparing the draft for the Commission's consideration.

Yours sincerely,
P. B. Gajendragadkar.

REPORT ON CIVIL APPEALS TO THE SUPREME COURT ON A CERTIEICATE OF FITNESS

Introductory.

1. This Report deals with civil appeals to the Supreme Court on a certificate of fitness under article 133(1)(c) of the Constitution. The scope and genesis of this Report should be first explained.

The Government of India had under consideration the question of limiting or restricting the right of appeal to the Supreme Court. The previous Law Commission was requested to examine whether it is at all rational to base the right of appeal on the value of the property to which the litigation relates. This question was examined by the Law Commission in its Report on the appellate jurisdiction of the Supreme Court in civil matters.[1] After due consideration and after considering the views of all High Courts, Bar Associations and State Governments in the country, the Law Commission came to the conclusion that in civil proceedings in the High Court an appeal should be permitted to the Supreme Court only if the High Court considers the case fit for appeal, keeping intact, of course, the discretion of the Supreme Court to grant special leave to appeal under article 136. The Law Commission, therefore, recommended the deletion of clauses (a) and (b) of article 133(1) of the Constitution, and recommended amendment of article 133(1) so as to limit it to cases where the High Court certifies that the case is a fit one for appeal to the Supreme Court. This Report of the Law Commission was submitted on the 30th of August, 1971. On the reconstitution of the Law Commission, Government have requested the Commission to examine the matter further. To quote from the letter of the Minister of Law and Justice,[2] "Before the Government takes a decision on the said recommendation made by the Law Commission the Government of India would like to have the views of the new Law Commission reconstituted under your Chairmanship. I have therefore to request you to give the view of the Law Commission on the said question as regards suitable amending article 133 of the Constitution so as to abolish the basis of valuation as conferring a right of appeal on a litigant. It may not be necessary for the Law Commission to investigate the matter again in detail as the earlier Law Commission had already fully considered the matter. On the material that was before the said Commission the Government of India would like to know whether the reconstituted Law Commission concurs in the conclusions and the recommendations

1. 44th Report of the Law Commission of India.

2. Letter of the Minister of Law and Justice to the Chairman, Law Commission dated 4th October, 1971.

made by the Law Commission in its 44th Report dated the 30th August 1971 or whether the Law Commission has any further useful suggestions to make." It is in pursuance of this request that this Report is being made.

Analysis of appealability under article 133 —Three broad tests.

2. Before we proceed to indicate our views in the matter, we consider it convenient to deal in brief with the three tests of appealability in civil matters under article 133(1) of the Constitution.

The main tests of appealability to the Supreme Court against judgments of the High Court in civil proceedings under article 133 (as it now stands) may, in broad terms, be described as :—

(1) the test of valuation;[1]

(2) the test of valuation coupled with the test of substantial question of law;[2]

(3) the test of fitness for appeal to the Supreme Court. By judicial decisions, the last mentioned test has come to be regarded as a test requiring a question of wide public or private importance.[3]

Test of valuation

3. First, as regards the test of valuation, laid down in article 133(1)(a) and (b) of the Constitution, the certificate required from the High Court is to the effect—

(a) that the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees (or such other sum as may be specified by Parliament by law); or

(b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value.

Scope of clauses (a) and (b)

4. The first portion, *i.e.* clause (a), requires that the subject-matter of the dispute must throughout have been of the prescribed value or amount. This clause does not present much difficulty in practice.

The second portion clause (b) is wider. This is indicated sufficiently by the word "involves", and also by the words "directly or indirectly". Judicial decisions generally emphasise that under this clause value of some property in addition to or other than the one in dispute in the suit, is to be taken into account.

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1. Paragraphs 3, 4 and 5, *infra*.
2. Paragraphs 6 to 10, *infra*.
3. See paragraphs 11 to 15, *infra*.

Decision of the Supreme Court on article 133(1)(a) and (b).

5. The Supreme Court has explained the scope of clauses(a) and (b) of article 133(1) as follows[1] :—

> Under clause (a), what is decisive is the amount or value of the subject-matter in the court of first instance and 'still in dispute' in appeal to the Supreme Court. Under clause (b), it is the amount or value of the property respecting which a claim or question is involved in the judgment sought to be appealed from. The word 'property' includes 'money'. But the property in respect of which the appeal arises must be property in addition to, or other than, the subject-matter of the dispute. If, in a proposed appeal, there is no claim or question raised respecting property other than the subject-matter, clause (a) will apply if there is involved in appeal a claim or question respecting property of an amount or value not less than Rs. 20,000 in addition to or other than the subject matter of the dispute, then clause (b) will apply.

