REVIEW OF THE WORKING OF THE CONSTITUTION

REPORT OF THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION



VOLUME—I

REPORT

OF

THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION

VOLUME – I

VIGYAN BHAVAN ANNEXE
MAULANA AZAD ROAD
NEW DELHI – 110 011
March 2002

1206 LJ&CA/2002—1A

National Commission to Review the Working of the Constitution

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- Justice Shri R.S. Sarkaria
- Justice Shri Kottapalli Punnayya
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CONTENTS

VOLUME I

		Page No.
Letter from the Chairperson forwarding the Report		(I)
Acknowledgements		(III)
Chapters		
1.	Introduction	1
2.	Basic Approach and Perspective	23
3.	Fundamental Rights, Directive Principles and Fundamental Duties	83
4.	Electoral Processes and Political Parties	119
5.	Parliament and State Legislatures	154
6.	Executive and Public Administration	176
7.	The Judiciary	198
8.	Union-State Relations	222
9.	Decentralization and Devolution	259
10.	Pace of Socio-Economic Change	289
11.	Summary of Recommendations	315
Notes of Members		371

VOLUME II

BOOK - 1

1.	**Gazette Notifications**		1
2.	**Advisory Panels**		13
3.	**Consultation Papers**		
	(i)	Enlargement of Fundamental Rights	23
	(ii)	Pace of Socio-Economic Change under the Constitution	55
	(iii)	Literacy in the context of the Constitution of India	233
	(iv)	Social Security and Employment	285
	(v)	Effectuation of Fundamental Duties of Citizens	369
	(vi)	Review of the Working of Political Parties specially in relation to Elections and Reform Options	419
	(vii)	Review of Election Law, Processes and Reform Options	473
	(viii)	Immunity of Legislators: What do the words 'in respect of anything said or any vote given by him' in article 105(2) signify?	539
	(ix)	Efficacy of Public Audit System in India: C&AG	559
	(x)	Probity in Governance	583
	(xi)	Liability of State in Tort	665
	(xii)	Superior Judiciary	703
	(xiii)	All India Judicial Service	749

BOOK – 2

3. **Consultation Papers (Contd.)**

(xiv)	Financial Autonomy of the Indian Judiciary	765
(xv)	Constitutional Mechanism for the settlement of Inter-State Disputes	831
(xvi)	Treaty-making power under our Constitution	861
(xvii)	The Institution of Governor under the Constitution	889
(xviii)	Article 356 of the Constitution	925
(xix)	Review of the Working of the Constitutional Provisions for Decentralisation (Panchayats)	955
(xx)	Decentralization and Municipalities	1007
(xxi)	Empowering and Strengthening local self-government in Cantonments	1093
(xxii)	Empowerment and Strengthening of Panchayat Raj Institutions/ Autonomous District Councils/Traditional tribal governing institutions in North East India	1135

BOOK – 3

4. **Background Papers**

(i)	Working of Parliament and Need for Reforms	1213
(ii)	Some ideas in Governance	1229
(iii)	Concurrent Power of Legislation under List III of the Indian Constitution	1245
(iv)	Fiscal and Monetary Policies	1259
(v)	Barriers to Inter-State Trade & Commerce – The Case of Road Transport	1273
(vi)	Article 262 and Inter-State Disputes relating to Water	1353
(vii)	Pace of Socio-Economic Change and Development under the Constitution	1385

5. **List of Organisations/Individuals who sent representations to the Commission** 1423

6. **List of Organisations/Individuals who responded to the Consultation Papers/Questionnaires issued by the Commission** 1451

7. **List of Organisations/Delegations/Individuals who interacted with the Commission** 1465

8. **List of Seminars sponsored by the Commission** 1469

9. **Minutes of meetings of the Commission** 1473

10. **Report of the Drafting and Editorial Committee** 1581

Justice M. N. Venkatachaliah
(Former Chief Justice of India)
Chairperson

सत्यमेव जयते

राष्ट्रीय संविधान कार्यकरण समीक्षा आयोग
विज्ञान भवन एनेक्सी,
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NATIONAL COMMISSION TO REVIEW
THE WORKING OF THE CONSTITUTION
VIGYAN BHAWAN ANNEXE,
MAULANA AZAD ROAD,
NEW DELHI-110011

March 31, 2002

Dear Mr. Prime Minister,

I am happy to present to you the Report of the National Commission to Review the Working of the Constitution.

My colleagues in the Commission and I have been guided, right from the inception of our work, by our conviction that the exercise to review the working of the Constitution would be meaningful and productive – even in the minutest degree – only if undertaken, from start to finish, in an objective and strictly non-partisan way, drawing judiciously and realistically upon experience thus far and with as clear a perception as may be of existing and emerging problems impinging on national reconstruction as lighted by the ideals, values and goals of the Constitution.

It is in this spirit that we endeavoured to invite the cooperation of all who felt they had something to say in regard to the subject matter before the Commission. The Commission is sincerely and deeply appreciative of the advice and assistance tendered to it by eminent persons and institutions engaged in diverse sections of nation-building activity. These included: distinguished parliamentarians, judges, civil servants, experts in the fields of science and technology, economic sciences, as well as jurists, and prominent personalities in the Media.

Many leaders of political parties were particularly forthcoming to contribute their ideas and perceptions as to what needed to be done to strengthen our Constitution to fulfill its objectives better.

The Commission sought to secure in its work as broad an engagement as possible of the public. Consultation Papers on various topics, prepared for the Commission by expert bodies, were publicized through the print and electronic media and placed on the Commission's web-site, and reactions from the people at large invited. The Commission was glad to avail of a large number of responses received from all regions of the country, from persons with stand-points in a wide-ranging variety of sectors. It was gratifying to note the interest in the public mind in the working of the Constitution and its organs, mechanisms and processes, and the frank expression of views in this respect made no doubt with a keen sense of personal involvement and duty as citizens with a real and direct stake in national well-being.

In reviewing the working of the Constitution, in the light of over fifty years of experience gained thus far, and formulating recommendations, the Commission has completed the task set for it in February 2000. Some recommendations, if found acceptable, may entail amendments to the Constitution; legislative interventions would be adequate for some others; and for the rest, administrative measures may suffice.

It is my pleasant duty to put on record that it has been a satisfactory experience to work with the distinguished members of the Commission who worked with a sense of duty and without accepting any consideration for performing the onerous task as a team. Members of the Drafting and Editorial Committee worked hard to draft and edit the report and help the Commission to adhere to the time schedule for presentation of the Report.

My colleagues in the Commission and I commend this Report to you.

With profound regards,

Yours sincerely,

(M.N. VENKATACHALIAH)

Shri Atal Bihari Vajpayee,
Prime Minister of India,
NEW DELHI.

ACKNOWLEDGEMENTS

The task of review of the working of the Constitution in its range, depth and complexity is such that any degree of its satisfactory accomplishment would have been impossible without collaborative assistance from many sources. The list of those who have earned the Commission's gratitude in this behalf is so large and the measure of the indebtedness of the Commission so deep that a mere formal expression of gratitude is inadequate.

To,

Justice Shri V.R. Krishna Iyer, Chairman, Justice Shri M. Jagannadha Rao, Prof. Amrik Singh, Shri Andre Beteille and Prof. Mushirul Hassan – Members of the Advisory Panel on "Enlargement of Fundamental Rights".

To,

Justice Shri R.S. Sarkaria, Chairman, Dr. M.G. Rao and Shri G.V. Ramakrishna – Members of the Advisory Panel on "Union State Relations".

To,

Justice Shri H.R. Khanna, Chairman, Dr. Jayaprakash Narayan and Dr. V.A. Pai Panandikar – Members of the Advisory Panel on "Strengthening of the Institutions of Parliamentary Democracy".

To,

Justice Shri O. Chinnappa Reddy, Chairman and Shri Raju Ramachandran, Shri R. Venkataramani, Shri Vinod Bobde, Shri Gopal Subramaniam and Prof. (Smt.) S.K. Verma – Members of the Advisory Panel on "Effectuation of Directive Principles".

To,

Justice Dr. K. Ramaswamy, Chairman and Shri P.S. Krishnan, Dr. Sukumar Azhikode and Dr. D. Swaminadhan – Members of the Advisory Panel on "Pace of Socio-Economic change and development under the Constitution".

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The Commission conveys its profound gratitude.

The Commission recalls with the sense gratitude of Dr. Subhash C. Kashyap, Chairman, Shri K. Parasaran and Dr. Abid Hussain, Members of the Drafting and Editorial Committee for the enduring value of the services rendered by them.

The Commission records with affection and appreciation the dedicated services of Dr. Raghbir Singh, (former Secretary to the Government of India) whose services have been invaluable to the Commission. Dr. Raghbir Singh co-ordinated the meetings of the Commission and of the Advisory Panels with commendable efficiency and patience, handling the complex procedures. The Chairman and the Members of the Commission convey their appreciation and gratitude to Dr. Raghbir Singh.

The Commission places on record the services of the team of officers consisting of Shri N.K. Nampoothiry, Additional Legislative Counsel, Dr. D.B. Singh, Deputy Secretary, Shri D. Bhardwaj, Deputy Research Officer, Shri K. Shankar, Deputy Research Officer, Shri S.R. Mishra, Assistant Legal Adviser, Dr. V.K. Singh, Assistant Legal Adviser and the establishment work done by Shri A.K. Pandey, Section Officer. These officers and their colleagues performed the responsibilities with meticulous care and put themselves whole heartedly on jobs assigned to them.

The Chairman expresses his appreciation of the valuable services rendered by his personal staff – Shri Naresh Kumar Sharma, Principal Private Secretary and Shri Mahesh Kumar Sharma, Personal Assistant for their sincere and devoted services.

The Commission places on record services of Late Prof. P.M. Bakshi, Ms. Maja Daruwala, Prof. N.R. Madhava Menon, Prof. Maitra, Prof. V.S. Rekhi and Prof. M.P. Singh, Dr. G. Mohan Gopal, Prof. S.P. Sathe for their research support.

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CHAPTER 1

INTRODUCTION

CONTENTS

1.1	➢ Genesis of the Commission	1.7	➢ Projects and Finance Committee
1.2	➢ Tenure of the Commission	1.8	➢ Eliciting Public Opinion
1.3	➢ Terms of Reference	1.9	➢ Process of Interaction
1.4	➢ Earlier efforts to review the Constitution	1.10	➢ Deliberations of the Commission
1.5	➢ Methodology and Procedure	1.11	➢ Drafting and Editorial Committee
1.6	➢ Consultation Papers and Advisory Panels	1.12	➢ Adoption of the Report

CHAPTER 1

INTRODUCTION

Genesis of the Commission

1.1.1 Pursuant to the President's address to the two Houses of Parliament assembled together at the commencement of the first session after the thirteenth general election to Lok Sabha, the Government of India, Ministry of Law, Justice and Company Affairs (Department of Legal Affairs), *vide* its Resolution, dated the 22 February, 2000 resolved to constitute "the National Commission to Review the Working the Constitution" to make suitable recommendations. The said resolution was subsequently modified by the Government *vide* its notifications dated 17 March, 2000 and 27 March, 2000 (Gazette Notifications are reproduced in Volume II).

1.1.2 The Resolution stipulated that the Commission shall consist of a whole-time Chairperson who shall be a person of distinction with knowledge and expertise of constitutional issues and in the working of the democratic institutions of the nation. It was further stipulated that besides the Chairperson, the Commission shall have not more than ten other Members who shall be selected on the basis of their proven expertise and knowledge in the field of constitutional law, economics, politics, law, sociology, political science and other relevant subjects. The Commission shall have a Secretary of the status of a Secretary to the Government of India to assist the Commission.

1.1.3 Accordingly, on 23 February 2000, the President of India appointed Justice Shri M.N. Venkatachaliah, former Chief Justice of India as the Chairperson of the Commission and the following persons as the other Members of the Commission:

1. Justice Shri B.P. Jeevan Reddy, Chairman, Law Commission of India
2. Justice Shri R.S. Sarkaria, former Judge, Supreme Court of India
3. Justice Shri Kottapalli Punnayya, former Judge, Andhra Pradesh High Court
4. Shri P.A.Sangma, former Speaker, Lok Sabha; and Member of Parliament
5. Shri Soli J. Sorabjee, Attorney General for India
6. Shri K. Parasaran, Senior Advocate and former Attorney General for India
7. Dr.Subhash C. Kashyap, former Secretary General, Lok Sabha
8. Shri C.R. Irani, Chief Editor and Managing Director, *The Statesman*
9. Dr. Abid Hussain, former Ambassador of India in the USA
10. Smt. Sumitra G. Kulkarni, former Member of Parliament, (Rajya Sabha)

Dr. Raghbir Singh, Secretary to the Government of India in the Ministry of Law, Justice and Company Affairs (Legislative Department) was asked to look after the work of the Secretary to the Commission immediately and on his superannuation, he was appointed as the Secretary to the Commission with effect from 1 April 2000.

Tenure of the Commission

1.2 In its Resolution of 22 February 2000, Government stipulated that the Commission shall complete its work and make its recommendations within one year. Government of India in the Ministry of Law, Justice and Company Affairs (Department of Legal Affairs) *vide* its Amending Notifications of 20 February 2001, 30 October 2001 and 26 February 2002 successively extended the tenure of the Commission upto 31 October 2001, 28 February 2002 and 31 March 2002 (Gazette Notifications are reproduced in Volume II).

1206 LJ&CA/2002—2B

Terms of Reference

1.3.1 The Resolution of the Government of India, Ministry of Law, Justice and Company Affairs (Department of Legal Affairs) of 22 February 2000 stipulated the following as the terms of reference of the Commission :-

> "The Commission shall examine, in the light of the experience of the past 50 years, as to how best the Constitution can respond to the changing needs of efficient, smooth and effective system of governance and socio-economic development of modern India within the framework of parliamentary democracy and to recommend changes, if any, that are required in the provisions of the Constitution without interfering with its basic structure or features."

1.3.2 The Government authorized the Commission to decide its own procedure and hear and entertain all persons, representations and communications which in the opinion of the Commission shall facilitate its work and final recommendation.

Earlier efforts to review the Constitution

1.4.1 There was nothing entirely new in the effort at reviewing the working of our Constitution. The debate had continued right from the first decade of the life of the Constitution. Also, every amendment had been an occasion for review. But, in the half-a-century and more since the Constitution came into force, whereas as many as eighty-five amendments have been instituted, there has been (till the setting up of the National Commission to Review the Working of the Constitution) no comprehensive and transparent official exercise to review the working of the Constitution in its entirety with a view to evaluating its achievements and failures in fulfilling the objectives of the Constitution in the context of experience gained, and for future requirements perceived.

1.4.2 That the Constitution ought to be amenable to change to allow for emerging needs was always recognized. This was emphasized – right from its nascent stage; indeed, even from the time the document was being conceived

and tissue, texture and shape was being given to it. The framers of the Constitution themselves had that vision and prescience. Speaking on the Objectives Resolution on 22 January 1947, Jawaharlal Nehru had declared:

> "A free India will see the bursting forth of the energy of a mighty nation. What it will do and what it will not, I do not know, but I do know that it will not consent to be bowed down... This House cannot bind down the next generation or the people who will duly succeed us..."

1.4.3 Nehru was prominent amongst those who had first broached the idea of a Constituent Assembly to draw up a Constitution for a renascent India. As the head of the Interim Government and a prime-mover of the Constitution-making process, he was deeply immersed and dynamically involved in every stage of the framing of the Constitution. Yet Nehru reiterated this view over and over again, on appropriate occasions. Speaking of the Draft Constitution on 8 November 1948, Nehru said:

> "The Constitution is after all some kind of legal body given to the ways of Government and the life of the people. A Constitution if it is out of touch with the people's life, aims and aspirations, becomes rather empty: if it falls behind those aims, it drags the people down. It should be something ahead to keep people's eyes and minds made up to a certain high mark... Remember this that while we want this Constitution to be as solid and as permanent a structure as we can make it, ... there should be a certain flexibility. If you make anything rigid and permanent, you stop a nation's growth, the growth of a living, vital, organic people."

1.4.4 After the Constitution came into force, within two years, it was required to be amended. In the course of his speech on the Constitution (First Amendment) Bill, 1951, on 2 June 1951 Nehru once again repeated his views as to the need for the Constitution to be amenable to amendment. On this occasion, his words were trenchant and unsparing. He said:

> ".. ..... we have in India a strange habit of making gods of various things, adding them to our innumerable pantheon, and having given them our theoretical worship, doing exactly the

reverse. If we want to kill a thing in this country, we deify it. That is the habit of this country largely. So if you wish to kill this Constitution, make it sacred and sacrosanct – certainly. If you want it to be a dead thing, not a growing thing, a static, unwieldy, unchanging thing, then by all means do so, realizing that that is the best way of stabbing it in the front and in the back... A Constitution which is unchanging and static, it does not matter how good it is, but as a Constitution it is past its use. It is in its old age already and gradually approaching its death. A Constitution to be living must be growing; must be adaptable; must be flexible; must be changeable... Therefore, it is a desirable and a good thing for people to realize that this very fine Constitution that we have fashioned after years of labour, is good in so far as it goes, but as society changes as conditions change, we amend it in the proper way. It is not like the unalterable law of the Medes and Persians that it cannot be changed, although the world around may change."

1.4.5 Four years later, as an experienced Prime Minister with prolonged first-hand knowledge of the efficacy of the fundamental law of the land, he held the same view. Speaking on the Constitution (Fourth Amendment) Bill, 1955 Nehru said:

> "After all, the Constitution is meant to facilitate the working of the Government and the administrative and other structures of this country. It is meant to be not something that is static and which has a static form in a changing world, but something which has something dynamic in it, which takes cognizance of the dynamic nature of modern conditions, modern society."

1.4.6 In the years that followed the Fourth Amendment, the Constitution has been amended 81 times. The Union and the State Governments and Parliament faced the Supreme Court over fundamental rights issues: freedom of expression *vis-à-vis* national integrity; personal liberty *vis-à-vis* political stability; special treatment for some segments of society *vis-à-vis* abstract equality for all; property rights *vis-à-vis* social revolution needs etc. Questions also arose whether the power of constitutional amendment was complete, unrestrained and unlimited and whether there were limits to the power of judicial review of constitutional amendments.

