NATIONAL LITIGATION POLICY

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I. INTRODUCTION

Whereas at the National Consultation for Strengthening the Judiciary toward Reducing Pendency and Delays held on the 24th and 25th October, 2009 the Union Minister for Law and Justice, presented resolutions which were adopted by the entire Conference unanimously.

And Wherein the said Resolution acknowledged the initiative undertaken by the Government of India to frame a National Litigation Policy with a view to ensure conduct of responsible litigation by the Central Government and urges every State Government to evolve similar policies.

The National Litigation Policy is as follows:-

I. THE VISION/MISSION

1. The National Litigation Policy is based on the recognition that Government and its various agencies are the pre-dominant litigants in courts and Tribunals in the country. Its aim is to transform Government into an Efficient and Responsible litigant. This policy is also based on the recognition that it is the responsibility of the Government to protect the rights of citizens, to respect fundamental rights and those in charge of the conduct of Government litigation should never forget this basic principle.

"EFFICIENT LITIGANT" MEANS

- Focusing on the core issues involved in the litigation and addressing them squarely.
- Managing and conducting litigation in a cohesive, coordinated and time-bound manner.
- Ensuring that good cases are won and bad cases are not needlessly persevered with.
- A litigant who is represented by competent and sensitive legal persons: competent in their skills and sensitive to the facts that Government is not an ordinary litigant and that a litigation does not have to be won at any cost.

"RESPONSIBLE LITIGANT" MEANS

- That litigation will not be resorted to for the sake of litigating.
- That false pleas and technical points will not be taken and shall be discouraged.
- Ensuring that the correct facts and all relevant documents will be placed before the court.

- That nothing will be suppressed from the court and there will be no attempt to mislead any court or Tribunal.

2. Government must cease to be a compulsive litigant. The philosophy that matters should be left to the courts for ultimate decision has to be discarded. The easy approach, "Let the court decide," must be eschewed and condemned.

3. The purpose underlying this policy is also to reduce Government litigation in courts so that valuable court time would be spent in resolving other pending cases so as to achieve the Goal in the National Legal Mission to reduce average pendency time from 15 years to 3 years. Litigators on behalf of Government have to keep in mind the principles incorporated in the National mission for judicial reforms which includes identifying bottlenecks which the Government and its agencies may be concerned with and also removing unnecessary Government cases. Prioritisation in litigation has to be achieved with particular emphasis on welfare legislation, social reform, weaker sections and senior citizens and other categories requiring assistance must be given utmost priority.

4. <u>The Stakeholders:</u>

A) In ensuring the success of this policy, all stake holders will have to play their part – the Ministry of Law & Justice, Heads of various Departments, Law Officers and Government Counsel, and individual officers all connected with the concerned litigation. The success of this policy will depend on its strict implementation. Nodal Officers will be appointed by Heads of Department.

"Head of Department" means the administrative person ultimately responsible for the working of the Department or Agency, as the case may be.

B) The appointment of Nodal Officers must be done carefully. The Nodal Officer has a crucial and important role to play in the overall and specific implementation of this Policy, including but not limited to the references made hereinafter. Every Ministry must be mindful of the responsibility to appoint proper Nodal Officers who have legal background and expertise. They must be in a position to pro-actively manage litigation. Whilst making such appointments, care must be taken to see that there is continuity in the incumbents holding office. Frequent changes in persons holding the position must be avoided. Nodal Officers must also be subjected to training so that they are in a position to understand what is expected of them under the National Litigation Policy.

C) Accountability is the touch-stone of this Policy. Accountability will be at various levels; at the level of officers in charge of litigation, those responsible for defending cases, all the lawyers concerned and Nodal Officers. As part of accountability, there must be critical appreciation on the conduct of cases. Good cases which have been lost must be reviewed and subjected to detailed scrutiny to ascertain responsibility. Upon ascertainment of responsibility, suitable action will have to be taken. Complacency must be eliminated and replaced by commitment.