Test of valuation and substantial question of law.

6. The second test, which has been adopted in article 133(1), last paragraph, is that of a "substantial question of law", which is required when a judgment, decree of final order appealed from affirms the decision of the court immediately below, and the appeal is sought to be filed on the basis of valuation. Briefly, therefore, this is a test of valuation coupled with a substantial question of law. Since two ingredients are required, the test is obviously narrower than the first test. But (as will be shown presently),[2] it is wider than the third test. In practice, controversies which arise in relation to this test are connected with the meaning of the expression "affirmed", and also with the meaning of the expression "substantial question of law".

History of the provision relating to "substantial question of law."

7. It may be noted that this condition (about the existence of a "substantial question of law") did not occur before 1874. When provisions regulating appeals to the Privy Council were consolidated in the Privy Council Appeals Act,[3] this condition appeared in section 5, which enacted that :[4]

> "Where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree, the appeal must involve some "substantial question of law."

The Code of Civil Procedure of 1877 contained the corresponding provision[5] in exactly similar terms. The validity of this provision was attacked before the Calcutta High Court, on the ground that it was *ultra vires* of the power of the Indian Legislature, as amounting to a curtailment of the jurisdiction given to the High Court by the Letters Patent; but the contention was rejected.[6]

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1. *Shan Pannalal Chandulal,* A.I.R. 1965 S.C. 1440, 1441, 1442; (1965) 2 S.C.R. 751.
2. Paragraph 10, *infra.*
3. Privy Council Appeals Act (6 of 1874), Section 5.
4. This has been noticed in I.L.R. 39 Mad. 843, 845, 849.
5. Section 596, Code of Civil Procedure, 1877 (10 of 1877).
6. *In the matter of Feda Hossein and Co.,* (1873) I.L.R. 1 Cal. 431, 448 (Markby, J.).

Section 596 of the Code of Civil Procedure, 1882, merely reproduced the original provision. In the Code of 1908, the words 'or final order' were added after the words 'the decree', but in other respects there was no change of substance.

Meaning of "substantial question of law".

8. That the word 'substantial' means substantial between the parties, was laid down long ago[1] by the Privy Council[2]. This was pointed out at length in a Madras case.[3]. In one case decided by the Supreme Court,[4] it was pointed out that the ground on which the appeal had been dismissed by the High Court, raised a question of law of importance to the parties, and that being so, the certificate had been properly granted in that case.

Privy Council decision.

9. The Privy Council[5] deicision on the subject was concerned with a judgment of the Chief Court of Oudh. The Chief Court of Oudh had, after stating that the only question of law arising in that case was as to the true construction of a will[6] said :

> "That, to our minds, is not a 'substantial question of law' though it is a question of law. It is not alleged that any recognised principle applicable to the construction of a document of the nature of the present will has been misunderstood or misused by this Court, nor does our decision lay down any general principle of construction. The construction which we have placed upon the *will in question is of no interest to any person outside the parties to the litigation.*[7] The old Court of the Judicial Commissioner of Oudh, to which the Court has succeeded, consistently adhered to the view[8] that the words 'substantial question of law' mean a question of general importance, and do not include the construction of a document in which the parties alone are interested."

The Privy Council rejected this approach.[9] Viscount Dunedin, delivering the judgment of their Lordships, regarded it as quite clear,—and indeed it was conceded by Mr. De Oruyther—that "substantial question of law" does not mean a question of general importance, but it means a substantial question of law as between the parties in the case involved.