1.4.7 In the period 1950 to 1967, Parliament and most State Assemblies had preponderant Congress majorities. General Elections in 1967 were followed by the formation of non-Congress coalitions in a number of States in the northern region of the country. Certain issues pertaining to Union-State relations arose during this period directly from the functioning of mechanisms and processes under the Constitution. An Administrative Reforms Commission was constituted by the Government of India to examine administrative aspects of Union-State relations.

1.4.8 In the period following the fourth General Election, the phenomenon of unprincipled defections for money or ministerships etc. came to the fore: legislators changing their party allegiance again and again in utter disregard of all moral and political proprieties, constituency choice and public opinion. Wide-spread concern about the problem was mirrored in Parliament, and led to a unanimous resolution in the Lok Sabha on 8 December 1967. The resolution read:

> "This House is of opinion that a high-level Committee consisting of representatives of political parties and constitutional experts be set up immediately by Government to consider the problem of legislators changing their allegiance from one party to another and their frequent crossing of the floor in all its aspects, and make recommendations in this regard."

1.4.9 Known subsequently as the Y.B. Chavan Committee, after the then Union Home Minister who was the Chairman of the Committee, this body produced a valuable report which addressed a variety of issues germane to the handling of the problem of defections which had basic implications with reference to the working of constitutional machinery and connected statutory and procedural instrumentalities.

1.4.10 The 25th anniversary of the coming into force of the Constitution of the world's largest democratic republic occurred, ironically, in the year in which the Emergency was clamped on the nation in an atmosphere of burgeoning national unrest. It was in this context that the first concerted initiative towards

a review and revision of the Constitution was undertaken in 1975. At the AICC Session in December, 1975 – the 'Kamagata Maru Session' – a resolution on the political situation stated:

> "If the misery of the poor and vulnerable sections of our society is to be alleviated, vast and far-reaching changes have to be effected in our socio-economic structure... The Congress urges that our Constitution be thoroughly examined in order to ascertain if the time has not come to make adequate alterations to it so that it may continue as a living document."

1.4.11 A document titled 'A Fresh Look at Our Constitution – Some Suggestions' surfaced at this time and was circulated but, after the recommendations contained in it had drawn stringent criticism from diverse quarters, it was not pursued. Amidst tenacious advocacy about the need for constitutional change, particularly after the Kamagata Maru Session of the Indian National Congress, the then Congress President, D.K. Borooah appointed, on 26 February 1976, a Committee "to study the question of amendment of the Constitution..., in the light of experience." The twelve-member Committee, headed by Sardar Swaran Singh, submitted 'tentative proposals' to the Congress President in April 1976 and these were then circulated among a select few. The then Chairman of the Law Commission of India, Justice P.B.Gajendragadkar wrote to the Prime Minister that while amendment to the Constitution was necessary to expedite the socio-economic revolution, "ad-hocism is undesirable and adoption of extremist doctrinaire positions is irrelevant and inadvisable". He advised the Prime Minister "to appoint a high powered committee to research and discuss the problem in depth for a dedicated and comprehensive effort."

1.4.12 The Swaran Singh Committee Report stated that its recommendations had been made with the background of the tentative proposals circulated earlier to Congress Chief Ministers and Pradesh Congress Committees, the views of Bar Associations of the Supreme Court and all the High Courts, comments in the Press and in public and memoranda and opinions received from individuals, professional bodies etc. It said:

"…..the Committee has kept before it certain important objectives. Our Constitution has functioned without any serious impediment during the past 26 years or so. While this is so, difficulties have been thrown up from time to time in the interpretation of some of its provisions, more particularly when they concern the right of Parliament to be the most authentic and effective instrument to give expression and content to the sovereign will of the people. Ours is a dynamic, moving and changing society, and the need to quicken the pace of socio-economic progress of our people has never been more urgent. Some of the amendments to the Constitution that we have proposed have been conceived in this spirit. The Committee would like to emphasise that the respect of the people for the three organs of our democracy and their confidence in these organs, have to be sustained and strengthened. An attempt has been made to clarify and define, where possible, with greater precision their respective functions in the light of the experience gained so that our democratic institutions may work smoothly in an atmosphere of complete understanding."

The Committee also declared that:

"The Parliamentary system is best suited to our country, and it is unnecessary to abandon it in favour of the Presidential or any other system. In a vast country like India, with the kind of regional diversity as we have, the Parliamentary system preserves best the unity and integrity of the country and ensures greater responsiveness to the voice of the people."

1.4.13 The Committee made a series of recommendations on a wide range of issues including the Preamble; the Directive Principles; the constituent power of Parliament to amend the Constitution; the power of judicial review; article 276; service matters; industrial and labour disputes; matters relating to revenue, land reform, procurement and distribution of food grains and other essential commodities; Election matters; Article 227; disqualification for membership of a house of Parliament or either house of the State Legislature; article 352 and Union State Coordination. The Committee also undertook to make separate proposals for the deletion of some provisions of the Constitution which, it observed, had become "obsolete or redundant."

1.4.14 Reacting to the Swaran Singh Committee and its report as published, Justice P.B. Gajendragadkar, then still the Chairman of the Law Commission,

in a letter to Smt. Indira Gandhi, reiterated his view that the amendment to the fundamental law of the land should not have been left to a party committee and that the modality could, advisedly, have been a committee of experts to hear all parties and persons. He said, further, that the Committee appointed by Congress President Borooah had "worked in a hurry, discussed issues in a casual manner and based its recommendations mainly on political considerations."

1.4.15 When the Forty-Second Amendment Bill was prepared, the Statement of Objects and Reasons echoed some of Jawaharlal Nehru's words: "A Constitution to be living must be growing", it declared. "If the impediments to the growth of the Constitution are not removed, the Constitution will suffer virtual atrophy.". The Prime Minister, in her speech in the Lok Sabha on 27 October 1976, said that the purpose of the Bill was "to remedy the anomalies that have long been noticed and to overcome obstacles put up by economic and political vested interests," and that the Bill was "responsive to the aspirations of the people, and reflects the realities of the present time and the future". The Bill was passed in the Lok Sabha with 4 votes against it and 366 in favour. All but eight of over 600 amendments had been dropped or defeated. The Rajya Sabha passed it by 190 votes in its favour and none against. Thirteen of 22 State Legislatures having ratified it, the President gave his assent on 18 December 1976.

1.4.16 After the change of Government, following general elections in 1977, the then Prime Minister, Morarji Desai appointed a Committee of Members of Parliament as a forum for considering substantive changes in the amendments brought about during the Emergency. Subsequently, the Prime Minister set up a Sub-Committee of the Cabinet for the same purpose. Issues germane to the 42nd Amendment were subject matter of voluminous expression of opinion by jurists, parliamentarians, editors and professional bodies. But, essentially, the effort focused on the correction of the imbalance in the Constitution caused by some provisions of the Forty-Second Amendment.

1.4.17 The need was felt for a comprehensive review of Union-State relations following the experience gained in the period after the General Elections of 1977 which had resulted in non-Congress governments at the Centre and in several major States in the north, but governments formed by the Congress in the southern States. In 1983, a Commission was constituted under the chairmanship of Justice R.S. Sarkaria with fairly wide-ranging terms of reference. These included:

> "(1) The Commission will examine and review the working of the existing arrangements between the Union and the States in regard to powers, functions and responsibilities in all spheres and recommend such changes or other measures as may be appropriate;
>
> (2) In examining and reviewing the working of existing arrangements between the Union and States and making recommendations as to changes and measures needed, the Commission will keep in view the social and economic developments that have taken place over the years and have due regard to the scheme and framework of the Constitution which the founding fathers have so sedulously designed to protect the independence and ensure the unity and integrity of the country which is of paramount importance for promoting the welfare of the people."

1.4.18 There were also some other especially note-worthy studies of particular problems in the political system. Deep concern had been voiced relative to flaws in the electoral process. This had occasioned a Joint Parliamentary Committee on Amendments to Election Law, which submitted its report in 1972. The Committee for Democracy set up by Loknayak Jaya Prakash Narayan had also studied the subject. Various aspects of electoral reforms were reviewed by a Cabinet Sub Committee appointed in 1977 and another in 1982. In 1990, the Government of India constituted a Committee under the Chairmanship of the then Union Law Minister Dinesh Goswami with Members drawn from different political parties. The Report of the Committee contained a series of recommendations, most of which were accepted for implementation. A Committee to examine issues related to State Funding of Elections was constituted in May 1998, known as the Indrajit

Gupta Committee after that outstanding Parliamentarian and leader who was its Chairman. Although the Committee had a relatively limited compass of study, its observations are noteworthy and comprise valuable supplementary material pertaining to the process of elections. Various Reports of the Law Commission of India provide a wealth of insights into the working of the machinery of the Constitution. The 170th Report of the Law Commission, on Reform of Election Laws, presented in May 1999, considers radical approaches seeking to improve the system of elections – the very sheet anchor of Parliamentary Democracy under the Constitution.

1.4.19 A little more than fifty years of national experience has accumulated relative to the working of our Constitution. Many things have changed since India's Independence. There have been impressive achievements in many spheres but so much more is required in qualitative as well as in quantitative terms, if we wish to build a truly just and caring society. Some important long range issues emerging from the prospects of India's participation in a global economic order advise an objective, expert review of our system to safeguard our national interest and our constitutional values and goals.

1.4.20 During the last two decades and more, there was a persistent demand in the civil society – from some NGOs, academics, constitutional scholars and others – that the working of the Constitution be subjected to a comprehensive review. Several books and a large number of articles and research papers devoted to the theme of constitutional review and reforms were published (some of these have been listed in the bibliographies annexed to Consultation Papers and were taken fully into account and used by the Commission in its study and deliberations) and many seminars and conferences organised in different parts of the country. The most significant of these non-political civil society efforts was the seminar organised by 15 national institutions in 1992 and the committee appointed by the India International Centre to review the working of the Constitution. The committee which had the senior Congress leader and former cabinet minister, Dr. Karan Singh as the Chairman and included among its members two of the members of this Commission,

presented its report to the President and others. Concluding recommendation of the committee was that of a Review Commission being appointed.

1.4.21 The National Agenda for Governance issued by the National Democratic Alliance as the NDA Election Manifesto before the last general elections contained a pledge that a Commission would be appointed to review the Constitution in the light of its working for fifty years. The Pledge was affirmed in the President's address to Parliament and was followed by the appointment of this Commission in February 2000.

Methodology and Procedure

1.5.1 The Commission held its first meeting at New Delhi on 23 March 2000. Taking note of its terms of reference, the Commission realised that it was not required to "re-write" the Constitution, as indeed the name of the Commission itself indicated, its function was to review the working of the Constitution and to examine how best it could respond to the changing needs of good governance and socio-economic development of modern India. The Commission felt concerned that the constitutional aspirations of raising the living conditions of the poor and the deprived and ensuring them an adequate means of livelihood had not been realised fully. It was decided to examine the working of the present provisions of the Constitution and the applicable laws and practices to consider how the constitutional objectives in the aforesaid areas could be achieved better.

1.5.2 Before considering the methodology and procedure of reviewing the working of the Constitution to be adopted by it, the Commission considered it appropriate to identify the main areas of concern which appeared to it to be most relevant to realising the values and vision of the founding fathers and the objectives and aims enshrined in the Constitution. These were found to be as follows :

I. Strengthening of the institutions of parliamentary democracy; (Working of the Legislature, the Executive

and the Judiciary; their accountability; problems of administrative, social and economic cost of political instability; exploring the possibilities of stability within the discipline of parliamentary democracy).

II. Electoral reforms; standards in political life.

III. Pace of socio-economic change and development under the Constitution (assurance of social and economic rights: how fair? how fast? how equal ?)

IV. Promoting literacy; generating employment; ensuring social security; alleviation of poverty.

V. Union-State relations.

VI. Decentralization and devolution; empowerment and strengthening of Panchayati Raj Institutions.

VII. Enlargement of Fundamental Rights.

VIII. Effectuation of Fundamental Duties.

IX. Effectuation of Directive Principles and achievement of the Preambular objectives of the Constitution.

X. Legal control of fiscal and monetary policies; public audit mechanism.

XI. 'Administrative system' and 'standards in public life'.

1.5.3 As a first step towards reviewing the working of the Constitution, the Commission in its meeting held on 23 March 2000 decided to invite suggestions from the public in regard to the endeavour of the Commission within its terms of reference. A public notice dated 9 June 2000 was issued through both the print and the electronic media inviting suggestions from public, non-governmental organizations, institutions and others interested, latest by the 31 July 2000. The notice was also put on the website of Commission.

Consultation Papers and Advisory Panels

1.6.1 One of its members, Justice B.P. Jeevan Reddy was nominated as the

spokesperson of the Commission to interact with the media. The Commission decided to adopt the methodology of generating public debate and eliciting opinion by way of releasing Consultation Papers and Questionnaires on the main areas of concern identified by it. The Commission also decided to constitute Advisory Panels of experts for each of the areas identified by it. It appointed a Committee consisting of the following Members for identifying the experts, research institutions and resource persons:-

1. Justice Shri B.P. Jeevan Reddy
2. Shri Soli J. Sorabjee
3. Shri K. Parasaran
4. Dr. Abid Hussain
5. Dr. Subhash C. Kashyap
6. Shri C.R. Irani

1.6.2 The Committee was asked also to identify experts or research institutions for preparation of Consultation Papers along with Questionnaires. In regard to the procedure and methodology for evaluating the working of the Constitution in the areas identified, it was decided that Consultation Paper(s) on each of the identified areas along with suitable questionnaires would be formulated in a computer-friendly format so as to enable the Commission to ledgerise and classify the data received in response to the Questionnaires. It was also decided that these Consultation Papers shall be circulated to all Political Parties, Ministries/Departments of Government of India, State Governments/Union Territory Administrations, Constitutional Bodies and Statutory Commissions such as the National Commission for the Scheduled Castes and the Scheduled Tribes, the National Commission for Minorities, the National Commission for Backward Classes, the National Human Rights Commission, the National Commission for Women, Representative Bodies of Trade and Industry, Bar Associations, Central Universities, Academicians and the Media. The Commission resolved to place the Consultation Papers and Questionnaires on the Commission's Website for general access and also to respond to all individual requests for Consultation Papers.

1.6.3 The aforesaid Committee suggested that for each of the Advisory Panels, one of the Members of the Commission may function as "Member-in-charge". It also made recommendations regarding the composition of the expert/advisory panels in respect of the different areas. Each Member-in-charge was authorized to nominate additional Members to the Panels. The Members-in-charge were required to identify research institutions/resource persons to prepare the Consultation Papers. It was also decided that the Secretary to the Commission would function as the Member-Secretary of the various Advisory Panels for close coordination and speedier and effective disposal of matters. Having regard to the importance and significance of the Consultation Papers and Questionnaires, it was decided that they should have authentic research backup.

1.6.4 The Commission constituted eleven Advisory Panels for scrutiny and approval of the various Consultation Papers and Questionnaires before the same could be placed before the Commission. The composition of the various Advisory Panels is given in **Volume-II.**

1.6.5 The Commission identified the following institutions/expert bodies/experts to entrust them with preparation of the Consultation Papers and Questionnaires on the areas identified by it:

(i) Centre for Policy Research, New Delhi.

(ii) Institute for Constitutional and Parliamentary Studies, New Delhi.

(iii) Institute of Social Sciences, New Delhi.

(iv) All India Institute of Local Self Government, Nagarpalika Network, New Delhi.

(v) Citizenship Development Society, New Delhi.

(vi) North East India Social Science Congress, Shillong

(vii) Omeo Kumar Das Institute of Social Change and Development, Guwahati.

(viii) Centre for the Study of Developing Societies, Delhi.

(ix) Institute for Social and Economic Change, Bangalore.

(x) Indian Institute of Public Administration.

Besides, the Commission could avail of the services of some experienced persons to assist it by preparing background materials and expert notes. The Commission also undertook in-house preparation of certain Consultation Papers and background materials.

1.6.6 The Commission, from time to time, released the Consultation Papers along with the Questionnaires and Executive Summary to the Press and other media, general public, Ministries/Departments of the Government of India, State Governments and Union Territory Administrations, recognized Political Parties, important institutions/Universities, interest groups, etc. for enabling them to furnish replies to the Questionnaires and submit their comments on the various issues raised in the Consultation Papers.

1.6.7 The Commission, with the assistance of National Informatics Centre, put the Consultation Papers and Questionnaires on the Commission's Website for enabling the public to make on line submission of their responses. The responses to the Questionnaires were collated, compiled and edited and a summary containing gist of replies was placed before the Commission for consideration at the time of finalizing the recommendations on the relevant subject.

1.6.8 The Commission released 22 Consultation Papers. Seven other Papers prepared for the Commission were also utilized by the Commission as Background Papers. All the Consultation Papers and Background Papers have been included in Volume-II.

Projects and Finance Committee

1.7.1 The Commission at its meeting held on the 8 and 9 July 2000 decided to constitute a Committee called the "Projects and Finance Committee" to consider *inter alia* the following matters:-

(i) Monitoring the quality of the "Consultation Papers" and "Questionnaires" so as to ensure uniformity and eliminate possibilities of duplication or repetition resulting from the overlapping areas in the subjects or topics to which they relate.

(ii) Lay down broad guidelines and procedures for the passage of the 'Consultation Papers' and 'Questionnaires' through the various stages.

1.7.2 The Committee comprised of the following members :

1. Shri Soli J. Sorabjee (Convener)
2. Justice B.P. Jeevan Reddy
3. Shri P.A. Sangma
4. Dr.Subhash C. Kashyap
5. Dr. Abid Hussain
6. Shri K. Parasaran

Eliciting Public Opinion

1.8.1 The Commission took various steps for having a wide range of consultations and debates on various issues and difficulties experienced in the working of the Constitution for more than 50 years with a view to eliciting public opinion. For the said purpose, besides issuing a public notice and circulating the consultation papers and questionnaires to elicit responses and replies, as and when the various Consultation Papers and Questionnaires were finalised by the Commission, these along with summaries thereof were released to the media at press conferences or otherwise.

1206 LJ&CA/2002—3A

1.8.2 Certain Universities/educational institutions in various parts of the country agreed to conduct Seminars/Interactive Sessions on behalf of the Commission to elicit views of the public on various issues of concern. The National Law Schools/Universities/College(s) which conducted seminars and conducted public interactive sessions under the sponsorship of the Commission have been listed in Volume-II.