D) There will be Empowered Committees to monitor the implementation of this Policy and accountability. The Nodal Officers and the Heads of Department will ensure that all relevant data is sent to the Empowered Committees. The Empowered Committee at the National level shall be chaired by the Attorney General for India and such other members not exceeding six in number as may be nominated by the Ministry of Law

with an Additional Secretary to be the Member Secretary. There will be four Regional Empowered Committees to be chaired by an Additional Solicitor General nominated by the Ministry of Law. It shall include all the Assistant Solicitors General of the Region and such other members including a Member Secretary nominated by the Ministry of Law. The Regional Committees shall submit monthly reports to the National Empowered Committee which shall in turn submit Comprehensive Reports to the Ministry of Law. It shall be the responsibility of the Empowered Committee to receive and deal with suggestions and complaints including from litigants and Government Departments and take appropriate measures in connection therewith.

II. GOVERNMENT REPRESENTATION

A) While it is recognized that Government Panels are a broad based opportunity for a cross section of lawyers, Government Panels cannot be vehicles for sustaining incompetent and inefficient persons. Persons who recommend names for inclusion on the Panel are requested to be careful in making such recommendations and to take care to check the credentials of those recommended with particular reference to legal knowledge and integrity.

B) Screening Committees for constitution of Panels will be introduced at every level to assess the skills and capabilities of people who are desirous of being on Government Panels before their inclusion on the Panel. The Ministry of Law shall ensure that the constitution of Screening Committees will include representatives of the Department concerned. The Screening Committees will make their recommendations to the Ministry of Law. Emphasis will be on identifying areas of core competence, domain expertise and areas of specialisation. It cannot be assumed that all lawyers are capable of conducting every form of litigation.

C) Government advocates must be well equipped and provided with adequate infrastructure. Efforts will be made to provide the agencies which conduct Government litigation with modern technology such as computers, internet links, etc. Common research facilities must be made available for Government lawyers as well as equipment for producing compilations of cases.

D) Training programs, seminars, workshops and refresher courses for Government advocates must be encouraged. There must be continuing legal education for Government lawyers with particular emphasis on identifying and improving areas

of specialization. Law schools will be associated in preparing special courses for training of Government lawyers with particular emphasis on identifying and improving areas of specialization. Most importantly, there must be an effort to cultivate and instill values required for effective Government representation.

E) National and regional conferences of Government advocates will be organized so that matters of mutual interest can be discussed and problems analysed.

F) Advocates on Record must play a meaningful role in Government litigations. They cannot continue to be merely responsible for filing appearances in Court. A system of motivation has to be worked out for Government advocates under which initiative and hard work will be recognised and extraordinary work will be rewarded. This could be in the form of promotions or out of turn increments.

G) It will be the responsibility of all Law Officers to train Panel lawyers and to explain to them what is expected of them in the discharge of their functions.

H) Panels will be drawn up of willing, energetic and competent lawyers to develop special skills in drafting pleadings on behalf of Government. Such Panels shall be flexible. More and more advocates must be encouraged to get on to such Panels by demonstrating keenness, knowledge and interest.

I) Nodal Officers will be responsible for active case management. This will involve constant monitoring of cases particularly to examine whether cases have gone "off track" or have been unnecessarily delayed.

J) Incomplete briefs are frequently given to Government Counsel. This must be discontinued. The Advocates-on-Record will be held responsible if incomplete

briefs are given. It is the responsibility of the person in charge of the Central Agency concerned, to ensure that proper records are kept of cases filed and that copies retained by the Department are complete and tally with what has been filed in Court. If any Department or Agency has a complaint in this regard it can complain to the Empowered Committee.

K) There should be equitable distribution of briefs so that there will be broad based representation of Government. Additional Solicitors General will be associated with regard to distribution of briefs in the High Court. Complaints that certain Panel advocates are being preferred in the matter of briefing will be inquired into seriously by the Empowered Committee.

L) Government lawyers are expected to discharge their obligations with a sense of responsibility towards the court as well as to Government. If concessions are made on issues of fact or law, and it is found that such concessions were not justified, the matter will be reported to the Empowered Committee and remedial action would follow.

M) While Government cannot pay fees which private litigants are in a position to pay, the fees payable to Government lawyers will be suitably revised to make it remunerative. Optimum utilisation of available resources and elimination of wastage will itself provide for adequate resources for revision of fees. It should be ensured that the fees stipulated as per the Schedule of Fees should be paid within a reasonable time. Malpractice in relation to release of payments must be eliminated.