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1. (a) *Raghunath Prasad Singh*, A.I.R. 1927 P.C. 110.
   (b) *Guran Datta* v. *Ram Datta*, A.I.R. 1928 P. C. 172, 173.
2. The apparently contrary dicta in *Moti Chand*, (1902) I.L.R. 24 All. 174 (P.C.) followed in *Bhagwant Lal*, A.I.R. 1928 All. 10-20, are now obsolete.
3. *Subbarao* v. *Veeraju*, A.I.R. 1951 Mad. 971, 972 paragraphs 6-7 (F.B.).
4. *Deputy Commissioner* v. *Rama*, A.I.R. 1953 S.C. 521, 523; (1954) S.C.R. 506.
5. *Raghunath Prasad* v. *Deputy Commissioner or Partabgarh*, A. I. R. 1927 P.C. 110; I.L.R. 2 Luck. 93, 96 (P.C.).
6. Observations of the Chief Court are quoted in (1927) I.L.R. 2 Luck. 93, 94.
7. Emphasis supplied.
8. A number of Such cases were referred to, as well as the judgment of the Allahabad High Court in I.L.R. 46 All. 227.
9. *Raghunath Prasad* v. *Deputy Commissioner of Partabgarh*, A.I.R. 1927 P.C. 110; I.L.R.-2 Luck. 93, 96.

Wide scope of substantial question of law.

10. If the question is of general public importance, then certainly it would be substantial. But, if it directly and substantially affects the right of the parties,[1] then also it would be substantial, provided it is either an open question, in the sense that it has not been settled by the Supreme Court, Privy Council or Federal Court, or is not free from difficulty, or calls for alternative views.

The Supreme Court[2] has, after reviewing the various shades of view prevalent in the High Courts[3] on this point, observed—

> "The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties, and if so, whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the pleas raised is palpably absurd, the question would not be a substantial question of law."[2]

For this reason, the mere appreciation of the effect of documentary evidence or the meaning of entries and terms in a document does not raise a substantial question of law.[4]

Test of fitness for appeal to the Supreme Court.

11. The third and last test is of fitness for appeal to the Supreme Court. In its very nature, no precise rules can be formulated as to the scope and ambit of this test as it is now expressed. It was with reference to the corresponding clause in the Code of Civil Procedure of 1882[5] that Lord Hobhouse made the following observation :—

> "That it is clearly intended to meet special cases—such, for example, as those in which the point of dispute is not measurable by money, though it may be of great public or private importance."[6]

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1. See *Chunilal Mehta* v. *C. S. & M. Co. Ltd.*, A.I.R. 1962, S.C. 1314, 1318, paragraph 6; (1962) Supp. S.C.R. 549.
2. *Chunilal Mehta* v. *C.S. & M. Co. Ltd.*, A.I.R. 1962, S.C. 1314, 1318; (1962) Supp. S.C.R. 549.
3. (a) *Kaikushroo* v. *C. P. Syndicate*, A.I.R. 1949 Bom. 134.
   (b) *Dinkar Rao* v. *Ratten Singh*, A.I.R. 1949, Nag. 300, 301-302, paragraphs 7 to 10.
   (c) *Subba Rao*, A.I.R. 1951 Mad. 969 (F.B.).
4. Lachmanlal, (1895) I.L.R. 22 Cal. 609, 617, 618.
5. Section 596, Code of Civil Procedure, 1882.
6. *Banarasi Parshad* v. *Kashi Krishna*, (1901) 28 I.A. 11, 13; I.L.R. 23 All. 227 (P.C.).

A mere substantial question of law arising *between the parties* is not, sufficient for the purpose.[1]

A question cannot for this purpose be said to be of public importance unless it is such as would arise frequently for decision, and affect many parties in litigation.[2] Further, a question which has been settled by the highest authority is not one which can be certified under this clause.[3]

Questions of private importance.

12. What is meant by great private importance[4] could be illustrated by two Madras cases. In the first of them,[5] the actual pecuniary amounts in appeal were small (Rs. 400 and Rs. 600); but the zamindar, who was one of the parties, contended that the question was one of great private importance to him, because there were many other persons in the zamindari holding under the zamindar whose rights were governed by documents similar to those construed by the Court in these cases. Application for leave to appeal to the Privy Council under section 109(c), of the Code of Civil Procedure was refused by the Madras High Court, on the ground that private importance means private importance to both parties and not to only one of them. On the other hand, in a later case, where there were disputes between two temples of considerable antiquity and of considerable importance, leave was granted because the question whether the decision of the High Court was right or wrong was a matter of "considerable private importance to both parties and almost of public importance".

Formulation of precise rules not possible.