1.8.3 In response to its Public Notice, the Commission received more than 20,000 letters/communications/Memoranda. The Commission examined all the communications/Memoranda/letters and found that 2350 of them contained certain suggestions/comments relevant to the study of the Commission as per its terms of reference. The rest of the communications were too general in nature. Certain letters questioning the necessity or relevancy of the review work were also received.

1.8.4 The Commission received 212 responses to its various Consultation Papers. Out of these, 131 responses were from organizations / institutions/ associations / universities / State Governments / Union Territory Administrations/Central Ministries/Political Parties and 81 from individuals. A list of individuals/organisations who made representations to the Commission and those who responded to the Consultation Papers and Questionnaires is included in Volume-II.

Process of Interaction

1.9 In order to elicit views of experienced persons on the problem areas, besides sponsoring Seminars, the Commission held wide-ranging interactive sessions with representatives of bodies/institutions which came up with proposals for such interaction. The Commission had also the privilege of inviting distinguished statesmen and other persons in various fields and hearing their views. They included some of the former Prime Ministers, Governors, Members of Parliament, political leaders and Journalists. The

1206 LJ&CA/2002—3B

Commission called on the former President of India, Shri R. Venkataraman and had the benefit of his views. A list of bodies / institutions and persons with whom the Commission had direct interactive sessions is included in Volume-II.

Deliberations of the Commission

1.10.1 The deliberations of the Commission were spread over eighteen sessions and 46 days of sittings. The Commission in its initial meetings decided the methodology and procedure required to be adopted by it for carrying out the task before it, identified the problem areas, put one Member in-charge of each area and organized the preparation and circulation of consultation papers on various matters of concern.

1.10.2 The Commission discussed in depth the various issues brought before it by its Members. The Commission also discussed the various Consultation Papers for finalizing them before these were actually issued for eliciting public opinion. Opportunity was availed by the Commission, during these meetings, to hear the views of eminent persons and organizations who came forward on their own or at the request of the Commission to give their suggestions.

1.10.3 In its thirteenth, fourteenth and fifteenth meetings held in November – December, 2001 and in January, 2002 the Commission held detailed discussions on draft recommendations as contained in the Consultation Papers and the public reactions and comments received thereon alongwith the draft reports on several aspects of matters under review. Each recommendation was thoroughly debated and considered before it was finally adopted by the Commission. The minutes of the meetings of the Commission are reproduced in Volume-II.

1.10.4 Besides the regular meetings, the Commission had opportunity to interact with various persons/ bodies/ institutions for hearing their views. These included Chairman and Members of the Union Public Service

Commission, Scientific Advisor to Prime Minister, Dr. A.P. J. Abdul Kalam, Chairman and Members of the Scheduled Castes and Scheduled Tribes Commission, Chairperson and Members of National Commission for Women and others.

1.10.5 The Advisory Panels of the Commission also held several meetings for detailed discussions for finalizing the Consultation Papers and some of the Background Papers.

Drafting and Editorial Committee

1.11.1 In September 2001, the Commission decided to appoint an Editorial Committee to edit the draft chapters as completed by the Members in-charge and approved by the Commission. Later in December the Committee was renamed Drafting and Editorial Committee and entrusted also with the task of drafting the Chapters. Shri Gopi K. Arora was appointed to assist the Committee as Consultant.

1.11.2 The Committee consisted of the following:

1. Dr. Subhash C. Kashyap (Chairman)
2. Shri K. Parasaran
3. Dr. Abid Hussain

1.11.3 The committee held 15 sessions . It worked out the chapterisation, layout and rules of format for presentation of the Report in two volumes. The first volume contained the main report and the second volume (divided in Books 1, 2 and 3) contained data regarding representations etc. and documents like the consultation papers. The main report was to consist of 11 chapters. The committee members divided the chapters of the report among themselves for purposes of drafting and editing and on completion, each chapter was discussed word by word by the committee before it was finalized

to form part of the Draft Report to be placed before the Commission for consideration and approval.

Adoption of the Report

1.12 The Drafting and Editorial Committee of the Commission submitted the complete Draft Report to the Chairperson on 15 February, 2002. The Commission considered the Report at its sixteenth session spread over five days from 25th February to 1st March, 2002 and the Seventeenth session spread over in four days from 6th to 9th March, 2002. The Report was finally adopted and signed on 11 March, 2002. The Commission resolved to present it to the Hon'ble Prime Minister on 31st March 2002.

(Justice M.N. Venkatachaliah)
Chairperson

(Justice B.P. Jeevan Reddy)
Member

(Justice R.S. Sarkaria)
Member

(Justice Kottapalli Punnayya)
Member

(Soli J. Sorabjee)
Member

(K. Parasaran)
Member

Subject to my note of 30.3.2002

(Dr. Subhash C. Kashyap)
Member
30/3/2002

(C.R. Irani)
Member
with additional Note attached

(Dr. Abid Hussain)
Member

(Shri Sumitra G. Kulkarni)
Member
Subject to my comments given separately
11.3.2002

CHAPTER 2

BASIC APPROACH AND PERSPECTIVE

CONTENTS

2.1 ➢ Approach to review

2.2 ➢ The 'Present' as History

2.3 ➢ Constitutional Reforms: Apprehensions

2.4 ➢ Polity and Democracy

2.5 ➢ Administrative Inefficiency and Indifference: The burgeoning of Extra-Legal Systems

2.6 ➢ India: Burden of the Colonial Past

2.7 ➢ Spirit of the Independence Movement

2.8 ➢ Making of the Constitution: Nature of the Polity: Federalism

2.9 ➢ Basic values of the Constitution: Democracy, Republicanism, Rule of Law, Constitutionalism and Respect for Minority Rights:

2.10 ➢ Democracy and Republicanism

2.11 ➢ Entrenched, Justiciable Constitutional Bill of Rights and Directive Principles:

2.12 ➢ The Working of the Constitution: Economic and Social Change

2.13 ➢ Economic Performance

2.14 ➢ Disturbing Features: Increasing Disparities of Income

2.15 ➢ Public Finance and Public Spending

2.16 ➢ Poverty in the Third World: myth and Reality:

2.17 ➢ The Working of the Executive

2.18 ➢ Parliamentary System: Reforms

2.19 ➢ Parliament and State Legislatures: Reforms

2.20 ➢ Accountability versus Stability

2.21 ➢ The Institution of Prime Minister

2.22 ➢ The Judiciary

2.23 ➢ Electoral System

2.24 ➢ Political Parties

2.25 ➢ Political System and Structure

2.26 ➢ Fifty years of Working of the Constitution: Achievements and Failure: A Balance Sheet

2.27 ➢ Areas of concern: Commission's perception

CHAPTER 2

BASIC APPROACH AND PERSPECTIVE

Approach to review

2.1.1 The terms of reference of the Commission have been so artistically drafted that they admit of no scope for misunderstanding. They aptly meet standards set by J. Stephen for a draftsman to attain a level of proficiency in drafting statutes whereby a reader or user of law drafted by him is not likely to go astray in construing the law even when he interprets it with a bad faith.

2.1.2 As the new millennium commences, we live in a world delicately poised between past fears and future hopes. Never in the past was the need to develop capabilities to manage forces of change so vital. Science and technology will change the world of tomorrow beyond recognition. Life-styles and mind sets will change; so would our world view. Newer concepts of wealth and newer dimensions of poverty will emerge; and so would newer patterns of geo-political equations. The world will increasingly be an inter-dependent world. What happens in far away countries is as consequential to our security and survival as what happen in our immediate neighbourhood. Research in genetically modified food, for instance, somewhere in another hemisphere, for instance, will profoundly affect our agricultural economy. Those who bear the responsibility of the government have a historic role and opportunity to re-build and prepare India for its rightful position in the comity of nations as front runner in humankind's struggle for a greater future. This requires enlightened leadership having vision and deep sense of mission, and great amount of much work on their part. There is a gnawing doubt whether, sometime and somewhere down the line, we, as a nation, appear to have dropped some fundamental values of a free and self governing people and are finding it extremely difficult to retrieve and restore these values to their proper position in our national life. The words "changing needs of efficient,

smooth and effective system of governance and socio-economic development" impart an important dimension to the task. "Today's world", wrote a scholar, "is divided not by ideology but by technology"[1]. The following characterizes the nature of the contemporary Indian State:

- *The crucial failure is the innate resistance in governments and governmental processes to the fundamental article of democracy, viz. that all power and all authority flows from the people and that all public institutions are meant solely to serve the public interest. The assurance of the dignity of the individual enshrined in the preamble of the Constitution has remained unredeemed;*

- *From this fundamental breach of the constitutional faith flow almost all our present ills. The first and the foremost need is to place the citizens of this country at center-stage and demonstrate this prioritization in all manifestation of governance;*

- *Citizens see their government "beseiged by uncontrollable events and are losing faith with institutions. Society is unable to cope with current events.";*

- *Human dignity, human rights, literacy, health, social security and other public goods are not to be seen as ultimate rewards of development; but are quintessentially crucial to the developmental process itself;*

- *Vision of the future shape of the world lies in science, technology, economics, international trade and intellectual property regimes;*

- *Human rights and the role India should endeavour to perform are matters that must receive fuller, more organized, sensitive and incisive intellectual responses;*

- *The ability to respond to and manage the great forces of change ushered in by science and technology is of critical importance. The future of the world is knowledge based and knowledge driven. We simply cannot afford to ignore this truth. Our strategic economic responses need to be sharper;*

[1] Jeffrey Sachs "NEW MAP OF THE WORLD" The Economist, June 2000

- *The Indian State has not shown commensurate and sensitive receptivity to the great transformation in international law and in the concept of national sovereignty. Domestic application of international treaty obligations has not adequately informed its institutions. Minimum economic standards are now a legitimate component of a justiciable Bill of Rights.*

2.1.3 Over the years under the sweep of the global winds of change transforming a welfare-economy into a market economy, the State has itself undergone a change in its character and in its mechanisms for the realization of its social and economic goals. The Overview of the World Development Report 2000 mentions that "The development landscape is being transformed, presenting policymakers with new challenges at the global and local levels". The Report recalls four critical lessons which 50 years of development-experience have yielded. "First, macro-economic stability is an essential prerequisite for achieving the growth needed for development. Second, growth does not trickle down; development must address human needs directly. Third, no one policy will trigger development, a comprehensive approach is needed. Fourth, institutions matter; sustained development should be rooted in processes that are socially inclusive and responsive to changing circumstances."

The 'Present' as History

2.2.1 "Monarchy", it is said, "lives by honour and the Republic by virtue". A period of little more than fifty years may, conceivably, be not deemed to constitute a period of history: being, perhaps too short a span in the life of a nation, or to pass judgement about a nation. But that time-span is enough to discern the virtues imbuing a nation's political institutions and the quality of its leadership. However, if the achievements of the present are so remarkable as to be historic, then, even a decade or two can be of historical import.

2.2.2 Surprises can be exciting and pleasant. Germany and Japan were amongst the many countries devastated at the end, and as a result, of the Second

World War. The economic development of Germany, its re-unification and the broader agenda of the unification of Europe provided one of the most shining examples of enlightened political statesmanship. While a megalomaniacal Hitler tried to put a 'German roof' over Europe, Helmut Kohl was determined to put a 'European roof' over Germany. Quality of leadership has immense significance especially in periods of national crisis and reconstruction.

2.2.3 The surprises can, quite often, be unpleasant. The 20th century has, on its conscience, some 100 million human beings killed in armed conflicts and a further 120 million dead as a result of politically-related violence, in which race, ethnicity, religion or political opinion has been a factor.

Constitutional Reforms; Apprehensions

2.3.1 At bicentenary of the Constitution of the United States of America a group of about two hundred persons – professors, jurists, politicians, journalists, diplomats, administrators, senators – looked into the need for reforms in the American Government. The broad issue was identified thus:

> *"Government deficits, the spiraling imbalance of trade, inconsistencies in foreign policy, illegal immigration, unemployment, the decay of our cities, the abuse of the environment, the staggering cost of elections, and the piracy of special interest groups – these problems and a host of others have led thoughtful citizens to question whether our political system is capable of meeting the challenge of modern governance"*[2].

As to the need for reassessment of institutions, it was said:

> *"We stand in awe of the wise men who framed the Constitution nearly two centuries ago, but as they themselves anticipated, changing circumstances demand a reassessment."*[3]

[2] About the Book and the Editor: Reforming American Government
[3] Ibid

2.3.2 The Debate ranged from "Leave the Constitution Alone" to "Crisis and Its Cure". "The foremost requirement of a great power", it was noticed, "is strong executive leadership. The political demand for it, manifest world-wide, arises from the present condition of international relationships, given the state of the military arts; from the inexorable need to develop and use science to maintain national security; and from the nature of modern economic and social organization especially when coupled with emergent ecological considerations."

2.3.3 The opposition to the idea of any reform, more so of constitutional reform, is understandable. Opposition may arise from any or more of several conceivable apprehensions vis-a-vis the nature and composition of the reform body itself; from a propensity for conservatism; a form of inertia relative to change; or from apprehensions as to possible loss of available privileges. On the first, a study says:

> *"There is much to be said for the use of a constitutional revision commission when it is so composed as to be representative of the various major interests of the state; when it is dominated by one of those interests, little can be expected of it."*

On the second cause of opposition, it is said:

> *"The forces standing against revision have as a major ally the conservatism and apathy of the average citizen who is willing to suffer what he knows rather than risk the unknown quantity that constitutional revision may produce. The history of constitutional revision wherever successfully accomplished has been one of constant and unremitting efforts for citizen education over a period of years. Citizen demand, and only citizen demand, eventually overcomes the interests standing in opposition to change. Great economic, social, and political pressure is required to overcome entrenched interests and citizen inertia."*[4]

On the third factor, it is observed :

> *"There are always substantial and powerful forces that will oppose any extensive constitutional revision. There are always groups that stand to lose – or think they stand to lose – in power, prestige, economic position, or legal status if a constitution is substantially rewritten.*

[4] Major Problems in State Constitutional Revision – edited by W. Brooke Graves p.30

Rewriting will bring up for reassessment and redetermination the constitutional provisions under which they hold power."[5]

2.3.4 "A nation may make a Constitution, but a Constitution cannot make a nation". No Constitution, written or unwritten, is 'worth more than the political temper of the community allows it to be worth'. A Constitution, however lofty its exhortations and sentiments, is not a self-executing document. It requires human agency to implement it. The political traditions of the people and the spirit of constitutionalism are what make a Constitution work. Its essence is its practice.

2.3.5 An assessment of 'half-a-century of the Constitution at work' involves an appraisal of the performance of all the three organs of the State, viz. the Executive, the Legislature and the Judiciary. These organs are not merely the manifestations of the presence of the State. Their functions hold a cardinal position. The conditions of activity of these organs are elemental to the comprehension of the inextricable nature of the relationship of the various organs of the State and provides an understanding of the philosophy of the Constitution at work. Making of India's Constitution has been a stupendous task. India has a diversity which few countries match. Its diversity needs a constitution which is not intended for a nation; but as a writer said its constitution is intended for a civilisation.

2.3.6 In the changing context of globalised economy, the Fundamental law should address itself in action to relocate the sources of the social obligations of the State. This is a complicated exercise. Central to the process of development is the realization of rights. It means that consideration of human rights, equity, equality, equal justice and the accommodation of diversity are central to the conceptualization, design, implementation, delivery, monitoring and evaluation of all developmental processes. The problems of social exclusion, more virulent in India on account of the hierarchical structure of its society, need systemic solutions.

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[5] Ibid p.28

2.3.7 The working of the Constitution over a period of about fifty years, on a balance of the good and bad, achievements and failures, promises and performances, is one of lost opportunities. The increasing impurity of the political climate and its deadening effect on the creativity of the people present a depressing picture. There are, it is true, some impressive achievements. Much has been done and achieved; but in the area of social justice performance falls greatly short of the potentials and of expectations.

Polity and Democracy

2.4.1 All political theories are united on the question of the principle; against arbitrary Government. When a democratic system is chosen, a nation cannot be impatient with democracy. Democracy has its own defects. It is not the best or the most beneficial form of political organization of human beings. But it is accepted as the least hostile amongst all other systems tried. The slackness in jettisoning the heavy baggage of inherited social evils in India has produced pervasive disenchantment with the institutions of democracy. 'Collective action that promises vast benefits is retarded by special interests that hold strategic controls'.

2.4.2 The political structure and system under the Indian Constitution envisage a federal democratic form of government based on the values of equality, social justice and republicanism. It provides a framework for the attainment of its social and economic goals. It envisages a State-centric welfare government. Fundamental Rights and the Directive Principles are the conscience of the Constitution. State has social obligations.

2.4.3 A glimpse of the 'Half-a-century of the Constitution at Work' render some undelectable conclusions inescapable:

(a) The full realization of the goals of social and economic justice as rewards of a peaceful social revolution promised by the Constitution has remained an unredeemed pledge.

(b) That the democratic processes have not promoted self-governance. People of India, under the dispensation, have no effective control over their social, political and economic destiny or emancipation. The system of administration designed and practiced by the political executive with the active support of the permanent civil services has reduced and limited the sovereignty of the people to a mere right to exercise their franchise at the elections; The remedy is to widen the base of democratic debate. As Jefferson observed; "I know of no safe depository of the ultimate powers of the society but the people themselves. And if we think them not enlightened enough to exercise their control with a wholesome discourse, the remedy is not to take it away from them but to inform their discretion".

(c) The society has not been able to use the great gifts of Human Rights, Human Security, Rule of Law, Secular Values to bring about a just, caring and inclusive society. Democratic sentiments and institutions need to be strengthened by civic- education, identifying and striving for common purpose and keeping the areas of private and public life separate. The sociology of pluralism is not inimical to strong democracy, but, on the contrary, is in itself a strong sustaining factor of democracy. It is essential to promote participatory institutions.

2.4.4 But the brighter side of the Half-a century of the Constitution at work is that basic spirit and creed of democracy has taken deep roots in the country, feudal character of society and polity notwithstanding. Democratic processes are, it is true, tainted by the impurity of the electoral processes and pervasive corruption in the working of the democratic institutions. They detract heavily from, and threaten, survival of democracy. Hopefully, they are the manifestations of a difficult but passing phase. With educational advancement and participatory institutions that situation hopefully would improve. The 73rd and the 74th Constitutional Amendments have provided a historic opportunity. The broader base of democratic debate, free compulsory education and an independent press will strengthen democratic institutions and processes.