III. ADJOURNMENTS

A) Accepting that frequent adjournments are resorted to by Government lawyers, unnecessary and frequent adjournments will be frowned upon and infractions dealt with seriously.

B) In fresh litigations where the Government is a Defendant or a Respondent in the first instance, a reasonable adjournment may be applied for, for obtaining instructions. However, it must be ensured that such instructions are made available and communicated before the next date of hearing. If instructions are not forthcoming, the matter must be reported to the Nodal Officer and if necessary to the Head of the Department.

C) In Appellate Courts, if the paper books are complete, then adjournments must not be sought in routine course. The matter must be dealt with at the first hearing itself. In such cases, adjournments should be applied for only if a specific query from the court is required to be answered and for this, instructions have to be obtained.

D) One of the functions of the Nodal Officers will be to coordinate the conduct of litigation. It will also be their responsibility to monitor the progress of litigation, particularly to identify cases in which repeated adjournments are taken. It will be the responsibility of the Nodal Officer to report cases of repeated and unjustified adjournments to the Head of Department and it shall be open to him to call for reasons for the adjournment. The Head of the Agency shall ensure that the Records of the case reflect reasons for adjournment, if these are repeated adjournments. Serious note will be taken of cases of negligence or default and

the matter will be dealt with appropriately by referring such cases to the Empowered Committee. If the advocates are at fault, action against them may entail suspension/removal of their names from Government Panels.

E) Cases in which costs are awarded against the Government as a condition of grant of adjournment will be viewed very seriously. In all such cases the Head of Department must give a report to the Empowered Committee of the reasons why such costs were awarded. The names of the persons responsible for the default entailing the imposition of costs will be identified. Suitable action must be taken against them.

IV. PLEADINGS / COUNTERS

A) Suits or other proceedings initiated by or on behalf of Government have to be drafted with precision and clarity. There should be no repetition either in narration of facts or in the grounds.

B) Appeals will be drafted with particular attention to the Synopsis and List of Dates which will carefully crystallise the facts in dispute and the issues involved. Slipshod and loose drafting will be taken serious note of. Defaulting advocates may be suspended/removed from the Panels.

C) Care must be taken to include all necessary and relevant documents in the appeal paper book. If it is found that any such documents are not annexed and this entails an adjournment or if the court adversely comments on this, the matter will be enquired into by the Nodal Officer and reported to the Head of Department for suitable action.

D) It is noticed that Government documentation in court is untidy, haphazard and incomplete, full of typing errors and blanks. Special formats for Civil Appeals, Special Leave Petitions, Counter Affidavits will be formulated and circulated by way of guidance and instruction as a Government Advocates Manual. This will include not only contents but also the format, design, font size, quality of paper, printing, binding and presentation. It is the joint responsibility of the Drafting Counsel and the Advocate on Record to ensure compliance.

E) Counter Affidavits in important cases will not be filed unless the same are shown to and vetted by Law Officers. This should, however, not delay the filing of counters.

V. FILING OF APPEALS

A) Appeals will not be filed against ex parte ad interim orders. Attempt must first be to have the order vacated. An appeal must be filed against an order only if the order is not vacated and the continuation of such order causes prejudice.

B) Appeals must be filed intra court in the first instance. Direct appeals to the Supreme Court must not be resorted to except in extraordinary cases.

C) Given that Tribunalisation is meant to remove the loads from Courts, challenge to orders of Tribunals should be an exception and not a matter of routine.

D) In Service Matters, no appeal will be filed in cases where:

a) the matter pertains to an individual grievance without any major repercussion;

b) the matter pertains to a case of pension or retirement benefits without involving any principle and without setting any precedent or financial implications.

E) Further, proceedings will not be filed in service matters merely because the order of the Administrative Tribunal affects a number of employees. Appeals will not be filed to espouse the cause of one section of employees against another.

F) Proceedings will be filed challenging orders of Administrative Tribunals only if

a) There is a clear error of record and the finding has been entered against the Government.

b) The judgment of the Tribunal is contrary to a service rule or its interpretation by a High Court or the Supreme Court.

c) The judgment would impact the working of the administration in terms of morale of the service, the Government is compelled to file a petition; or

d) If the judgment will have recurring implications upon other cadres or if the judgment involves huge financial claims being made.