13. By its very nature, the right of appeal under clause (c) is such that no shackles can be imposed upon its ambit by precise rules, the only test being whether the case is fit for appeal to the Supreme Court. The broad consideration, no doubt, is that the point is of great public or private importance. But that is only an illustration, and not an exhaustive statement of the principles to be applied.

Some guide-lines in Orders-in-Council regarding appeals to Judicial Committee.

14. It would, however, be of interest to note that the Orders-in-Council issued to regulate appeals to the Judicial Committee from many of the Colonies, after providing for appeal as of right from a final judgment of the highest court of the Colony in cases where the matter in dispute on appeal amounted to or was of the

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1. (a) *Iqbal Bahadury* v. *Mt. Ram Sree*, A.I.R. 1934 All. 58, 60;
   (b) *Govind* v. *Mt. Indravati*, A.I.R. 1950 All. 38;
   (c) *Sein Htaung* v. *V.E.A. Chettyar Fir*, A.I.R. 1936 Rang. 65, 66.
2. *Rucheha Sai Kiwar* v. *Hansrain*, A.I.R. 1928 All. 220.
3. *Muhammad Hussain* v. *Ganga Naicken*, A.I.R. 1963 Mad. 223.
4. Paragraph 11, *supra*.
5. *Sathupathi* v. *Tiruneelakantam*, A.I.R. 1923 Mad. 232, 235.
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value of the specified sum or upward or where the appeal involved, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the specified value or upward, dealt with appeal at the discretion of the highest court of the Colony in a formula covering questions of wide public or private[1] importance.

Order-in-Council for Borneo Territories.

15. For example,[2] contemporaneously with establishment of a Supreme Court for the three territories of Sarawak, North Borneo and Brunei, there was promulgated the Sarawak, North Borneo and Brunei (Appeal to the Privy Council) Order-in-Council, 1951, which provides for appeal to Her Britannic Majesty in Council—

(a) as of right, from any final judgment of the Court of Appeal, where the matter in dispute amounts to the value of five hundred pounds sterling, or more, or where the appeal involves some claim or property of a comparable amount; and

(b) at the discretion of the Court of Appeal, from any other judgement if, in the opinion of the Court, "the question involved in the appeal is one which, by reason of its great general or public importance or otherwise" ought to be submitted to the Privy Council.[3]

Order-in-Council for Africa.

16. Another example is furnished by the Order-in-Council regulating appeals from East Africa.[4] In addition to appeal as of right on the basis of valuation, the Order-in-Council provides for appeals at the discretion of the highest court of the country from any other judgment, whether final or inter-locutory, if in the opinion of the court the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council for decision.

Position in New Zealand.

17. The position regarding New Zealand is understood to be similar. Leave to appeal to the Privy Council may be given at the discretion of the Court of Appeal from any judgment, whether final or interlocutory, if the court considers it proper to do so because of the great general or public importance of the appeal or otherwise.[5]

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1. For examples, see Jennings, Constitutions of the Commonwealth, (1952), page 54.

2. See Sheridan, Malaya and Singapur and Borneo territories—The Development of Laws and Constitutions, (1961), pp. 133-134.

3. Appeals to the Privy Council Order in Council, 1951, section 3.

4. Section 3(b), Eastern Africa (Appeal to Privy Council) Order in Council, 1931; S.I. 1951, No. 609, referred to in Halsbury, 3rd Edn., Vol. 5, page 684, paragraph 1461.

5. Robson, New Zealand, the Development of its Laws and Constitution, (1967), page 84

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5. Robson, New Zealand, the Development of its Laws and Constitution, (1967), page 84

Pr vy Counci decision in Canadian case.

18. In a case[1] from Canada, their Lordships of the Privy Council were dealing with the question of special leave, and laid down that special leave should not be granted where the decision to be appealed against does not raise a far-reaching question of law or matters of dominant public importance.

Some guidelines of fitness for appeal.

19. Some of the guidelines adopted in determining if the case is a fit one to be certified under clause (c) of section 109, Civil Procedure Code which corresponds to article 133(1)(c) are—

(a) the case is likely to affect numerous cases of a like nature;[2] or

(b) the point is of such a nature that a decision thereon might result in a precedent governing numerous cases. *e.g.* suits for arrears of rent,[3] or may affect several properties;[4]

(c) there are other exceptional circumstances justifying the grant of a certificate.