2.4.5 But, on an overall assessment, the political, social and economic gifts of democracy have endowed Indians with significant rewards, particularly in the

matter of enjoyment of personal liberty and individual freedom. The Press has been free and fiercely independent.

Administrative inefficiency and indifference: The burgeoning of Extra-Legal Systems

2.5.1 It is a sad fact that needlessly harsh, lugubrious, unimaginative and indifferent administration has pushed the poor to the wall. Pervasive corruption, inefficiency and insensitivity – particularly in the distribution of public goods – has resulted in the burgeoning of 'extra-legal' systems. These "extra-legal systems", says an economist, "constitute the most important rebellion against the status-quo in the history of developing countries since their independence" :

- *"Unlike the situation in advanced countries where the 'under-class' represents a small minority living on the margin of society, in some countries extra-legality has always been the mainstream ... Most Governments in most nations are in no condition to compete with the extra-legal power ..... throughout the Third World extra-legal activities burgeon wherever the legal systems imposes rules that thwart the expectations of those it excludes. People take refuge in it when the cost of obeying the law – outweighs the benefit."*[6]

- *'Fraternity' the noble ideal of brotherhood of man enshrined in the Preamble of the Constitution has remained unrealized. The People of India are more divided amongst themselves than at the time of the country's independence.*

- *National political parties are more divided on the definition of 'common national purpose' than ever before; the noble purposes of public life have degenerated than ever before into opportunistic and self-seeking politics of competitive personal gain.*

- *The world is changing at a bewildering pace. In 1800, the world's population is estimated to have been 1 billion. It took 130 years to climb to the mark of 2 billion; just 3 decades for the third billion; only one decade and a half for the fourth, a dozen years for the fifth and even less than that for the sixth billion.*[7]

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[6] Hernando de Soto "The Mystery of Capital" p.73, 74, 76, 77
[7] P.C. Alexander: India in the New Millennium p.17, 18

- *While it took 1000 years for English wheat production to quadruple from half a tonne to two tonnes per hectare, the world's cereals yields have doubled in the last 40 years.*

- *Crisis of leadership, corruption, insensitivity and inefficiency of administration have resulted in extra-legal systems and parallel economies and even parallel governments. Bureaucratic pettifoggeries which cause frustration in people in their daily life has a more serious fallout of pushing more and more people into extralegal systems.*

India: Burden of the Colonial Past

2.6.1 Today as we celebrate the 50 years of the Constitution we stand in awe of the great women and men who sculpted it. Political leaders of the day, who had come under the spell of the Mahatma, were truly magnificent individuals. When we compare them with the founding fathers of the American Constitution, the great leaders of the Russian Revolution and the leaders of the movement for the advancement of the coloured people in America and Africa, our leaders, in addition to their great patriotism and wisdom, had another dimension to their great vision. They brought a spiritual dimension to a political task. In the entire debates in the Constituent Assembly, there is no touch of bitterness or rancour against the British or the grim events of the Partition; their anxiety was to save the Indian sub-continent from the scourge of the bigotries and intolerances that had made Partition inevitable. They reaffirmed their immense faith in the good sense of the common man and provided universal adult suffrage as one of the corner stones of the democratic edifice.

2.6.2 In 1750, India's share of the world's manufacturing output was 24.5% while that of the United Kingdom and the United States was 1.9% and 0.1% respectively. By 1900, India's share had come down to 1.7% while the United Kingdom and the United States of America[8] had increased their shares to 62%

[8] Paul Kennedy – The Rise and Fall of the Great Powers – page 149

and 23.6% respectively. Emerging from a long period of colonial rule, exploitation and divisive politics, independent India still bore visible, deep and unmistakable fault lines strewn across its national fabric. The dominant devisors included a whole range of ethnic, linguistic, religious, class and caste differences so pronounced that these appeared as serious impediments to formulating an agenda for materializing the vision of a democratic society with legal, political, social and economic benefits accruing to all citizens and with the ability to attain its rightful position in the comity of nations. Enveloping entire social spheres was a huge cultural haze manifested by superstition, social evils and malpractices, antediluvian dogmas, prejudices and contradictions across different sections of our society. It was an unequal society and all unequals were prone to live 'under a constant dread of an impending disaster.'

Spirit of the Independence Movement

2.7.1 The biggest divides – caused by communal and casteist attitudes – provided the sub-text for regional and other social divides. Increasingly, sentiments involving religion were manipulated by the colonial power to counter the movement towards the cherished goal of freedom and independence; and proved decisive in precipitating the Partition. The fight on this front was lost early. There were other divides fostered by colonial strategists and rulers who operated the policy of 'Divide et impera' and consciously contrived to create and widen fissures in the polity. The other India overseen by the British, but ruled by the princes and their overlords, was perpetuated as an independent autonomous chunk of political India.

2.7.2 There were some social road blocks to progress fostered by moribund tendencies innate to the society itself. Under the caste regime, access to social facilities, social institutions and educational and economic opportunities were not available at all; but were severely restricted. The position of women presented a pitiable picture of injustice, cruelty, exploitation and indignity.

2.7.3 The stupendous task of the framers of the Indian Constitution needs to be seen in this context. A people suffering oppression under a feudal system were grimly struggling to be reborn into a life of dignity and hope. The past was heavy on their shoulders and the future uncertain. Over the centuries, despite India's magnificent achievements in, and contributions to, art, literature, architecture, astronomy, sculpture, aesthetics, etc. and to the profound issues of man's spiritual quest towards which the whole world looked with wide eyed wonder, it remained a fractured society deeply and painfully riven with rifts, animosities, hostilities and threats. The communal carnage of the Partition left India shocked and demoralized.

2.7.4 Within the independence movement strenuous efforts were made to address some of these issues by symbolism, action and dialogue. The struggle for freedom and independence was energized and driven by a powerful passion to free India from foreign rule and contained in it myriad hopes and aspirations for political, social and economic emancipation not of Indians alone, but of subjugated and exploited human beings the world over. Our great national leaders consistently articulated their vision of a higher human civilization based on humanism, pluralism, peace, brotherhood and oneness in which India would perform her rightful role in service of humankind.

2.7.5 Thus, inherent to the national movement was a social compromise that lasted through to the time when Independence was finally declared. The other lights kindled within the freedom movement on swadeshi, self-reliance, rural re-construction and basic education were available as pointers to address the issues in the future.

Making of the Constitution: Nature of the Polity : Federalism

2.8.1 Federalism as a form of governance becomes an attractive, and indeed, an obvious choice where wide political, cultural and linguistic diversity exists in a vast

area of a country. Referring to the federal form being the obvious choice for India, Sawer observes: "The sub-continent of India was another area which by reason of size, population, regional (including linguistic) differences and communication problems presented an obvious federal situation, if not the possibility of several distinct Nations:"[9] "Not only did India become the first republican member of the Commonwealth", writes C.F. Strong[10], "but it began the chapter of post-war constitutionalism."

> *"The rise of the constitutional state is essentially a historical process and the chief materials of history include the history of political ideas which have prompted their development." A Constitution is defined "as a frame of political society organized through and by law, in which law has established permanent institutions with recognized functions and definite rights", and a constitutional state "as one in which the powers of the government, the rights of the governed and the relations between the two are adjusted."*

2.8.2 Constitutions can be unitary or federal, unwritten or written, flexible or rigid, whether parliamentary or non-parliamentary. These are merely broad propositions and "the only manner in which states may be differentiated is according to the structural peculiarities of their governmental organization".

2.8.3 A unitary state is one organized under a single central government; a federal state is one in which a number of coordinate states unite for certain common purposes. But the distinction must be kept clearly distinguished between "local governments in a unitary state and state governments within a federal state."

2.8.4 Federalism, as a political choice, was an inevitable necessity in view of the vast size of the country and its diverse regional, linguistic, ethnic, cultural patterns. But the federalism that the wise founders conceived was not the conventional or the ideal concept of federalism. India was to be a 'union' of States. The Union was an indissoluble union. The range of problems that confronted India at the time of the making of its Constitution has few parallel in the history of any country. The depth, range, diversity and complexity of its problems could baffle any pre-set

[9] Sawer, Modern Federalism (1969) p.284
[10] C.F. Strong –Modern Political Constitutions – Sidgwick & Jackson, London

political pattern or theoretical solutions or off-the-shelf-solutions as obvious political choices. The pattern was indeed sui-generis. This aspect was aptly summed up by a distinguished author when he said, "Characterizations such as 'quasi-federal' and 'statutory decentralization' are interesting, but not particularly illuminating. The members of the Assembly themselves refused to adhere to any theory or dogma about federalism. India had unique problems, they believed, problems that had not 'confronted other federations in history'. These could not be solved by recourse to theory because federalism was 'not a definite concept' and lacked a 'stable meaning'..... The Assembly, in fact, produced a new kind of federalism to meet India's peculiar needs."[11]

2.8.5 The Objectives Resolution of the Constituent Assembly dated 22nd January, 1947 had arguably contemplated that, "the territories in India shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of Government and administration, save and except such powers and functions are vested in, or assigned to, the Union or as are inherent or implied in the Union or resulting therefrom".[12] But later, in the light of the experiences of the Partition, the Union Powers Committee (Second Report, 5th July, 1947) opted for a strong Centre taking the view, "that the soundest framework of our Constitution is a federation with a strong Centre. In the matter of distributing powers between the Centre and the units, we think that the most satisfactory arrangement is to draw up three exhaustive lists on the lines followed in the Government of India Act, 1935, viz. the federal, the provincial and the concurrent. We think that the residuary power should remain with the Centre."

2.8.6 In a federal system, the Union and its Units touch each other at many points. That can be a source of friction; therefore, the need for accurate definition of their respective spheres and powers. This is possible only under a written Constitution. The achievement of the federal form of government is that it reconciles the conflicts between the Union and the States by an appeal to a

[11] The Indian Constitution Cornerstone of a Nation: Granville Austin p.186
[12] Indian Federalism – A comparative Study: by Justice E.S. Venkataramiah and P.M. Bakshi p.75

fundamental law which all the parties recognize as binding and which erects a judicial forum for the authoritative determination of the limits of the respective powers.

2.8.7 The observations of Dr. Ambedkar on the special nature of India's federalism are worth recalling. He said, ... "there are some other special features of the proposed Indian Federation which mark it off not only from the American Federation but from all other Federations. All federal systems including the American are placed in a tight mould of federalism. No matter what the circumstances, it cannot change its form and shape. It can never be unitary. On the other hand the Draft Constitution can be both unitary as well as federal according to the requirements of time and circumstances. In normal times, it is framed to work as a federal system. But in times of war it is so designed as to make it work as though it was a unitary system."

2.8.8 Dr. Ambedkar added that Indian federalism did not suffer from the faults of rigidity or legalism. The Indian federal polity was not the classical federalism of the American mould as is demonstrated by the many of its features which may be called 'unfederal'. There is no separate judicial systems to administer the State and federal laws separately. The judiciary is an integrated judiciary.

2.8.9 Article 263 had been most underutilized provisions of the Constitution. It can be imaginatively put into service by constituting subject or area specific Inter State Councils to deal with emerging new issues involving Union-State relations, more so in relation to areas touching upon international trade and participatory role therein of the States.

2.8.10 Dealing with the prominent unitary features of India's federal set-up, the Supreme Court observed, "that the inference is inevitable that the distribution of powers – both legislative and executive – does not support the theory of full sovereignty in the States".[13] "In a sense, therefore, the Indian Union is federal.

[13] AIR 1963 Supreme Court 1241 (V 50 C 188) State of West Bengal vs. Union of India

But, the extent of federalism in it is largely watered down by the needs of progress and development of a country which has to be nationally integrated, politically and economically coordinated, and socially, intellectually, and spiritually uplifted." [14]

Basic Values of the Constitution: Democracy, Republicanism, Rule of Law, Constitutionalism and Respect for Minority Rights

2.9.1 The Preamble of the Constitution is the key to its social, political and economic philosophy. It enshrines sovereignty of the people; promises a socialist, secular, democratic republic based on justice, liberty, equality and fraternity. Democracy, rule of law, constitutionalism and respect for minority rights are essential, collective, inter-dependent, indivisible elements of a pluralist society. They together assure the dignity of the individual and unity and integrity of the nation. The Constitution promised a social revolution and the democratic means for its achievement. The reality of a constitution is not merely its adoption which, in and of itself, does not necessarily signal a state's commitment, even in theory, let alone in practice, to constitutionalism. Constitutionalism is a broad amorphous concept. Louis Henkin[15] presents some minimum ingredients of constitutionalism such as: government according to the constitution; separation of powers; popular sovereignty and democratic governance; constitutional review; an independent judiciary; controlling of police; civilian control of the military; individual rights; and provision for amendment.

2.9.2 Elective despotism could be checked only by the doctrine of Government of enumerated powers under a written constitution. There are certain essential components of this concept of rule of law. The law is supreme over the acts of both Government and private persons. There is one law for all. Rule of law requires for its operation the making of just laws which embody and give expression to the more general and somewhat amorphous normative principles of rule of law and an independent judiciary, and a judiciary with the power to issue

[14] Rajasthan vs. Union (1978) 1 S.C.R. at p.34
[15] Henkin, 'Elements of Constitutionalism', Occasional Paper Series, August, 1994, Centre for the Study of Human Rights, Columbia University (Quoted in "Enforcement of Human Rights through Bill of Rights P.465)

practical orders: "Rights and duties, after all, may exist on paper, but those who are unimpressed by pieces of paper may still have a healthy respect for threats of imprisonment. The exercise of all public power must find its ultimate source in some legal rule. This principle is the bond that unites the governors and the governed. If this obligation of the government is broken, then, it would be unrealistic to expect a voluntary, unilateral adherence to law by the citizenry".

Democracy And Republicanism

2.10.1 Strong democracy does not need homogenous interests but depends on civil education, capacity for mutual action and sociology of pluralism. Constituent Assembly debates refer to the times in the past "when India was studded with republics and even where there were monarchies, they were either elected or limited". Dr. Radhakrishnan echoed this:

> *"We cannot say that the republican tradition is foreign to the genius of this country. We have had it from the beginning of our history. When a few merchants from the north went down to the south, one of the Princes of Deccan asked the question, "Who is your King?" The answer was, "Some of us are governed by assemblies, some of us by kings".*

2.10.2 Democracy has wider moral implications than mere majoritarianism. A mere majoritarian democracy is likely, sooner or later, to degenerate into elective despotism. Pluralism is the soul of democracy. "A true democracy", it is said, "is surely one in which the existence of the power of the many is conditional on respect for the rights of the few." There is no place for "a crude statistical view of democracy."

2.10.3 Democratic polity, to be conflict-free, has to be an inclusive democracy. Prof. De Smith expressed this:

> *"...we have seen it enacted so many times in so many countries. In a large majority of newly independent states, even the most modest expectations of liberal constitutionalists have gone unfulfilled..."*

"...Nor was a federal constitutional structure, which presupposed a willingness to accept restraints on the exercise of power at both the central and regional levels, at all likely to flourish. When, moreover, the principal divisive factors in the state are communal-religious, racial, tribal or linguistic, the prospects for constitutionalism are never bright, even in a developed country, as the recent history of Northern Ireland has underlined."

2.10.4 It is erroneous to think that democracy succeeds where the composition of the society is homogeneous and that it is difficult in pluralist society. Benjamin Barber[16] affirms that:

"Strong Democracy rests on the idea of a self-governing community of citizens who are united less by homogeneous interests than by civic education and who are made capable of common purpose and mutual action by virtue of their civic attitudes and participatory institutions rather than their altruism or their good nature. Strong democracy is consonant with – indeed it depends upon – the politics of conflict, the sociology of pluralism, and the separation of private and public realms of action".

2.10.5 On the positive side, the significant developments in the working of the democratic system are that the democratic base has been widened with the formation of elected panchyati raj institutions. Second is the impressive and progressive improvement in the educational qualifications of the elected members of the Parliament and State legislatures. The third significant feature is that the representation of the society in the legislatures has become more egalitarian. The composition of Parliament and the State legislatures, in terms of width of social representation, is moving in the right direction. Political debate is becoming increasingly broad based.

2.10.6 Equally impressive has been the way democracy has taken roots in the country. The 73rd and 74th amendments to the Constitution ensuring reservation of one-third of seats for women in elections to village *panchayats* and *nagar palikas* have provided a further impetus to democracy, decentralization and local governance providing a broader base for democratic debate.

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[16] Benjamin Barber "Strong Democracy" p.117

2.10.7 The framers of the Constitution sought to unite the vast country with its great diversity and many languages and creeds within the common bond of constitutional justice on the great ideals of Justice, Liberty, Equality and Fraternity. The framers showed an uncompromising respect for human dignity, an unquestioning commitment to secularism, equality and non-discrimination and an abiding concern for the poor and the weak. They made a bold attempt to base the constitutional foundations on the firm faith that all classes of people, followers of all faiths and particularly the traditionally under-privileged should all join to work for their united constitutional salvation on the shared faith that the peoples as a whole must sink or swim together and that in the long run prosperity and salvation are in union and not in division. The words of Pandit Nehru during the constituent assembly debates are worth recalling:

> *"What we achieve in unanimity, what we achieve by cooperation is likely to survive. What we gain here and there by conflict and by overbearing manners and by threats will not survive long. It will only leave a trail of bad blood..... The great thing is to discover not what Governments prescribed", said Lord Acton, "but what they ought to prescribe; for no prescription is valid against the conscience of mankind."*

2.10.8 The Union of India was intended to be an indestructible union. The units had no power of secession. The cherished values of the Constitution were enshrined in the great words of its preamble. The Constitution promised Justice, social, economic and political; Liberty of thought, expression, belief, freedom of faith and worship; Equality of status and opportunity and to promote Fraternity, assuring the dignity of the individual and the unity and integrity of the Nation. The constitutional document thus is a formidable one. It has more than 395 articles and 12 schedules. It has an 'internal architecture' of its own called the 'basic features'. Any expounding of its provisions must have reference to the other provisions and the structure of the constitutional scheme, which underlies and infuses and breathes life into it.