G) Appeals in Revenue matters will not be filed:

a) if the stakes are not high and are less than that amount to be fixed by the Revenue Authorities;

b) If the matter is covered by a series of judgments of the Tribunal or of the High Courts which have held the field and which have not been challenged in the Supreme Court;

c) where the assessee has acted in accordance with long standing industry practice;

d) merely because of change of opinion on the part of jurisdictional officers.

H) Appeals will not be filed in the Supreme Court unless:

a) the case involves a question of law;

b) If it is a question of fact, the conclusion of the fact is so perverse that an honest judicial opinion could not have arrived at that conclusion;

c) Where public finances are adversely affected;

d) Where there is substantial interference with public justice;

e) Where there is a question of law arising under the Constitution;

f) Where the High Court has exceeded its jurisdiction;

g) Where the High Court has struck down a statutory provision as ultra vires;

h) Where the interpretation of the High Court is plainly erroneous.

I) In each case, there will be a proper certification of the need to file an appeal. Such certification will contain brief but cogent reasons in support. At the same time, reasons will also be recorded as to why it was not considered fit or proper to file an appeal.

VI. LIMITATION : DELAYED APPEALS

A) It is recognized that good cases are being lost because appeals are filed well beyond the period of limitation and without any proper explanation for the delay or without a proper application for condonation of delay. It is recognized that such delays are not always bonafide particularly in cases where high revenue stakes are involved.

B) Each Head of Department will be required to call for details of cases filed on behalf of the Department and to maintain a record of cases which have been dismissed on the ground of delay. The Nodal Officers must submit a report in every individual case to the Head of Department explaining all the reasons for such delay and identifying the persons/causes responsible. Every such case will be investigated and if it is found that the delay was not bonafide, appropriate action must be taken. Action will be such that it operates as a deterrent for unsatisfactory work and malpractices in the conduct of Government litigation. For this purpose, obtaining of the data and fixing of responsibility will play a vital role. Data must be obtained on a regular basis annually, bi-monthly or quarterly.

C) Applications for condonation of delay are presently drafted in routine terms without application of mind and resorting to word processed “boiler plate.” This practice must immediately stop. It is responsibility of the drafting counsel to carefully draft an application for condonation of delay, identifying the areas of delay and identifying the causes with particularity. Drafting advocates who fail to adhere to this may be suspended/removed from the Panel.

D) Every attempt must be made to reduce delays in filing appeals/applications. It shall be responsibility of each Head of Department to work out an appropriate system for elimination of delays and ensure its implementation.

E) Belated appeals filed beyond the period of limitation cannot be approached merely from the point of view that courts have different approaches towards condonation of delay. Since some courts liberally grant condonation of delay, a general apathy seems to have taken over. The tendency on the part of Government counsel to expect leniency towards Government for condonation of delay must be discouraged. The question of limitation and delay must be approached on the premise that every court will be strict with regard to condonation of delay.

VII. ALTERNATIVE DISPUTE RESOLUTION

ARBITRATION

A) More and more Government departments and PSUs are resorting to arbitration particularly in matters of drilling contracts, hire of ships, construction of highways, etc. Careful drafting of commercial contracts, including arbitration agreements must be given utmost priority. The Ministry of Law and Justice recognizes that it has a major role to play in this behalf.

B) The resort to arbitration as an alternative dispute resolution mechanism must be encouraged at every level, but this entails the responsibility that such an arbitration will be cost effective, efficacious, expeditious, and conducted with high rectitude. In most cases arbitration has become a mirror of court litigation. This must be stopped.

C) It is recognized that the conduct of arbitration at present leaves a lot to be desired. Arbitrations are needlessly dragged on for various reasons. One of them is by repeatedly seeking adjournments. This practice must be deplored and stopped.

D) The Head of Department will call for the data of pending arbitrations. Copies of the roznama, etc. (record of proceedings) must be obtained to find out why arbitrations are delayed and ascertain who is responsible for adjournments. Advocates found to be conducting arbitrations lethargically and inefficiently must not only be removed from the conduct of such cases but also not briefed in future arbitrations. It shall be the responsibility of the Head of Department to

call for regular review meetings to assess the status of pending arbitration cases.