It is needless to repeat that these situations are mentioned here only to illustrate what cases are likely to be regarded as fit for appeal to the Supreme Court.

First two tests to be deleted as recommended in earlier Report.

20. *So far as the first two tests (based on pecuniary value) are concerned, we agree with the recommendation made in the earlier Report*[5]*, to delete clause (a) and (b) of article* 133(1) and in particular, with the reasons adduced in the Report in support of that recommendation,[6] namely, that all ordinary litigation should end in the High Court, and only exceptional circumstances should justify recourse to the Supreme Court.

Futher limitation necessary as regards the third test.— Question involved must be one of law.

21. After careful consideration of the problem, we have come to the conclusion that we should also recommend one more limitation with reference to the third test of appealability, which is concerned with the grant of a certificate of fitness. In our view, there ought to be some limitations as to the cases in which the certificate of fitness could be granted. In the first place, the grant of a certificate should be ruled out where the questions involved are not of law. So far as questions of fact are concerned, the judgment, decree or final order of the High Court should be final—except, of course, in those exceptional cases where the Supreme Court chooses to intervene under article 136.

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1. *Albright* v. *Hydro-Electric Power Commission* of *Ontario,* (1923) A.C. 167, 169 (P.C.). (Viscount Haldane).

2. *Gotan Lime Syndicate* v. *Income-tax Commissioner,* A.I.R. 1964 Raj. 277, 278, 279, para. 4-5 (reviews case-law).

3. *Gulab Bai* v. *Manchoo,* A.I.R. 1953 Rai. 242,45, paragraph 18 (Wanchoo, C.J. Ranawat and Sharma, JJ). (Question whether decision of court of lower jurisdiction will be res judicata in second suit triable by higher court by virtue of accumulation of arrears of rent,—case held to be fit for appeal because suits for arrears of rent were common).

4. *Gangaram* v. *Bapuji,* A.I.R. 1943 Nag. 76, 77.

5. 44th Report, paragraph 19.

6. 44th Report, paragraph 15.

Secondly, it is not enough that a question of law is involved. It should also be a condition precedent to the grant of a certificate of fitness that the question of law must be of a nature or magnitude which justifies recourse to the highest judicial organ of the country.

Nature of questions of law fit for decision by Supreme Court.

22. We shall indicate very broadly the nature of the questions of law which we regard as appropriate for submission to the Supreme Court under article 133.

Uniformity.

23. First,—and the most important of all,—is the consideration of uniformity. The unity of the Indian legal system, brought into being by what have come to be known as the Anglo-Indian Codes, must undeniably be maintained. In so far as interpretation of those Codes is concerned, it is the task of the judiciary to maintain that unity, and the Supreme Court, as the highest tribunal at the national level, should continue to have the ultimate authority to establish unity by resolving divergence of views in different High Courts.

Here, we do not have in mind merely Central Acts. There are, on many subjects, legislative measures which, while enacted by invididual State Legislatures, possess features similar to measures passed by the legislatures of other States. The various State Acts relating to Universities, police, children, correctional measures, land reforms, rent control, court fees, sales tax and the like, contain provisions substantially similar to each other, and it is desirable that uniformity of application and interpretation of such laws which, while appearing on the statute book as Acts of different States, are integral parts of the legal system, should not be underrated.

Position in Germany and Switzerland.

24. It may be of interest to mention here that the Basic Law of Germany[1] expressly refers to the need for preserving uniformity of application in the Republic. The relevant provisions are as follows :—

> "Article 95. (1) To preserve the uniformity of application of federal law a Supreme Federal Court will be established.
>
> (2) The Supreme Federal Court decides cases in which the decision is of fundamental importance for the uniformity of the administration of justice by the higher federal courts.

Similarly, in Switzerland, the primary task of the Federal Tribunal is to ensure the uniform application of the federal laws. As the Federal legislature has used its constitutional grant of power to establish single uniforms codes of justice, most law has become federal law. As there are no inferior federal

1. Article 95(1) and (2), Basic Law of the Federal Republic of Germany.

Pr vy Council decision in Canadian case.

18. In a case[1] from Canada, their Lordships of the Privy Council were dealing with the question of special leave, and laid down that special leave should not be granted where the decision to be appealed against does not raise a far-reaching question of law or matters of dominant public importance.

Some guidelines of fitness for appeal.