Entrenched, Justiciable Constitutional Bill of Rights and Directive Principles

2.11.1 A Bill of Rights is the political technique of placing certain basic civilisational values as limitations on the majority. The entrenched and justiciable Fundamental Rights are the expedient adopted by self-governing peoples to recognize certain basic human-rights as inalienable and place them beyond the reach of an 'amoral majority.' Values of life, liberty and dignity are not subject to political vicissitudes. They depend on the outcome of no elections. They are sacrosanct in themselves and are inalienable.

2.11.2 Part III of the Indian Constitution enshrines these great rights. Part IV contains directives which enable the realization and effectuation of the aspiration of Part III and give full meaning to them. Part IV is theoretically non-justiciable. But it permeates the whole ethos of Part III. Despite Sir Ivor Jenning's sarcasm that "the ghost of Sidney and Beatrice Webb stalk through the pages of the text, Part IV of the Constitution expresses Fabian Socialism without the Socialism", the Constitution seeks humanism, endurance and higher values.

The Working of the Constitution: Economic and Social Change

2.12.1 India has recorded significant achievements along many dimensions of human development since Independence. Important changes, for example, are visible in the social sphere too where affirmative action, political organization and collective mobilization are gradually transforming the status and position of many socially backward communities, particularly among those classified as belonging to the Scheduled Castes and the Scheduled Tribes. Equally impressive has been the way democracy has taken roots in the country. The 73rd and 74th amendments to the Indian Constitution ensuring reservation of one-third of seats for women in elections to village level *panchayats* and *nagar palikas* have provided a further impetus to democracy, decentralization and local governance. Several positive changes are beginning to be felt at the grassroot level with women enjoying far greater freedoms than before, with the induction of more and more women into

public decision making and with several thousands of self-help groups, voluntary organisations and civil society initiatives engaged in critical development action.

2.12.2 Market economy has its own negative impact on equality of distribution. It can produce unacceptable levels of economic inequality. The share of income and consumption of the poorest 20 per cent in India is 9.2% while that of the richest quintiles is 39.5%. This is perhaps the pattern in the modern market economics. In USA (1994) poorest 20% of the population had 1.5% share of income and consumption while the richest 20% had 45.2%. In China (1995), the poorest 20% had 5.5% share and the richest 20% had 47.5%. This reflects, in a non-trivial sense, the anomalies and inequities of the international economic order. Over the 30 years from 1960 to 1990, the affluent 20% of the world have enhanced their share of incomes and consumption to 86% while the poorest 20% have had their share reduced to 1%.

2.12.3 Similarly, there has been only a marginal improvement in access to basic health care between 1992-93 and 1998-99.

- *Despite the positive growth record, there has not been a perceptible and significant improvement in the quality of people's lives. For instance, there has been a marked slowing down in the rate of reductions in infant mortality in recent years.*
- *Again, despite the better growth record in recent years, progress in bridging gender gaps has been slow. Between 1991 and 1997, literacy gaps between women and men has hardly been bridged.*

Economic performance

2.13.1 Most noticeable, however, is the expansion and diversification of production. New technologies, modern management and the advances in science, medicine, engineering and information technology have increased domestic production of a wide range of goods and services. Particularly significant has been the increase in agricultural production. Between 1950-2000, the index of

agricultural production increased more than four fold. Between 1960-2000, wheat production went up from 11 million tonnes to 75.6 million tonnes and the production of rice increased from 35 million to 89.5 million tonnes. This is no mean achievement for a country that relied on food aid until the early 1960s. Similarly, there has been a rapid expansion in both the industrial and service sectors. The index of industrial production went up from 7.9 in 1950-51 to 154.7 in 1999-2000. Electricity generation went up from 5.1 billion KWH to 480.7 billion KWH.

2.13.2 This economic expansion has contributed to a steady and impressive growth in India's GNP. With the exception of 4 years, India has enjoyed a positive growth rate in its GNP every year since 1950. Particularly striking are the higher rates of growth after the mid-1980s, and even more so after the initiation of economic reforms in 1991. Prudent fiscal and economic management enabled India to avert the fiscal crisis that many east asian countries experienced in the mid-1990s. On the contrary, India's GDP grew annually by 6-8% per annum between 1994-2000 except in the year 1997-98 when it grew by 4.8%.

2.13.3 As a result, India's per capita Net National Product (NNP) in 1999-2000 was more than 2.75 times higher than what it was in 1951. Before 1980, the annual average rate of increase of per capita income was around 1.2%. Since then, there has been a significant change. In the first half of the 1980s, per capita NNP grew by 2.4%, and between 1985-90, by 3.2% on average every year. The financial crisis of the early 1990s saw a slowing down in the growth of per capita income, but there has been a quick recovery. Per capita NNP has grown on average by 4.8% every year between 1993-94 and 1998-99.

2.13.4 In India the industry generated 330 billion Rs. ($7.7 billion) in 1999, 15 times the level in 1990. One study estimates that by 2008, information technology shall account for 30% of India's exports and 7.5% of its GDP. Employment in the software industry is projected to rise from 180,000 in 1998 to 2.2 million in 2008, to account for 8% of India's formal employment.

2.13.5 Information and communication technology has created new out-sourcing opportunities by enabling services to be provided in one country and delivered in another. Delivered by telecommunication or data networks, the services include credit card administration, insurance claims, business payrolls and customer, financial and human resource management. The global out-sourcing market is worth more than $100 billion, with 185 Fortune 500 companies out-sourcing their software requirements in India alone. India has now 1,250 companies exporting software.

2.13.6 India's English-language technical colleges turn out more than 73,000 graduates a year. By investing in infrastructure (especially high-speed links and international gateways with sufficient bandwidth), the Government has helped develop India's place in the new economy. These efforts will deliver long-term benefits for human development and equitable growth.

2.13.7 There are economic predictions that by 2020 India would be one amongst top 10 countries in per capita income and the third in purchasing-power-parity. It is also predicted that by 2020 India would be the largest software developer and will be leading in space technology which will greatly enhance the potential for education, tele-medicine, disaster-management, meteorology, remote sensing, etc.

Disturbing Features: Increasing Disparities of Income

2.14.1 Global disparities of incomes and inequality are, indeed, high.

- *In 1993, the poorest 10% of the world's people had only 1.6% of the income of the richest 10%.*
- *The richest 1% of the world's people received as much income as the poorest 57%.*
- *The richest 10% of the US population (around 25 million people) had a combined income greater than that of the poorest 43% of the world's people (around 2 billion people).*
- *Around 25% of the world's people received 75% of the world's income (in PPP US$).*

- *In 1998, out of $70 billion spent on global health research, only $300 million went for research on HIV/AIDS and $100 million on malaria which are the problems of developing countries.*
- *This attitude is reflected on the fact that out of 1223 new drugs developed between 1975 and 1976 only 13 were relevant to tropical diseases.*[17]

2.14.2 The Human Development Report (1999) noted of increasing inequalities between the countries. It says :

> "Inequality between countries has also increased. The income gap between the fifth of the world's people living in the richest countries and the fifth in the poorest was 74 to 1 in 1997, up from 60 to 1 in 1990 and 30 to 1 in 1960."

2.14.3 By the late 1990s, the fifth of the world's people living in the highest-income countries had:

- 86% of world GDP – the bottom fifth just 1%
- 82% of world export markets – the bottom fifth just 1%
- 68% of foreign direct investment – the bottom fifth just 1%
- 74% of world telephone lines, today's basic means of communication – the bottom fifth just 1.5%.

2.14.4 But despite the positive growth record, there has not been a perceptible and significant improvement in the quality of people's lives. For instance, there has been a marked slowing down in the rate of reductions in infant mortality in recent years. Again, despite the better growth record in recent years, progress in bridging gender gaps has been slow. Between 1991 and 1997, literacy gaps between women and men has hardly been bridged. India's low level of human development reflects the persistence of extensive human deprivations. Despite the growth record, India's backlog of human poverty is indeed enormous. At the end of 50 years, *human poverty* still persists in substantial number and the backlog of human deprivations are enormous.

[17] UNDP Human Development Report, 2001

Extent of Human Deprivation in India

- *India ranks 128 on the Human Development index – only 45 countries in the world have a lower human development index than India.*
- *Life expectancy at birth is estimated to be 63 years up by 32 years from the life expectancy in 1950-51. But it is 17 years less than of Japan, 10 years less than of Sri Lanka and 7 years less than of China.*
- *Wide variations exist in life expectancy between male and female between the States and between the rural and urban areas.*
- *260 million people in India live below the income poverty line.*
- *Close to 380 million people are illiterate and nearly 2/3rd of them are women.*
- *52% married women in the reproduction age group suffer from anaemia – the proportion varies from 23% in Kerala to 86% in Arunachal Pradesh.*
- *Nearly 1,10,000 women die during child birth or due to pregnancy related causes - most of them can be avoided.*
- *Infant mortality rate have almost halved to 72 births per 1000 births down from 146 in 1951 but in South Asia, India had the slowest rate of improvement in child survival.*
- *Wide variations in infant mortality rate extist across the states – it varies from 16 in Kerala to 98 (more than 6 times higher) in Madhya Pradesh and Orissa.*
- *One third of all babies in India have low birth-weight; in Sub-Saharan Africa, the proportion is just one-sixth.*
- *53% children under 5 years remain malnourished. Percentage of malnourished children is nearly twice the percentage reported in many parts of Sub-Saharan Africa.*

Public Finance and Public Spending

2.15.1 The state of public finance in India, despite the accelerating growth and low inflation and reasonable foreign exchange reserves situation, remains a source of concern. India's fiscal deficit is among the highest in the world - between 5-6% of GDP. The combined deficit of the Central and State Governments, after declining from 9.2% in 1990-91 to 6.8% in 1993-94, rose to 8.5% in 1998-99. Bulk of social sector spending comes from State Government revenues. However, the fiscal situation of most States is not good. Many face severe deficits. The pressure from the Central Government to reduce these deficits is even greater. This typically translates into State Governments cutting down their spending on social sectors - at a most inappropriate time. Indeed, it is

only when the State invests in the social sectors - in health and education - that there is any possibility of sustaining a more equitable and higher economic growth rate in the years to come.

2.15.2 The combined fiscal deficit of the Central Government and the State Governments, as mentioned by the Finance Minister in his budget speech on 28th February, 2001, was in the order of 10 per cent of GDP. The amount left in the hands of the Central Government, after disbursement of States' share of the Central taxes and grants and meeting Central expenditures in the nature of expenses on interest payments, defence, major subsidies and pensions, was Rs. 12,000 crores necessitating borrowing in the order of 111,000 crores to make both ends meet. Again, the depressing picture portrayed by the Finance Minister was that 70% of these borrowings had to be for financing unproductive expenditures.

2.15.3 The preoccupation with managing the fiscal deficit as a goal in itself is resulting in many instances of lower allocations to the social sector. Unfortunately, the State Governments do not realize the impact of such cutbacks on human development. Many policy makers in fact see this as an opportunity for government to abdicate its responsibility towards assuring citizens of their basic human rights.

2.15.4 The poor and other socially disadvantaged groups are worst affected by such cuts. The combined deficit of the States has also gone up from 3.2% to 3.6% between 1991-99. In 1998-99, the States' budget deficit worsened below the level of 1990-91, and is likely to continue unless a serious effort is made to check it. Between 1993-94 and 1997-98, the fiscal deficit rose in Uttar Pradesh from 4.5% of State GDP to 8.6%; in Bihar from 4% to 6.2%; in Orissa from 5.7% to 6.3%.

2.15.5 Public spending has played an important role in India's poverty reduction. The marked decline in income poverty from the mid 1970s to the end of the 1980s coincided with the sharp rise of public expenditures. Between 1976 and early

1206 LJ&CA/2002—5B

eighties, real per capita development expenditure increased at an annual rate of 6%. It was also a period that coincided with the declaration of an increased political commitment to poverty eradication, and the introduction of several new anti-poverty programmes. Nationalized banks were required to assign 40% of their lending to priority sectors – small farmers, small businesses and artisans. New employment-creation and asset generation programmes were introduced. The period also witnessed a substantial increase in rural non-agricultural employment and real wages went up sharply.

2.15.6 Government expenditures on poverty alleviation appear to have strong "trickle down" characteristics, much more distinctly than income growth. Practically all States that have succeeded in reducing income poverty have made sizeable investments in poverty alleviation programmes. The size of government spending matters, and so does the efficiency of spending. It cannot be denied that leakage, wastage, corruption and inefficiency greatly reduce the impact on poverty reduction. The enormous scope that exists for improving the efficiency of public spending shows the potential that exists for rapidly reducing human poverty with significant improvements in the implementation and management of development programmes.

2.15.7 Some recent trends in public spending on poverty alleviation are however disturbing. Between 1990-91 and 1996-97, the Central Government expenditure as a percentage of GDP at current market prices went down from 18.1% to 14.3%. During this period, however, Central Government expenditure on social sectors (comprising education, health and family welfare, water supply, sanitation, housing, social welfare, nutrition, rural employment and minimum basic services) as a ratio to total expenditure increased from 7.7% to 10.5%. Real development expenditure per capita by the States went up from Rs.207 in 1980-81 to Rs.367 in 1995-96. However, what is worrisome is that during this period, development expenditure as a multiple of non-development expenditures fell from 3.2 in 1980-81 to 2.1 in 1995-96.

2.15.8 Taking all 14 States together, there has been a decline in State plan expenditures. And this perhaps conceals an even greater decline in investment for new capacity as much of the increase is in the revenue component of the plan. With the exception of Rajasthan where there has been a marginal increase, there has been a decline in the levels of plan expenditure in every other State. The drop is the largest in Bihar.

Poverty In the Third World: Myth and Reality

2.16 The economic conditions in the Third World, no doubt, present a grim picture. Poverty in the developing countries is real and grinding. Enormous disparities of global wealth between the North and South, the West and the rest is a reality. An economist points out,

> *"Even in the poorest countries the poor save. The value of savings among the poor is, in fact, immense: forty times all the foreign aid received throughout the world since 1945."*

The chief obstacle, according to him, is that these enormous assets and resources of the poor are not documented and, therefore, not available to support credit. If U.S.A raises its budget for foreign aid to 0.7% of national income as recommended by U.N., it would take that richest country 150 years to transfer to the world's poor the wealth they already possess.

He says,

> *"In the West, by contrast, every parcel of land, every building, every piece of equipment or store of inventories is represented in a property document that is visible sign of a vast hidden process that connects all these assets to the rest of the economy.*
>
> *Without an integrated formal property system, a modern market economy is inconceivable.*
>
> *By our calculations, the total value of the real estate held but not legally owned by the poor of the Third World and former communist nations is at least $9.3 trillion. This is a number worth pondering: $9.3*

trillion is about twice as much as the total circulating US money supply. It is very nearly as much as the total value of all the companies listed on the main stock exchanges of the world's twenty most developed countries: New York, Tokyo, London, Frankfurt, Toronto, Paris, Milan, the NASDAQ and a dozen others. It is more than twenty times the total direct foreign investment into all Third World and former communist countries in the ten years after 1989, forty-six times as much as all the World Bank loans of the past three decades, and ninety-three times as much as all development assistance from all advanced countries to the Third World in the same period."

Speaking of the poor, he writes,

"The words 'international poverty' too easily bring to mind images of destitute beggars sleeping on the kerbsides on Calcutta and hungry African children starving on the sand. These scenes are, of course, real, and millions of our fellow human beings demand and deserve our help. Nevertheless, the grimmest picture of the Third World is not the most accurate. Worse, it draws attention away from the arduous achievements of those small triumphed over every imaginable obstacle to create the greater part of the wealth of their society. A truer image would depict a man and woman who have painstakingly saved to construct a house for themselves and their children, and who are creating enterprises where nobody imagined they could be built. I resent the characterization of such heroic entrepreneurs as contributors to the problem of global poverty.

They are not the problem. They are the solution."

The author also recounts a story whose message, he said, had stirred millions of people:

"of an Indian merchant who had been promised by a prophet that he would surely become rich beyond all imaging if only he would seek his treasure. The merchant traveled the world only to return home old, sad and defeated. As he re-entered his abandoned house, he needed a drink of water. But the well on his property had silted up. Wearily, he took out his spade and dug a new one – and instantly struck the Golconda, the world's greatest diamond mine.'
"Leaders of the Third World", he says, "need not wander the world's foreign ministries and international financial institutions seeking their fortune. In the midst of their own poorest neighbourhoods and shanty towns there are – if not acres of diamonds – trillions of dollars, all

ready to be put to use if only we can unravel the mystery of how assets are transformed into live capital."[18]

The Working of the Executive

2.17.1 A political executive is in the form of the Council of Ministers. In a parliamentary democracy, unlike in the presidential system, there is a degree of fusion of the two organs of the State, the Political Executive and the Legislature. The principle of responsible government has its institutional implications. The conventions of the cabinet system are : (1) that members of the cabinet are, as a rule, members of parliament; (2) that they are necessarily members of the majority, whether of one party or of a coalition; (3) that they hold office only while parliament and the country do not obviously withdraw their confidence from a minister or the entire cabinet; (4) that the cabinet acts as unit in face of other governmental bodies and this implies a certain predominance of the prime minister over his colleagues. The principle of collective responsibility means that the ministers answer as one for any action of the government. It does not necessarily mean collective decisions upon every matter. Normally, cabinet is a small body of persons drawn from the majority party (or the majority coalition) in the legislature. In India over the years the size of the Cabinets, both in the Union and the States, have tended to increase enormously adding to the cost and clumsiness of Government. A law or parliamentary convention to limit the size of the Cabinet is all the more desirable at the present juncture in view of a manifest sense of abandonment with which large size of Cabinets are resorted to. There are also other political rewards for the party members and supporters in the form of chairmenship of statutory corporations, usually attached with status of a Minister of Cabinet rank. The magnitude of the harm caused to public-interest, to the efficiency of administration and to the exchequer is, indeed, incalculable. This has increasingly become the pervasive political culture of the day.

[18] Hernando de Soto – The Mystery of Capital p.30

2.17.2 The permanent civil service is another gargantuan structure. The salaries, perquisites and the other benefits of office are so heavy that very little is left out of the revenues towards social infrastructure, social security, health, and education and other needs of the society. The financial allocations for health, education and social security in terms of percentage of the GDP is dismally low. The mobilization of resources in the States present a discouraging picture. There is heavy leakage of taxes. The executive has failed to afford reassurances to the citizenry of prompt reasonable efficient services particularly in public utilities. The citizenry has no assurances of living under the adequate system. Public-Greviance-Rederessal-Mechanisms are weak. Citizen Charters and Institutions of Charter Ombudsman have not taken off. Commission's Report addresses some of these problems bedeviling the polity.