E) Lack of precision in drafting arbitration agreements is a major cause of delay in arbitration proceedings. This leads to disputes about appointment of arbitrators and arbitrability which results in prolonged litigation even before the start of arbitration. Care must be taken whilst drafting an arbitration agreement. It must correctly and clearly reflect the intention of the parties particularly if certain items are required to be left to the decision of named persons such as engineers are not meant to be referred to arbitration.

F) Arbitration agreements are loosely and carelessly drafted when it comes to appointment of arbitrators. Arbitration agreements must reflect a well defined procedure for appointment of arbitrators. Sole arbitrator may be preferred over a Panel of three Arbitrators. In technical matters, reference may be made to trained technical persons instead of retired judicial persons.

G) It is also found that certain persons are “preferred” as arbitrators by certain departments or corporations. The arbitrator must be chosen solely on the basis of knowledge, skill and integrity and not for extraneous reasons. It must be ascertained whether the arbitrator will be in a position to devote time for expeditious disposal of the reference.

H) It is found that if an arbitration award goes against Government it is almost invariably challenged by way of objections filed in the arbitration. Very often these objections lack merit and the grounds do not fall within the purview of the scope of challenge before the courts. Routine challenge to arbitration awards

must be discouraged. A clear formulation of the reasons to challenge Awards must precede the decision to file proceedings to challenge the Awards.

VIII. SPECIALISED LITIGATION

A) Proceedings seeking judicial review including in the matter of award of contracts or tenders.

Such matters should be defended keeping in mind Constitutional imperatives and good governance. If the proceedings are founded on an allegation of the breach of natural justice and it is found that there is substance in the allegations, the case shall not be proceeded with and the order may be set aside to provide for a proper hearing in the matter. Cases where projects may be held up have to be defended vigorously keeping in mind public interest. They must be dealt with and disposed off as expeditiously as possible.

B) Cases involving vires, or statutes or rules and regulations.

In all such cases, proper affidavits should be filed explaining the rationale between the statute or regulation and also making appropriate averments with regard to legislative competence.

C) PUBLIC INTEREST LITIGATIONS (PILS)

- Public Interest Litigations must be approached in a balanced manner. On the one hand, PILs should not be taken as matters of convenience to let the courts do what Government finds inconvenient. It is recognized that the increase in PILs stems from a perception that there is governmental inaction. This perception must be changed. It must be recognized that several PILs are filed for collateral reasons including publicity and at the instance of third parties. Such litigation must be exposed as being not bonafide.

- PILs challenging public contracts must be seriously defended. If interim orders are passed stopping such projects then appropriate conditions must be insisted upon for the Petitioners to pay compensation if the PIL is ultimately rejected.

D) PSU LITIGATIONS

- Litigation between Public Sector Undertakings inter se between Government Public Sector Undertakings is causing great concern. Every effort must be made to prevent such litigation. Before initiating such litigation, the matter must be placed before the highest authority in the public sector such as the CMD or MD. It will be his responsibility to endeavour to see whether the litigation can be avoided. If litigation cannot be avoided, then alternative dispute resolution methods like mediation must be considered. Section 89 of the Code of Civil Procedure must be resorted to extensively.

IX. REVIEW OF PENDING CASES

A) All pending cases involving Government will be reviewed. This Due Diligence process shall involve drawing upon statistics of all pending matters which shall be provided for by all Government departments (including PSUs). The Office of the Attorney General and the Solicitor General shall also be responsible for reviewing all pending cases and filtering frivolous and vexatious matters from the meritorious ones.

B) Cases will be grouped and categorized. The practice of grouping should be introduced whereby cases should be assigned a particular number of identity according to the subject and statute involved. In fact, further sub-grouping will also be attempted. To facilitate this process, standard forms must be devised which lawyers have to fill up at the time of filing of cases. Panels will be set up to implement categorization, review such cases to identify cases which can be withdrawn. These include cases which are covered by decisions of courts and cases which are found without merit withdrawn. This must be done in a time bound fashion.