19. Some of the guidelines adopted in determining if the case is a fit one to be certified under clause (c) of section 109, Civil Procedure Code which corresponds to article 133(1)(c) are—

(a) the case is likely to affect numerous cases of a like nature;[2] or

(b) the point is of such a nature that a decision thereon might result in a precedent governing numerous cases, *e.g.* suits for arrears of rent,[3] or may affect several properties;[4]

(c) there are other exceptional circumstances justifying the grant of a certificate.

It is needless to repeat that these situations are mentioned here only to illustrate what cases are likely to be regarded as fit for appeal to the Supreme Court.

First two tests to be deleted as recommended in earlier Report.

20. *So far as the first two tests (based on pecuniary value) are concerned, we agree with the recommendation made in the earlier Report*[5]*, to delete clause (a) and (b) of article* 133(1) and in particular, with the reasons adduced in the Report in support of that recommendation,[6] namely, that all ordinary litigation should end in the High Court, and only exceptional circumstances should justify recourse to the Supreme Court.

Futher limitation necessary as regards the third test.— Question involved must be one of law.

21. After careful consideration of the problem, we have come to the conclusion that we should also recommend one more limitation with reference to the third test of appealability, which is concerned with the grant of a certificate of fitness. In our view, there ought to be some limitations as to the cases in which the certificate of fitness could be granted. In the first place, the grant of a certificate should be ruled out where the questions involved are not of law. So far as questions of fact are concerned, the judgment, decree or final order of the High Court should be final—except, of course, in those exceptional cases where the Supreme Court chooses to intervene under article 136.

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1. *Albright* v. *Hydro-Electric Power Commission* of *Ontario,* (1923) A.C. 167, 169 (P.C.). (Viscount Haldane).

2. *Gotan Lime Syndicate* v. *Income-tax Commissioner,* A.I.R. 1964 Raj. 277, 278, 279, para. 4-5 (reviews case-law).

3. *Gulab Bai* v. *Manchoo,* A.I.R. 1953 Rai. 242,45, paragraph 18 (Wanchoo, C.J. Ranawat and Sharma, JJ). (Question whether decision of court of lower jurisdiction will be res judicata in second suit triable by higher court by virtue of accumulation of arrears of rent,—case held to be fit for appeal because suits for arrears of rent were common).

4. *Gangaram* v. *Bapuji,* A.I.R. 1943 Nag. 76, 77.

5. 44th Report, paragraph 19.

6. 44th Report, paragraph 15.

Secondly, it is not enough that a question of law is involved. It should also be a condition precedent to the grant of a certificate of fitness that the question of law must be of a nature or magnitude which justifies recourse to the highest judicial organ of the country.

Nature of questions of law fit for decision by Supreme Court.

22. We shall indicate very broadly the nature of the questions of law which we regard as appropriate for submission to the Supreme Court under article 133.

Uniformity.

23. First,—and the most important of all,—is the consideration of uniformity. The unity of the Indian legal system, brought into being by what have come to be known as the Anglo-Indian Codes, must undeniably be maintained. In so far as interpretation of those Codes is concerned, it is the task of the judiciary to maintain that unity, and the Supreme Court, as the highest tribunal at the national level, should continue to have the ultimate authority to establish unity by resolving divergence of views in different High Courts.

Here, we do not have in mind merely Central Acts. There are, on many subjects, legislative measures which, while enacted by invididual State Legislatures, possess features similar to measures passed by the legislatures of other States. The various State Acts relating to Universities, police, children, correctional measures, land reforms, rent control, court fees, sales tax and the like, contain provisions substantially similar to each other, and it is desirable that uniformity of application and interpretation of such laws which, while appearing on the statute book as Acts of different States, are integral parts of the legal system, should not be underrated.

Position in Germany and Switzerland.

24. It may be of interest to mention here that the Basic Law of Germany[1] expressly refers to the need for preserving uniformity of application in the Republic. The relevant provisions are as follows :—

> "Article 95. (1) To preserve the uniformity of application of federal law a Supreme Federal Court will be established.
>
> (2) The Supreme Federal Court decides cases in which the decision is of fundamental importance for the uniformity of the administration of justice by the higher federal courts.