Parliamentary System : Reforms

2.18.1 Debate on constitutional and parliamentary reforms has been raging for a long time. On occasions these have also become part of political campaigns. The ideas of a fixed term for Parliament, proportional system of representation, changes in the first-past-the post system, negative voting, state funding of elections, disqualification from electoral contest, anti-defection measures have all been debated endlessly.

2.18.2 Though the polity is federal, system of Government is the "parliamentary system" on the British pattern called the Westminster model. In a Parliamentary system there is no strict separation of powers between the Legislature and the Executive. Indeed, it involves a fusion of legislative and executive powers than a strict separation of those powers. The executive is drawn from the legislative-majority and can count on automatic endorsement of its programmes. The responsibility for success or failure of programme is clear and identifiable.

2.18.3 Indian Constitution has adopted this parliamentary system as distinct from the "presidential system" in which the executive is independent of, and not

accountable to, the legislature. Position of the President of the Indian Republic under the Constitution is substantially different from that of the American President and is similar to that of the Queen in England. A learned judge adopting a picturesque riverine imagery said, "Not the Potomac, but the Thames, fertilizes the flow of the Yamuna,".[19] The President of India "represents the nation but does not rule the nation. He is the symbol of the nation."

2.18.4 The Supreme Court of India dealing with the nature of the system of Cabinet Government observed,

> *"The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity.....*
>
> *Our Constitution, though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State.*
>
> *..... In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting , as it does, of the members of the legislature is, like the British Cabinet, "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part.....*
>
> *The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions;"*[20]

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[19] AIR 1974 Supreme Court Samsher Singh v. State of Punjab p.2212
[20] 1955 AIR Supreme Court (Vol.42) p.556

2.19.1 The Parliament and the State Legislatures, owing to the inherent weaknesses of the electoral system, have not acquired a true representative character. The 13th Lok Sabha represents only 27.9% of the total electorate and the recent past Legislature of Uttar Pradesh represents only 22.2% of the electorate. A fair and impartial electoral system is the key to the success of any democracy. Corruption in political life and elections is at the root of the pervasive corruption that is seen everywhere. Electoral reforms and reforming of the political parties and their internal democracy, both stupendous tasks, are an essential part of the remedies. The politician-bureaucrat nexus has eroded administrative credibility. Unprincipled, opportunistic political re-alignments from time to time and defections and re-defections erode the stability of governments. The administrative and economic costs of political instability and short-lived governments are enormous.

2.19.2 Maladministration has paralysed the creative energies of the people and has pushed people and their day to day living more and more into extra-legal systems. Owing to opportunistic and self-seeking politics and politicians and an increasing scenario of politician, criminal and bureaucratic nexus, the political climate of the country has been polluted bringing in its wake enormous corruption - electoral, political and bureaucratic. There is pervasive de-generation of values. The foremost requirement is the restoration of confidence in the institutions of democracy. This needs strong and enlightened national leadership to be able to address itself to the emergent problems in international relationships; to issues of national integrity and security, to issues of development and economics. This Report addresses some of these issues particular in relation to the ticklish issues of dealing with the aspirations to enter Parliament and State Legislatures of those who have criminal records.

2.19.3 The first significant development in the composition of our Parliament and the State legislatures is the increasing higher level of education amongst them. The second significant and impressive feature is that the representation of the elite sections of society in the legislatures has given way to more and more common people who till recently were in the lower echelons. The composition of the legislatures is moving in the right direction. However, the negative factor that compels notice is the representative character of panchayat and legislatures. As noticed earlier, the 13th Lok Sabha represents only 27.9% of the total electorate in the country and amongst the State legislatures, for example, in Uttar Pradesh, the largest State population-wise and constituting of highest number of Members of Parliament for any State, the legislature represents only 22.2% of the total electorate. This low representative character of the panchayat and legislatures, even after more than 50 years of Independence, is a matter of concern. This position is indeed partly reflection of the number of voters who do not discharge this civic duty; but is more reflective of the inherent defect in the first-past-the-post system as it now obtains. In some cases those who would otherwise have forfeited their security deposit have been declared elected as they had obtained the highest number of votes amongst the candidates.

2.19.4 The Commission has examined these issues and other connected issues of the processes and products of the electoral system and has made certain recommendations. The alarming increase of violence and influence of money in the electoral processes is a matter of great concern. It threatens the very survival of the democratic system.

Accountability versus Stability

2.20.1 A Parliamentary system, unlike the Presidential system, lays emphasis on accountability. Any emphasis of the preponderance on stability, as against accountability, would negate certain basic assumptions - the political relationship between the Parliament and the Cabinet - and would 'presidentialise' the Prime Minister's office. Indeed, on the 'ever growing power' of the Prime Minister in

Britain, some observers comment that "Britain, now has a quasi-presidential government." and that "the Prime Minister had become the focal point of public attention and governmental power" [21]. The debate, by implication, recognizes the trend in the Parliamentary system towards stability. In an article written for the American bicentennial review, Arther M. Schlesinger, Jr. said:

> *"The parliamentary system is to be defined by a fusion rather than by a separation of powers. The executive is drawn from the legislative majority and can count on automatic enactment of its program. No one doubts where responsibility lies for success or failure. But while the parliamentary system formally assumes legislative supremacy, in fact it assures the almost unassailable dominance of the executive over the legislature."*[22]

2.20.2. In the Parliamentary system, if there is conflict between accountability on the one hand and stability on the other, the latter must necessarily yield. But accountability and stability need not necessarily and always be mutually conflicting. Instability introduced by personal ambitions in opportunistic politics and unprincipled defections would need to be provided against. Need for political stability has to be seen in two emerging contexts: that in administering any economy in the global context, a reasonable degree of stability of Government and strong governance is important. Secondly, the economic and administrative costs of political instability might reach unaffordable levels. Writing on the economic costs of political instability a scholar says:

> *"The costs of the Indian economy of short-lived governments and their fall are very high. The uncertainty leads to postponement of investment decisions, both by domestic investors as well as foreign investors. Foreign direct investment gets postponed too. The paralysis of governmental decision-making also delays public investment. Naturally, one would expect economic growth to slow down. The economic impact can be quite sizeable as is reflected in our experience.*

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[21] Mackintosh: "The British Cabinet"
See also: Lalit Mohan Gautam's critiques of the Commission's Consultation papers: "Presidentialising the System".
[22] Reforming American Government: Leave the Constitution Aone(1982) p.51

Thus the fall in the annual GDP growth rate over the growth rate of the previous year was 10.7 percentage points during 1979-80 when Morarjee Desai and Charan Singh governments fell; 4.6% in 1991-92 when V.P. Singh and Chandra Sekhar governments fell, 2.8% in 1996-97 when Deve Gowda government fell.

These numbers are large, but not surprising. A three-month postponement of half of total investment means 16 per cent fall in investment. This could easily result in lowering of growth rate by 1 percentage point. In today's terms, this is an income loss of roughly Rs. 15,000/- crores. If the political uncertainty lasts longer, the loss would be higher. This is the immediate loss. When its future effects are accounted for, the value of the loss would be many times more."

2.20.3 There are also those who do not subscribe to this instability argument. They point out that only on 5 occasions out of 13, the Lok Sabha was dissolved before completing its full term and during the 53 years since Independence, just four Prime Ministers ruled for 40 years - two of them for 30 years between them. One political party alone, it is pointed out, was in power for 45 years out of 50 years.

The Institution of Prime Minister:

2.21.1 The importance and influence of the Prime Minister under the Cabinet-System is ever increasing. To those who speak of the 'Presidential System', the answer of the critics is the increasing 'presidentalising' of the Prime-Minister's office. Walter Bagehot said that the "hyphen which joins, a buckle which fastens, the legislative part of the State to the executive part of the State is the Council of ministers,"[23] But Crossman in his introduction to Bagehot's "English Constitution" referring to the increasing importance of the institution of the Prime-Minister said that the 'hyphen which joins, the buckle which fastens' is one single-man, viz. the Prime-Minister. "His right to select his own Cabinet and dismiss them at will; his power to decide the Cabinet's agenda and announce the decisions reached without taking a note; his control, through the Chief Whip, over patronage – all this had already before 1867 given him near-Presidential powers. Since then his

[23] R.H.S. Crossman: Introduction to Walter Bagehot: "The English Constitution" p.20

powers have been steadily increased, first by the centralization of the party machine under his personal rule..."[24]

2.21.2 Speaking of the British Cabinet and power to recommend dissolution of the House, C.F. Strong observes, "As Walter Bagehot acutely pointed out, the Cabinet is a creature, but, unlike all other creatures, it has the power of destroying its creator, i.e. the House of Commons. For if the Cabinet is defeated in the Commons it can, instead of resigning, advise the Queen to dissolve the assembly upon which it depends. Then the electorate decides whether the party from which the appealing Cabinet is drawn shall return with a majority or not."[25] But the position is held to be different under the Indian Constitution.

The Judiciary

2.22.1 Though India has a federal polity, it has an integrated judiciary.There are no separate systems of Federal and State courts. One system of courts deal with enforcement of laws – both of Union and of the States. A written constitution defines the powers of the different organs of the State. Each organ, the Executive, the Legislature and the Judiciary has its own assigned role. It is supreme in its assigned field. However, under parliamentary system of government, there is a fusion between the two organs of the State, namely, the Executive and the Legislature. The Legislature oversees the working of the Executive and exercises legislative control over public expenditure. A government under a written constitution is one of enumerated powers. Under a federal disposition, quite often, issues of the demarcation of powers between the Union on the one hand and the States on the other hand need to be settled by an independent wing. So also, the issues as to the limits of the powers of the Legislature and the Executive. There must necessarily be some authority to adjudicate such issues and to interpret and define the scope and limitations of the powers of the Executive and the Legislature. Under the Constitution, that power is vested in the Judiciary to ensure

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[24] Ibid p.51
[25] Modern Political Constitutions, C.F. Strong p.216

the constitutional checks and balances and to adjudicate disputes touching the limits on the power of the respective branches of Government. This task is as vital as it is essential. If a justiciable entrenched constitutional Bill of Rights is appended, the role of the judiciary assumes a more significant dimension. Democracy is said to be most perfect work of political wisdom but the pivot on which this grand machine turns is the principle of equality. Rule of law is the force which moves the democratic machine.

2.22.2 Another recurrent theme of debate relates to constitutional adjudications, judicial review and judicial activism. Even the incorporation of an entrenched justiciable Bill of Rights was attacked on democratic theory that the consequential shift of power to the judiciary, and away from the elected legislature, would place power in the hands of 'unelected, unaccountable and elite group of people, viz., the judges' who can over-turn the acts of Parliament. The power to identify and determine the inconsistency between an impugned law or an administrative policy on the one hand and the provisions of the Bill of Rights on the other hand, would itself, it is said, violate three most fundamental elements of democracy viz.- participation, representativeness and accountability and that judges exercise such powers without being accountable to the community. It is argued that 'judicial activism' is a slippery word which could mean a thin justification to interfere in the governing process.

2.22.3 It was also argued that such a power in the judiciary would shift the power from the legislatures to the judges; a process bristling with the possibilities of politicization of the judiciary. Speaking of this process an American writer[26] said,

> "A popular style in complaining about the courts is to contrast modern judges with those of a golden or, at least, a less tarnished age. Many people have a fuzzy impression that the judges of old were different. They did things like "follow precedent" and "apply the law, not make it up." There is a good deal to be said for that view. The practice of judicial law making has certainly accelerated

[26] Robert H. Bork – The Tempting of America – The Political Seduction of the Law p-15

spectacularly in this century, particularly in the past four or five decades. Nevertheless, the whole truth is rather more complicated."

Of the need for judicial restraint the author says:[27]

> "In law, the moment of temptation is the moment of choice, when a judge realizes that in the case before him his strongly held view of justice, his political and moral imperative, is not embodied in a statute or in any provision of the Constitution. He must then choose between his version of justice and abiding by the American form of government. Yet the desire to do justice, whose nature seems to him obvious, is compelling, while the concept of constitutional process is abstract, rather arid, and the abstinence it counsels unsatisfying. To give in to temptation, this one time, solves an urgent human problem, and a faint crack appears in the American foundation. A judge has begun to rule where a legislature should."

2.22.4 But Bill of Rights and judicial activism are here to stay. Constitutional adjudications have an inevitable legislative element. But then, they need great wisdom and restraint on the part of the judges in wielding that high power lest they erect their own prejudices into principles. The "irreplaceable value of the power of judicial review lies in the protection which it has accorded to constitutional rights." A learned judge of the American Supreme Court said that "it is this role and not some amorphous general supervision of the government that has maintained public esteem for the federal courts and **has permitted the peaceful existence of counter-majoritarian implications of judicial review and the democratic principles on which our federal government rests."** **(emphasis supplied)**

2.22.5 About half a century of the Constitution at work has tossed up many issues of the working of the judiciary: from the difficult problems of appointments to the superior judiciary to the problems of court clogging and judicial delays. A wide variety of issues have arisen. Who should appoint the judges? Should they be "judges' judges" or "peoples' judges"? Should the composition of the judiciary reflect the pluralism of the society? Particularly disturbing has been the chronic

[27] Robert H. Bork – The Tempting of America – The Political Seduction of the Law p-1

and recurrent theme of the near collapse of the judicial trial-system, its delays and the mounting costs. The glorious uncertainties of the law have frustrated the aspirations for an equal, predictable and affordable justice.

2.22.6 In all countries with advanced systems of dispute resolution, the percentage of cases which will go through the entire litigative processes is comparatively small. Most of the litigations or potential litigations are settled at the pre-litigation stage or at the pre-trial stages. In India, however, the percentage of cases that go through whole processes in courts and their hierarchies is quite large. Imaginative use of Alternative Dispute Resolution mechanisms, such as, arbitration, mediation, conciliation etc. and auxiliary adjudicative services, neutral assessment and active case flow management need to be explored.

Electoral System

2.23.1 Regular, fair and free elections are fundamental to a constitutional democracy. They draw the nation to a debate on vital issues that touch the lives of the people. But there is increasing disillusionment about the purity of electoral process. Corruption and criminalisation has bedeviled its processes.

2.23.2 At the Golden jubilee of Independence, the Parliamentarians took a pledge :-

> *"That meaningful electoral reforms be carried out so that our Parliament and other legislative bodies be balanced and effective instruments of democracy; and further that political life and processes be free of the adverse impact, on governance of undesirable extraneous factors including criminalisation;*
>
> *That continuous and proactive efforts be launched for ensuring greater transparency, probity and accountability in public life so that the freedom, authority and dignity of the Parliament and other legislative bodies are ensured and enhanced; that more especially, all political parties shall undertake all such steps as will attain the objective of ridding our polity of criminalisation or its influence;*

2.23.3 The proposals in the Consultation papers have evoked diverse views, including some sharp reactions. For instance, the proposal whether a political party securing less than, say, 5% or 10% of the votes polled should be entitled at all to representation, there was a pointed criticism. It has been eminently argued by a young scholar that, if the rule was operated, only two national parties, viz. the Congress and the B.J.P, which together, at present, account for about 300 seats in the Lok Sabha would qualify and the rest of the parties which account for 245 seats would be looked upon as "usurpers"![28] Such a rule, it was urged, would ignore regional, social and other legitimate force, seeking space in the national democratic debate. It was mentioned that even in Britain, the two-party system is on the decline and the vote share of the top two political parties show a marked fall over the years.

2.23.4 Even in regard to requirement of 50%+1 vote considered necessary to improve the representative image of Parliament and the State Legislatures, there have been certain criticisms in the responses raised from the public.

2.23.5 In a different context, namely, the requirement of "secure majority" for the outcome of referenda, both as international practice and practice adopted by the United Nations, the responses have indicated the 50%+1 vote as desirable standard. In that context, a Canadian Minister said:

> *"In short, Canadian practice, international practice and the practice of the United Nations unanimously indicate that in the matter of referendums on accession to sovereignty, the absolute majority of votes, namely, 50%+1, expresses not only a clear majority but also a rule that must be recognized as being democratic, constant and universal."*[29]

2.23.6 In regard to the relevance of the German Model to Indian conditions critics rely upon the following observations of David Willets:

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[26] Lalit Mohan Gautam "Presidentialising the System"

[29] Joseph Facal, Minister Responsible for Canadian Intergovernmental Affairs on "Rules cannot be changed in the middle of the game".

"We have had a different history from the countries of the continent and that does give our Constitution a different shape from theirs. But that is not evidence that it is wrong. Different countries with their own traditions can quite reasonably have different constitutional arrangements. That the German Constitution works well for them is no reason for us to have it here."

Political Parties

2.24.1 Herman Finer sets out Burke's definition of a political party as "a body of men, united for the purpose of promoting by their joint endeavours the public interest, upon some principle on which they are all agreed."[30] C.F. Strong refers to the following definition of political parties by Walter Dean Burnham, "...political parties, with all their well-known human and structural shortcomings, are the only devices thus far invented by the wit of Western man which with some effectiveness can generate countervailing collective power on behalf of the many individually powerless against the relatively few who are individually – or organizationally – powerful."[31] This desire for collective power and solidarity against perceived injustices seems to be the moving force behind the phenomenon of proliferation of smaller political parties.

2.24.2 Under the Constitutional document, there is no specific reference to the political parties excepting in the Twelfth Schedule which deals with defections. The right to form a political party is a right under the common law and is protected article 19(1)(c) of the Constitution.

2.24.3 Political parties play a great role in the working of the Constitution and its democratic institutions. Issues of the organization, functioning, inner-party-democracy, transparency of funding, ethical standards are all matters of vital public concern. There are 552 political parties in the country at the last count. But there is no comprehensive law regulating their functions and operations which are crucial to the welfare of the nation and, indeed, to the very survival of the

[30] The Theory And Practice of Modern Government: Herman Finer p.240
[31] Supreme Court Statecraft: The Rule of Law and Men: Wallace Mendelson p.226

democratic spirit and tradition. Samuel Lubbel, speaking on the crisis in politics, saw "no party coalition in command of sufficiently stable majority to be able to advance a unifying set of policy" and that "reasoned argument compromise and accommodation were increasingly shoved aside in favour of polarization, violence and struggle for raw power"[32]. This, more or less, characterizes the situation in the country.