Similarly, in Switzerland, the primary task of the Federal Tribunal is to ensure the uniform application of the federal laws. As the Federal legislature has used its constitutional grant of power to establish single uniforms codes of justice, most law has become federal law. As there are no inferior federal

1. Article 95(1) and (2), Basic Law of the Federal Republic of Germany.

courts in Switzerland, the case which the Federal Tribunal decides come to it directly from the courts of all twenty-two cantons. Therefore, if on any point or points of law involved in a case, there appears to be a divergence of views, there is a fit case for grant of certificate.

Questions of law of general importance.

25. Secondly, apart from questions of interpretation of Central Acts in general and of State Acts which fall in the category mentioned above,[1] there arise questions of law of general importance. The uncodified law constitutes a fertile ground for such questions. The law of torts, and so much of the personal law as has not yet been codified, furnish examples. There might also be questions of construction of statutes which do not depend on the wording of particular provisions of the statute, but concern general principles, such as the commencement of statutes, the effect of repeal, the vires of subordinate legislation, and the like. Such questions, even though they arise with reference to a provision in the nook and corner of a State Act, possess an importance which transcends the narrow area of that nook and corner.

Questions already decided by the Supreme Court but requiring re-consideration.

26. Thirdly, there may be points already decided by the Supreme Court which may, nevertheless, appear to the High Court to require further consideration. Not unoften, a Bench of High Court Judges dealing with a question of law on which there has already been a pronouncement by the Supreme Court, comes to take the view that the matter is capable of further consideration at the hands of the Supreme Court and that the grant of a certificate of fitness would further the cause of justice. In some of the cases which may fall under this category, the High Court may take the view that there are decisions of the Supreme Court which contain observations that are not quite consistent with each other, and such a case would be obviously fit for a certificate. Similarly, where a judgment of the Supreme Court contains observations that are ambiguous, and the High Court thinks the ambiguity should be removed by clarification, a certificate may appropriately be granted.

Difference of opinion among the Judges in the High Court Bench.

27. Fourthly, when there has been a difference of opinion among the Judges of the High Court Bench on a question of law, and the usual avenues of settling the differences within the High Court have been exhausted, there may, amongst the Judges, survive an impression that the question is one of such difficulty that it ought to be allowed to be submitted for decision by a yet higher tribunal.

Other questions of law fit for decision by the Supreme Court.

28. Finally, apart from questions falling within the categories stated above, there remain questions of law of a nature or magnitude rendering it appropriate that the Supreme Court should take cognizance of them, and the opportunity that has arisen for its so taking cognizance should be availed of. Questions falling within this residuary category, though not easy of definition in the abstract, can be recognised when they arise in practice.

1. Paragraph 23, *supra*.

Questions of law which are not considered fit for decision by the Supreme Court.

29. So much as regards the questions which we contemplate as appropriately falling within the appellate jurisdiction under article 133(1)(c). We should also state here that we do not visualise such a wide scope for the jurisdiction of the Supreme Court as would embrace every question of law which is "substantial between the parties". This clarification on our part becomes necessary because the expression "substantial question of law" has been given a wide meaning[1] by the Privy Council. This wide meaning was given with reference to the provisions in the Code of Civil Procedure, sections 109 and 110, corresponding to article 133(1)(a) and (b) of the Constitution. In our view, such questions should not engage the time and attention of the Supreme Court. The Supreme Court, being essentially the highest court at the national level which declares the law which is binding, should not ordinarily engage itself in settling factual controversies, however great the stakes may be, unless, of course, it feels that in the interests of justice its interference on facts is called for under article 136. The paramount consideration indicated by the words "fit for appeal to the Supreme Court" which occur in clause (c) of article 133(1), rules out such questions. We are sure that the undesirability of an appeal being permitted merely because the parties regard the question of law as of some importance, will, as heretofore, continue to be borne in mind by the High Courts after the proposed amendment of article 133(1)(c).

Practice in the U.S.A.

30. The points that we have made above will show that our anxiety is to emphasise that resort to the Supreme Court is not to be permitted except where the question of law is one of the nature indicated above. It may be useful, by way of comparison, to refer to the practice of the Supreme Court of the U. S. A. in granting certiorari.

The analogy is not totally applicable ; nevertheless, it is helpful as bringing out some aspects.

The Supreme Court of the U. S. A. has made it clear that it will grant certiorari "only where there are special and important reasons therefor", and particularly :

Where a court of appeals has rendered a decision in conflict with the decisions of another court of appeals on the same matter ; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law ; or has decided an important question of federal law which has not been but should be, settled by this court ; or has decided a federal question in a way in conflict with applicable decisions of this court ; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.[2]

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1. See paragraph 8, *supra*.
2. U.S. Sup. Ct. Rule 19(1)(b).

Certificate not to be granted lightly.

31. We believe that in emphasising what we have emphasised above, we are not only not doing violence to the scope of article (133) (1) (c) as properly understood, but are furthering its true spirit. We find that in the earlier Report[1] also, the Law Commission observed—

> "The Supreme Court, in our opinion, should be troubled only if the High Court finds itself in great difficulty in deciding a case and the question of law is of great importance. As we have said, such occasions would and should be few".

Difficulty of formulating a test.

32. It is not easy to formulate in precise language a test which, while excluding the questions to be excluded from the purview of the Supreme Court, will include all questions to be included in its purview in conformity with what we have stated above.[2] And yet, some formulation was to be attempted. After careful consideration, we have come to the conclusion that two requirements should be stressed, namely, that (i) the question involved in the proposed appeal must be a substantial question of law of general importance, and (ii) the question must be one which needs to be decided by the Supreme Court. The requirement that the question must be one which needs to be decided by the Supreme Court will render it necessary for the High Courts to approach the matter after paying due regard to the considerations which we have outlined above.[2]

Jurisdiction under article 136 to be preserved.

33. It is needless to add that the jurisdiction of the Supreme Court under article 136 of the Constitution to entertain an appeal by special leave—a jurisdiction which is admittedly not subject to any rigid limitation pertaining to courts, proceedings or questions—is not intended to be affected by our recommendation or by the preceding discussion.

Before making our recommendation as above, we had an opportunity of consulting the Hon'ble the Chief Justice of India, and we may state that the Hon'ble the Chief Justice personally approves of the change proposed by us. We are grateful to the Hon'ble the Chief Justice for giving us the benefit of his views.

The Hon'ble the Chief Justice has further suggested that the Law Commission may consider whether an amendment on somewhat similar lines should not be proposed in article 134 and the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, repealed. However, this question may have to be dealt with separately.

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1. 44th Report, paragraph 14.
2. Paragraphs 22 to 29, *supra*.

34. In the light of the above discussion, we recommend that article (133)(1) of the Constitution should be amended so as to read as follows :— Principal recommendation for amendment of article 133(1).

"(1) An appeal shall lie to the Supreme Court from any judgement, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifiies—

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

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

35. So far as transitional provisions are concerned, we think that it is sufficient if they are framed on the same lines as were recommended in the earlier Report.[1] Transitional provisions.

36. We should make it clear that we do not, in making a recommendation[2] for amending article 133(1), wish to underrate the importance of the Supreme Court, or to impose undue restrictions on access to the Supreme Court for getting questions of law decided. Opinions could differ as to the proper role of the highest court in the land as a court of appeal in questions not raising constitutional issues. We have attempted to indicate what we conceive to be its proper role. The High Court should not be thought of as another step in the ladder of appeals. So far as questions of fact or questions of law of minor importance are concerned, the litigant should be content with the position as resulting from the judgement of the High Court. The possibility that another Court may take a different view on facts or on questions of law of minor importance, always remains. If it does, its decision is not necessarily likely to be more satisfactory to the defeated party or to the society at large than the decision of the Court below. A party may be anxious to have his case taken to yet another court. But the quetion still remains how far it is in the public interest to do so. These are the broad considerations that have weighed with us. Broad considerations that have weighed with the Commission.

37. We cannot do better than quote a minute which the Law Member in the Government of India had occasion to record a century ago.[3] Minute of Hobhouse.

"In considering what limit should be assigned to the power of appealing, our leading maxim is, that it is the interest of the commonwealth to have an end of law suits. No man has a right to unlimited draughts on the time and money of the public in order to get his private affairs settled as he wishes. The State's duty is discharged when it has provided such a reasonable amount of attention and skill and honesty as

1. 44th Report, paragraph 29.

2. Paragraph 34, *supra*.

3. Hobhouse, Minute dated 5th September, 1872, on the Bill leading to the Privy Counc Appeal Act, 1874.

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