"Government is man's unending adventure." John Morley in his notes on "Politics and History" speaks of the great complexity of Governmental business: "Everybody who knows anything knows that it is a waste of our short lives to insist on ideal perfection. Popular government, or any other for that matter, is no chronometer, with delicate apparatus of springs, wheels, balances, and escapements. It is a rough heavy bulk of machinery, that we must get to work as best we can. It goes by rude force and weight of needs, greedy interests and stubborn prejudices."

2.24.4 Political parties that control and run democratic governments themselves need to be arranged on transparent systems as to their organization, funding, accounts and audit. There is increasing criminalisation of politics and of the electoral process. If remedies are not found and implemented speedily there might remain very little of value to salvage.

Political System and Structure:

2.25.1 The political, social and economic philosophy of the Constitution is reflected in the Preamble of the Constitution which declares India a "sovereign, socialist, secular, democratic, republic". The Preamble read with the Directive Principles of State Policy presents the socio-economic goals of the Constitution. Fundamental Rights and Fundamental Duties are the means by which the socio-

[32] Samuel Lubell: "The Hidden Crisis in American Politics:

economic goals of the Constitution are to be realized. "The Judiciary", said Granville Austin, "was to be the arm of the social revolution."[33]

2.25.2 The framers of the Constitution sought to unite the vast country with its great diversity, many languages and creeds within a common-bond of constitutional justice on the great ideals of liberty, equality, fraternity and justice. Universal adult franchise was the foundation for the democratic polity. Framers showed an uncompromising respect for human dignity, an unquestioning commitment to equality and non-discrimination, and an abiding concern for the poor and the weak. They made a bold attempt to base the constitutional foundations on the firm faith that all classes of people, followers of all faiths, and particularly the traditionally under-privileged should all join to work for their united constitutional salvation on the shared faith that peoples of the several faiths must sink or swim together, and that in the long run prosperity and salvation are in union and not in division.

2.25.3 The framers of the Constitution intended that it should not commit the country to any particular form of economic structure giving fullest freedom to the elected representatives to evolve any economic order or system to achieve the goals of economic democracy.

2.25.4 Indeed political reforms, in their very nature, follow and cannot force the pace of enlightened public opinion. Educating public opinion even on a vital and important issue may take years. The nuances of Parliamentary Democracy are political. As A.W. Bradley said:

> *"the responsibility of government to parliament is a political relationship. As such it is not a matter of precise definition and lawyers must resist the temptation to lay down rules for it".*[34]

The words of Sir Ivor Jennings are also worth recalling :

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[33] The Indian Constitution – Cornerstone of a Nation – Granville Austin p.
[34] ECS Wade and G. Philip "Constitutional & Administrative Law" by A.W. Bradley 5th Ed. P.97

"In truth what the democratic system does is to harness a man's ambitions; if they lie in the right direction, to the National dog-cart: The horse will go of his own volition because he wants to get somewhere, and perforce the cart will follow; by choosing the right horses the nation will arrive at it's chosen destination. The horse chooses the destination, but the Nation chooses the horse; and – it is here a dictatorship differs; the horse can always be changed in mid-stream if necessary."[35]

Fifty years of Working of the Constitution: Achievements & Failures : A Balance Sheet

2.26.1 "The ideals on which this Draft Constitution is framed", lamented a member of the Constituent Assembly, "have no manifest relation to the fundamental spirit of India. I can assure you that this Constitution will not prove suitable and will break down soon after being brought into operation."[36] But a learned author who surveyed its working spoke with feeling when he said, "The Constitution has been accepted as the charter of Indian unity. Within its limits are held the negotiations over the working of the federal system..... The Constitution has established the accepted norms of 'national' behavior..... The Constitution's greatest success, however, lies below the surface of government. It has provided a framework for social and political development; a rational, institutional basis for political behavior. It not only establishes the national ideals, more importantly it lays down the rational, institutional manner by which they are to be pursued – a gigantic step for a people previously committed largely to irrational means of achieving other-worldly goals."[37] "By independence we have lost the excuse" said Ambedkar, "of blaming the British for anything going wrong. If hereafter things going wrong, we will have nobody to blame except ourselves."

2.26.2 What are our achievements and failures over the 50 years since Independence? How have each of the three organs of the State, the Legislature,

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[35] Sir Ivor Jennings – Parliament Second Edition p.521 (See: Lalit Mohan Gautam's paper "Presidentialising the System"

[36] The Indian Constitution – Cornerstone of a Nation – Granville Austin p.325

[37] Ibid p.309-310

the Executive and the Judiciary redeemed the constitutional pledge of ushering in a social revolution? Has the dream of the founding fathers for a life of dignity to the vast millions through the process of socio-economic transformation been realized? What then is the Balance Sheet?

2.26.3 Political Accomplishments:

- India's democratic base has stabilized as a working federal polity. With the Constitution, 73rd and 74th amendments, the base of democratic debate has widened. There is greater push towards non-centralisation. General Elections have been held with regularity; and transfers of power consequent upon the results of elections have been orderly, peaceful and democratic.

- The educational qualifications of the Members of Parliament and Legislatures have shown marked improvements. The Parliament and Legislatures are increasingly more representative of the composition of society. More and more members of the hitherto backward classes are moving up in the political ladder.

- The main cause and source of political-decay is the ineptness of the electoral process which has not been able to keep out criminal, anti-social and undesirable elements from participating in and even dominating the political scene and polluting the electoral and parliamentary processes.

- Though democratic traditions are stabilizing, however, democracy cannot be said to be an inclusive representative democracy. The pluralism and diversity of India is not reflected in and captured by its democratic institutions; likewise, participation of women in public affairs and decision-making processes is nowhere near proportionate to their numbers.

- The enormity of the costs of elections and electoral corruption in having have been a grievous deleterious effect on national progress and has led to the degradation of political processes to detriment of common good.

- Political parties, which have a fair share of the criminal elements, handle enormous funds collected ostensibly for meeting party

and electoral expenditure. Money-power and criminal elements have contributed to pervasive degeneration of standards in public life and have criminalized politics. This is reflected in the quality of governments and of the governing processes.

- There are no legal instrumentalities or set of law regulating the conduct of the political parties, legitimacy of fund-raising, audit and account requirements and inner-party democracy.

- National political parties are more divided on the definition of 'common national purpose' than ever before; the noble purposes of public life have degenerated than ever before into opportunistic and self-seeking politics of competitive personal gain.

- 'Fraternity', the noble ideal of brotherhood of man enshrined in the Preamble of the Constitution has remained unrealized. The people of India are more divided amongst themselves than at the time of the country's independence.

- There is increasing criminalisation and exploitation of the political climate and processes and an increasing criminals-politicians-bureaucratic nexus.

- There is crisis of confidence. There is crisis of leadership. Political leaders, owing to narrow partisan and sectarian interests and desire for short-time political gains, are unable even to agree upon broad common national purposes.

2.26.4 Economic or Physical Infrastructure: Impressive Performance

- There has been marked expansion and diversification of production. New technologies and modern management techniques are increasingly employed. There are marked advances in Science, Technology, Medicine, Engineering and Information Technology.

- Between 1950-2000, the index of agricultural production increased from 46.2 to 176.8.

- Between 1960-2000, wheat production went up from 11 m. tones to 75.6 million tones.

- Between 1960-2000, rice production went up from 35 m. tones to 89.5 million tones.

- Impressive expansion of industrial and service sectors has taken place.
- Index of industrial production went up from 7.9 in 1950-51 to 154.7 in1999-2000.
- Electricity generation has increased from 5.1 billion KWH in 1950-51 to 480.7 billion KWH in 1999-2000.
- 6 to 8% annual growth of GNP between 1994-2000 (except in 1997-98) was achieved.
- Revenues from Information Technology industry have grown from $150 million in 1990 to $ 4 billion in 1999.
- India's per capita Net National Product (NNP) in 1999-2000 was more than 2.75 times than what it was in 1951.

2.26.5 Social Infrastructure:

- Between 1950 to 1998 infant mortality rate have halved to 72 births per 1000 births down from146.
- India's maternal mortality rate in 1998 was 407 per 100,000 live births. These levels are more than 100 times the levels found in the West.
- Some 53% children (almost 60 million) under five remain malnourished – nearly twice the levels reported in many parts of sub-Saharan Africa.
- The proportion of low birth weight babies born in India is 33%. It is only 9% in China and South Korea, 6% in Thailand and 8% in Indonesia.
- India was a signatory to the Alma Ata Declaration in 1978 that assured 'health for all' by the year 2000. Only 42% of the children between 12-23 months are fully immunized – 37% in rural areas and 61% in urban areas. The coverage is shockingly low in Bihar – 11% and in Rajasthan – 17%.

- Life expectancy at birth has grown up from 32 years in 1950-51 to 63 years in 2000.
- A child born in Kerala today can expect to live longer than a child born in Washington.
- Life expectancy of women in Kerala is now 75 years.
- India has put in place an extensive system of Public Health Services and medical network. In 1951, the country had only 725 primary health centers. By 1995, this has increased to more than 1,50,000.
- The number of primary schools has increased significantly between 1951 and 1995 from 2,10,000 to 5,90,000.
- Close to 95% of the villages have a primary school within a walking distance of one kilometer.
- While per capita daily consumption of cereals has improved only marginally from 400 gms in 1950 to about 440 gms in 2000. The per capita pulses (protein intake) have over the 50 years decreased.
- The promise of social revolution has remained unredeemed. There are 270 million Scheduled Castes and Scheduled Tribes measures for whose welfare and uplift have not been implemented with sincerity.
- There are 380 million children below the age of 14. Almost 100 million of them are Dalit children. No effective steps are taken to bring them to the level of the "core-mainstream".
- Population control measures in the northern States have not succeeded. Fertility rates in Uttar Pradesh indicate that State is almost a century behind Kerala.

2.26.6 Significant Failures: Economic Issues:

- The richest top quintile of population has 85% of the income. In India, the poorest quintile has only 1.5% of the country's income. The second, the third and the fourth quintile from top have respectively 8%, 3.5% and 2% of the income.

- This disparity is an internal reflection of the international economic order. Internationally, inequalities amongst countries have been increasing. The income gap between the fifth of the world's people living in the richest countries and the fifth in the poorest was 74 to 1 in 1997, up from 60 to 1 in 1990 and 30 to 1 in 1960.

- 260 million people live below the poverty line.

2.26.7 Administration :

- Corruption, insensitivity and inefficiency of administration have resulted in extra-legal systems and parallel economies and even parallel governments. Bureaucratic corruption and pettifoggeries, which cause frustration in people in their daily lives has more serious fallout of pushing more and more people into extra-legal systems. The pervasive cynicism that mal-administration generates results in a lack of faith in and disenchantment with institutions of democracy.

- There is an increasing non-accountability. Corruption has been pervasive. Public interest has suffered.

- Constitutional protection for the Services under Article 311 has largely been exploited by dishonest officials to protect themselves from the consequences of their wrong-doings.

2.26.8 Gender Justice and Equality:

- The regional disparities in life expectancy is indicated by the fact that a woman born in Kerala can expect to live 18 years longer than one born in Madhya Pradesh.

- In most countries life expectancy among women exceeds that of men by about 5 years. In all but a few countries of the world, there are typically 1005 women for every 1000 men. Men outnumber women only in societies where women are specifically and systematically discriminated. In India, there are only 933 women for every 1000 men. This is the phenomenon about 'missing' women.

- Overall representation of women in public services is just 4.9%.
- Political participation of women indicates that in 1952 there were only 22 women in Lok Sabha against 499 seats (4.41%). In 1991 this increased to 49 seats as against 544 seats (9.02%).
- In the Central Council of Ministers there are only 3 Cabinet Ministers out of 30.
- In India between 1995-2000, out of 503 judges of the High Court only 15 were women.

2.26.9 Administration of Justice:

- Judicial system has not been able to meet even the modest expectations of the society. Its delays and costs are frustrating, its processes slow and uncertain. People are pushed to seek recourse to extra-legal methods for relief. Trial system both on the civil and criminal side has utterly broken down.

2.26.10 On an overall assessment there are more failures than success stories, making the inference inescapable that the fifty years of the working of the Constitution is substantially a saga of missed opportunities.

Areas of Concern: Commission's perception

2.27 The following are the important areas of concern according to the perception of the Commission:

(a) There is a fundamental breach of the constitutional faith on the part of Governments and their method of governance lies in the neglect of the people who are the ultimate source of all political authority. Public servants and institutions are not alive to the basic imperative that they are servants of the people meant to serve them. The dignity of the individual enshrined in the Constitution has remained an unredeemed pledge.

There is, thus, a loss of faith in the Governments and governance. Citizens see their Governments besieged by uncontrollable events and are losing faith in institutions. Society is unable to cope up with current events.

(b) The foremost area of concern is the present nature of the Indian State and its inability to anticipate and provide for the great global forces of change ushered in by the pace of scientific and technological developments.

(c) The next and equally important dimension is the increasing cost of government and financial defects which are alarming. In 1947, there was a deficit of Rs.2 crores in the revenue budget; in 1997-98 it became Rs.88,937 crores; in 2001-02, it is about Rs.1,16,000/- crores(4.8% of GDP). India is on its way to a debt-trap.

(d) There is pervasive impurity of the political climate and of political activity. Criminalisation of politics, political-corruption and the politician-criminal-bureaucratic nexus have reached unprecedented levels needing strong systemic changes.

(e) Issues of national integrity and security have not received adequate and thoughtful attention. Mechanisms for the assessment of early warning symptoms of social unrest are absent. Mechanisms for adequate and immediate state responses to emergencies and disaster management are wholly inadequate. Administration, as a system for anticipating coming events and planning responses in advance, has failed. It has become un-coordinated and directionless amalgam of different departments often with over-lapping and even mutually conflicting jurisdictions, powers and responsibilities

which merely acts as a reaction to problems. There are no clear-cut standards or basis for fixing responsibilities.

(f) Though India's overall record and experience as a working democracy (despite many centrifugal forces) are worthy to mention and though the bases of democratic debate have widened with the 73rd and 74th Constitutional amendments, the working of the institutions of parliamentary democracy, however, have thrown-up serious fault-lines, which might, if unattended, prove destructive of the basic democratic values.

(g) There is pervasive misuse of the electoral process and the electoral system is unable to prevent the entry of persons with criminal record into the portal of law-making institutions.

(h) The Parliament and the State Legislatures, owing to the inherent weakness of the electoral system, have failed to acquire adequate representative character. The 13th Lok Sabha represents only 27.9% of the total electorate and the Legislature of U.P. represents only 22.2% of electorate, respectively.

(i) The increasing instability of the elected governments is attributable to opportunistic politics and unprincipled defections. The economic and administrative costs of political instability are unaffordably high and their impact on the polity is not clearly comprehended and realized. Though just four Prime Ministers ruled the country for 40 years out of the 54 years of independence and one political party alone was in power for 45 years, however, 1989 onwards the country saw five General Elections to the Lok Sabha. Costs of this political instability are simply colossal.

(j) The state of the Indian economy is disturbing. The economy is gradually sinking into a debt-trap. Economic, fiscal and monetary policies, coupled with administrative inefficiency, corruption and wasteful expenditure are increasingly pushing the society into extra-legal systems, crime-syndicates, mob-rule and hoodlum out-fits. Black-money, parallel economy and even parallel governments are the overarching economic and social realities. Legitimate governments will, in due course, find it increasingly difficult to confront them. In course of time these illegal criminal out-fits will dictate terms to the legitimate governments.

(k) Rural de-population, urbanization and urban-congestion and social unrest need immediate attention and solutions. Increasing unemployment will prove a serious threat to orderly government.

(l) Future of society is increasingly knowledge-based and knowledge-driven. The quality of education and the efficiency of the administration and higher research are in educational agenda and need of immediate and urgent repair. The country is engaged in a unilateral and unthinking educational disarmament.

(m) System of administration of justice in the country is another area of concern.

(n) Criminal justice system is on the verge of collapse. The quality of investigations and of prosecutions requires a strong second look. Law's delay and costs of litigation have become proverbial. Victimology, victim-protection, protection of

witnesses in sensitive criminal-trials need institutional arrangements. Recruitment, training, refresher and continuing legal education for lawyers, judges and judicial administrators need immediate attention. The increasing utilization of alternative dispute resolution mechanisms, such as mediation, conciliation and arbitration and mechanisms of auxiliary adjudicative services need to be stressed. Training programmes for conciliators, mediators etc. need to be institutionalized. Legal profession needs to be transformed to meet the increasing public-expectations. Modernizing the system and making it user-friendly is one of the urgent tasks.

(o) Communal and other inter-group riots in a country like India with its religious, social and cultural diversity cannot be treated as merely law and order problem. They are manifestations of collective behavioural disorders. Legal and administrative measures are required to be taken to remove the insecurity felt by the minorities and for bringing them into the mainstream of the national fabric. The Commission dealt with various safeguards required in the matter. The Commission considered the aspects of positive discrimination for bringing equality of opportunity under articles 15 and 16 of the Constitution to the socially and educationally backward classes of citizens, granting of recognition to languages spoken by a section of population in a State under article 347, inadequate political representation of minorities, religious freedom under article 25(2) and necessity of establishment of an Inter-Faith Commission in the context of the present scenario.

(p) The state of social infrastructure is disturbing. There are 380 million children below the age of 14. The arrangements for their education, health and well-being are wholly inadequate both qualitatively and quantitatively. 96.4% of the primary education budget goes for salaries alone.

(q) Rates of infant mortality, blindness, maternal mortality, maternal-anemia, child malnutrition and child-immunization, despite significant progress achieved, yet remain at high and disconcerting levels.

(r) Public health and hygiene have not received adequate attention. There is alarming increase of infectious diseases such as Tuberculosis, Malaria, Hepatitis, HIV etc.

Pandora's Boxes!

2.28.1 The Commission has examined various areas of the working of the Constitution with the help and assistance of experts and formulated its views. Change must come from the spirit of constitutionalism and by determined and dedicated leaders and statesmen when societies do not have predictable futures.

2.28.2 A learned university scholar likened the proposals in the Consultation papers of the Commission as Pandora's boxes. Michael Foley referred to a similar criticism of William Ress-Mogg of the 11 proposals of the Labour Party under John Smith and lamented that the 'party under John Smith fell into hands of lawyers... (who) love proposals for constitutional reform.'

2.28.3 There is pervasive disenchament with the working of the institutions of democracy. People themselves seem almost to have resigned to what they consider their inevitable fate. Their patience and emotional resources appear to be wearing thin, yielding place to a sense of revulsion against the State and a deep

distrust against the machinery of the government, particularly - the police and the bureaucracy. There is pervasive and cynical disbelief that anything will change at all. Seventy eight years ago Chakaravarti Rajagopalachari wrote some prophetic words from his prison cell in Vellore: "We all ought to know that Swaraj will, not at once or, I think, even for a time to come, bring better government or greater happiness for the people. Elections and their corruptions, injustice, and the power and tyranny of wealth, and inefficiency of administration, will make a hell of life as soon as freedom is given to us."

2.28.4 Government, it is said, is a potent teacher which teaches people by its own example. In the Indian context the lessons have not been happy. Quite often they were bitter, leaving the populace confused. The Parliamentary reforms need a high level of public awareness and political commitment. Simplistic analogies do not help. Not unoften, the proposed solutions may themselves turn-out to be the source of other problems. There is always the law of unintended results. Particularly, in regard to the institutions of parliamentary democracy, the utility of changes imposed by law is greatly debateable.

Arthur M. Schlesinger, Jr. said[38]:

> *"My concern is that this agitation about constitutional reform is a form of escapism. Constitution-tinkering is a flight from the hard question, which is the search for remedy. Structure is an alibi for analytical failure. As Bryce wisely reminds us, "The student of institutions, as well as the lawyer, is apt to overrate the effect of mechanical contrivances in politics.*
>
> *Fascinating as constitutional-tinkering may be, like the Rubik cube, let it not divert us from the real task of statecraft. Let us never forget that politics is the high and serious art of solving substantive problems".*

John Major said[39]:

> *"The British Constitution is vibrant and robust. But it is not indestructible. People must realize that our Constitution is not a piece*

[38] 'Leave the Constitution Alone (1982): Reforming American Governmentp.54
[39] John Major, Speech on the Constitution given to the Centre for Policy Studies: 26th June, 1996.

of architecture that one can re-engineer by knocking down a wall here or adding an extension there. It is a living, breathing constitution. It's roots are ancient but it has evolved. It embodies a set of values, a legacy of understanding that have developed year by year over the centuries. No one should lightly contemplate tampering with an institution that is so ancient and yet so alive."

Remedies, it is said, will come by reversing the decay not by sweeping reform measures. An American writer said,"

"The remedies will come – if they come at all – not through any sudden and sweeping reform measures but through the gradual development and adoption of new doctrine by the elite cadre of political activist and, through them, by the public at large, which will lead to incremental changes in institutions and behaviour."[40]

Madhu Limaye observed:

"The process of cleansing public life and strengthening democracy is a difficult and painful process. ..... It has to be accompanied by democratization of parties. There is no easy way out, no instant solution awaiting implementation through a suitable statute."[41]

2.28.5 In the last analysis, citizen education is essential for any remedial action. If the democratic polity has failed to fulfill even the minimal expectations of the people, in a large measure, people have none else to blame except themselves. Indeed 200 years ago, in one of the most moving and poignant events in human history, Pontius Pilate offered to the hysteric crowd before him a choice as to whom he should pardon – Jesus or Ba-rab'bas. The crowd wanted pardon for Ba-rab'bas, the robber. Jesus was crucified. Professor Rene Cassin, the illustrious French jurist and principal architect of the Universal Declaration of Human Rights on the occasion of the award of the Nobel Prize for Peace on him, was asked why he thought the Universal Declaration of Human Rights was necessary. He is reported to have answered "because, Men are not always good." The haunting words "Not Always Good", reverberates through history as man's inhumanity.

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[40] 'Reversing the Decay of Party (1982), James L. Sundquist : Reforming American Government
[41] 'Contemporary Indian Politics' Madhu Limaye

2.28.6 Good systems can and do change men. Good governments can earn their confidence. It is only when we fulfill the basic duty of politics and restoring the power of the Constitution and its institutions back to their legitimate owners – the people – that things will begin to change. It is only then that "We can move beyond the limits of physical world and use our minds to sore into the future". Dag Hammarskjold said: "In our era, the path to holiness must lead through the world of action."

2.28.7 It is with this hope that the Commission dedicates this Report to the people.

CHAPTER 3

FUNDAMENTAL RIGHTS, DIRECTIVE PRINCIPLES AND FUNDAMENTAL DUTIES

CONTENTS

A. Fundamentals of the Constitution

B. Vision of Socio-Economic Change

3.2 ➢ The Preamble
3.3 ➢ The Socio-Economic Agenda

C. Fundamental Rights

3.4 ➢ Background and Approach
3.5 ➢ Definition of 'the State'
3.6 ➢ Heads of Discrimination
3.7 ➢ Reservation for Minorities
3.8 ➢ Freedom of Press and Freedom of Information
3.9 ➢ Rights against Torture and Inhuman, Degrading and Cruel Treatment and Punishment
3.10 ➢ Right to Compensation for being Illegally Deprived of one's Right to Life or Liberty
3.11 ➢ Right to Travel Abroad and Return to one's Country
3.12 ➢ Right to Privacy
3.13 ➢ Right to Work
3.14 ➢ Preventive Detention
3.15 ➢ Right to Justice and Legal Aid
3.16 ➢ Right to Property
3.17 ➢ Article 31B and Ninth Schedule
3.18 ➢ Suspension of articles 17, 23, 24,25 and 32 during Emergency
3.19 ➢ Capital Punishment
3.20 ➢ Right to Education
3.21.1 ➢ Rights of Children
3.22.1 ➢ Right to Safe Drinking Water, Clean Environment, etc.
3.23.1 ➢ Right to Freedom of Religion
3.24 ➢ Special Provision Relating to Language Spoken by a Section of Population of a State

D. Directive Principles

3.25 ➢ Principles of Governance
3.26 ➢ Justiciability and Enforceability
3.27 ➢ Right to Social Security and to Work
3.28 ➢ Right to Health
3.29 ➢ Right to Food and Freedom from Hunger, Clothing and Housing or Shelter
3.30 ➢ Right to Education
3.31 ➢ New Challenges to Education Policy
3.32 ➢ Control of Population
3.33 ➢ Right to Culture
3.34 ➢ Promotion of Inter-Religious harmony and inter-faith values
3.35 ➢ Mechanism for Realization of Directive Principles
3.36 ➢ Credibility of Socio-Economic Data

E. Fundamental Duties

3.37 ➢ The Background
3.38 ➢ Usefulness of Duties
3.39 ➢ Spirit of Harmony and Dignity of Women
3.40 ➢ Composite Culture

CHAPTER 3

FUNDAMENTAL RIGHTS, DIRECTIVE PRINCIPLES AND FUNDAMENTAL DUTIES[1]

A. Fundamentals of the Constitution

3.1 The Constitution which lays down the basic structure of a nation's polity is built on the foundations of certain fundamental values. The vision of our founding fathers and the aims and objectives which they wanted to achieve through the Constitution are contained in the Preamble, the Fundamental Rights and the Directive Principles. These three may be described as the soul of the Constitution and the testament of the founding fathers to the succeeding generations together with the later Part on Fundamental Duties.

B. Vision of Socio-Economic Change

The Preamble

3.2.1 The vision of socio-economic change through the Constitution is reflected in its lofty Preamble. The Preamble expresses the ideals and aspirations of a renascent India. At independence, emerging out of a long period of foreign domination and oppression under a feudal system, the people were grimly struggling to be reborn into a life of dignity and hope. The past was heavy on their shoulders, and the future uncertain. There was social and economic exploitation around. There were a whole host of social ills such as illiteracy, superstition, *sati*, child-marriage, agrarian exploitation, child-labour, bonded labour, gender-inequality, bedeviling the society and polity.

3.2.2 The framers of the Constitution sought to unite the vast country with its great diversity of languages and creeds within a common bond of constitutional justice based on the great ideals of liberty, equality, fraternity and justice. Framers showed an uncompromising respect for human dignity, an

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[1] *See* also the Consultation Papers released by the Commission on "Enlargement of Fundamental Rights" and "Effectuation of Fundamental Duties" in Volume II (Book 1) of this Report.

unquestioning commitment to equality and non-discrimination, and an abiding concern for the poor and the weak. They made a bold attempt to base the constitutional foundations on the firm faith that all classes of people, followers of all faiths, and particularly the traditionally under-privileged should all join to work for harmony, progress, prosperity and nation building.

3.2.3 The Preamble through its noble words promised Justice, social, economic and political; Liberty of thought, expression, belief, freedom of faith and worship; Equality of status and of opportunity and to promote Fraternity, assuring the dignity of the individual and the unity and integrity of the Nation. Speaking of the imperatives of social democracy, Dr. Ambedkar said:

> "It was, indeed, a way of life, which recognizes liberty, equality and fraternity as the principles of life and which cannot be divorced from each other: Liberty cannot be divorced from equality; equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things."

The Socio-economic Agenda

3.3.1 The scheme of the Constitution for the realisation of the socio-economic agenda comprises of both the justiciable Fundamental Rights as well as the non-justiciable Directive Principles. The judicial contribution to the synthesis and the integration of the Fundamental Rights and the Directive Principles in the process of "constitutionalising" social and economic rights has been crucial to the realisation of the Directive Principles not only as a means to effectuate Fundamental Rights but also as a source of laws for a welfare state.

3.3.2 The Constitution makes it mandatory to protect and promote freedoms, and to assure every citizen a decent standard of living. It makes a strong commitment to promoting the well-being of all citizens without any discrimination on the grounds of caste, creed, community or gender.

C. Fundamental Rights

Background and Approach

3.4.1 Constitutional guarantees for the human rights of our people were one of the persistent demands of our leaders throughout the freedom struggle. By the year 1949, when the Constituent Assembly had completed the drafting of the Fundamental Rights Chapter, it had before it the 'Universal Declaration of Human Rights, 1948.

3.4.2 The International Covenant on Civil and Political Rights,1966 (ICCPR) broadly referred to the inherent right to life and liberty and the right against arbitrary deprivation of those rights and its various aspects (Articles 6 to 14); privacy, family, etc. (Article 17); freedom of conscience and religion (Article 18); freedom of expression and information (Article 19); Right of peaceful assembly (Article 21); freedom of association (Article 22); rights of minorities (Article 27); etc. The International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) broadly referred to the "right to work" and its various aspects (Articles 6 and 7); right to form trade unions for promotion of economic or social interests and the right to strike (Article 8); right to social security and social insurance (Article 9); family, marriage, children and mothers' rights (Article 10); adequate standard of living, right to food, clothing and housing, freedom from hunger (Article 11); physical and mental health (Article 12); education (Article 13); compulsory primary education (Article 14) and culture (Article 15). The treaty obligations under the covenant enjoined the State Parties to ensure these rights without discrimination and "to take steps" to promote them "to the maximum of its available resources", with a view to achieving "progressively" the full realisation of these rights. The Directive Principles of State Policy in Part IV of the Constitution are indeed the precursor to economic, social and cultural rights specified in the ICESCR.

3.4.3 During the last three decades, a vast number of human rights have found place in new constitutions and bills of rights of more than eighty countries and of

supra-national entities. Countries which enacted these new constitutions have had the benefit of all the developments in the human rights jurisprudence which have taken place since 1950. Also, our Supreme Court has by judicial interpretation expanded the scope of the fundamental rights, particularly in relation to article 21, and this has included more civil and political rights which were not explicit in Part III.

3.4.4 A new development is that of the principle of 'basic structure' of the Constitution enunciated by the Supreme Court in 1973 in *Kesavananda Bharati vs. State of Kerala*[2]. As to what are these basic features, the debate still continues. The Supreme Court has also held that the scope of certain fundamental rights could be adjudged by reading into them or reading them not only in the light of the Directive Principles of State Policy but also international covenants or conventions which were in harmony with the Fundamental Rights.

3.4.5 The Commission feels that after fifty years, time is ripe to review and enlarge suitably the contents of some of the Fundamental Rights, particularly those Fundamental Rights which have been judicially deduced.

Definition of 'the State'

3.5 Fundamental rights guaranteed by the Constitution are, in the absence of specific constitutional provisions, mainly enforceable against 'the State'. The definition of 'the State' in article 12 being an 'inclusive' one, courts have ruled that where there is pervasive or predominant governmental control or significant involvement in its activity, such bodies, entities and organizations fall within the definition of 'the State'.

It is recommended that in article 12 of the Constitution, the following Explanation should be added:-

[2] AIR 1973 SC 1461 = 1973(4) SCC 228

'Explanation – In this article, the expression "other authorities" shall include any person in relation to such of its functions which are of a public nature.'

Heads of discrimination

3.6 **In articles 15 and 16, prohibition against discrimination should be extended to "ethnic or social origin; political or other opinion; property or birth'.**

Reservation for minorities

3.7.1 There was a plea on behalf of some minority communities for an express provision for reservation in favour of minorities both in articles 15 (4) and 16 (4). The Commission, upon due consideration of the representations, felt that no special provision was necessary inasmuch as, under the existing provision of articles 14, 15 and 16, it is open to the State to make reservation if it is of the opinion that such reservation is necessary and justified.

3.7.2 The Commission noted that the ultimate aim of affirmative action of reservation should be to raise the levels of capabilities of people of the disadvantaged sections and to bring them at par with the other sections of society.

Freedom of Press and Freedom of Information

3.8.1 Article 19(1)(a) refers to 'freedom of speech and expression'. It is proposed that the article must expressly include the freedom of the press and other media, the freedom to hold opinion and to seek, receive and impart information and ideas. It is also proposed to amend article 19(2) by adding a further restriction on disclosure of information received in confidence except if required in public interest.

The Commission recommends that article 19(1)(a) and (2) be amended to read as follows:

"Art. 19(1): All citizens shall have the right -

(a) to freedom of speech and expression which shall include the freedom of the press and other media, the freedom to hold opinions and to seek, receive and impart information and ideas;".

19(2): "Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence, or preventing the disclosure of information received in confidence except when required in public interest.".

3.8.2 A mere legislation by the Parliament by amending the Contempt of Courts Act, 1971 alone may not suffice because the power of the Supreme Court and the High Courts to punish for contempt is recognized in the Constitution. Therefore, **the Commission recommends that an appropriate proviso to article 19(2) of the Constitution may be added as under:-**

"Provided that, in matters of contempt, it shall be open to the Court to permit a defence of justification by truth on satisfaction as to the bona fides of the plea and it being in public interest.".

Rights against torture and inhuman, degrading and cruel treatment and punishment

3.9 Torture and inhuman, degrading and cruel treatment and punishment grossly violate human dignity. The Supreme Court has implied a right against torture, etc. by way of interpretation of article 21 which deals with the right to life and liberty. The Universal Declaration of Human Rights 1948 and the ICCPR prohibit such acts in article 5 and article 7 respectively.

It is, therefore, recommended that the existing article 21 may be re-numbered as clause (1) thereof, and a new clause (2) should be inserted thereafter on the following lines:-

"(2) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.".

Right to compensation for being illegally deprived of one's right to life or liberty

3.10 Article 9(5) of the ICCPR states, "any one who has been victim of unlawful arrest or detention shall have an enforceable right to compensation." In *D.K. Basu vs. State of West Bengal*[3], the Supreme Court of India held that the reservation made by India to this clause while acceding to the Convention does not come in the way of the Court's awarding compensation in the cases of illegal arrest or detention. The High Courts in India have also been awarding compensation.

It is, therefore, recommended as under:-

After clause (2) in article 21 as proposed in para 3.9, a new clause (3) should be added on the following lines :-

"(3) Every person who has been illegally deprived of his right to life or liberty shall have an enforceable right to compensation."

Right to travel abroad and return to one's country

3.11 The Supreme Court has spelt out in articles 14 and 21 the right to travel abroad and return to one's country. Again, this right finds a place in article 13(2) of the Universal Declaration of Human Rights, 1948 as well as in articles 12(2),(3) and (4) of the ICCPR.

It is, therefore, recommended that after article 21, a new article, say article 21A, should be inserted on the following lines:-

"21A. (1) Every person shall have the right to leave the territory of India and every citizen shall have the right to return to India.

[3] 1997 (1) SCC 416

(2) Nothing in clause (1) shall prevent the State from making any law imposing reasonable restrictions in the interests of the sovereignty and integrity of India, friendly relations of India with foreign States and interests of the general public."

Right to Privacy

3.12 The Supreme Court has included[4] 'Right to Privacy' in the Right to 'Life' under article 21.

It is, therefore, proposed that a new article, namely, article 21-B, should be inserted on the following lines:

"21-B. (1) Every person has a right to respect for his private and family life, his home and his correspondence.

(2) Nothing in clause (1) shall prevent the State from making any law imposing reasonable restrictions on the exercise of the right conferred by clause (1), in the interests of security of the State, public safety or for the prevention of disorder or crime, or for the protection of health or morals, or for the protection of the rights and freedoms of others.

Right to Work

3.13.1 It is in the rural sector that widespread poverty, underemployment, malnutrition, lack of access to healthcare and oppressive social customs that bear down heavily on women and children create a social landscape of appalling misery. It is here that a major action plan has to be launched to create additional jobs, to enhance incomes of those at the bottom rung of the social ladder and to create the physical and social infrastructure of a vibrant economy.

3.13.2 **The Commission, therefore, recommends that a new article, say article 21-C, may be added to make it obligatory on the State to bring suitable legislation for ensuring the right to rural wage employment for a minimum of eighty days in a year.**

[4] Kharak Singh v. State of U.P., AIR 1963 SC 1295; R. Rajagopal v. State of Tamil Nadu, 1994 (6) SCC 632.

Preventive Detention

3.14.1 Article 22 (3)(b) permits 'preventive detention' and the rule in clause (2) of article 22 which requires production before the nearest magistrate within 24 hours does not also apply in such cases. No doubt, several preventive detention laws have been upheld by the courts. But, being detention without trial, there is a view that such a detention is a negation of the rule of law and the principles of fair trial. The arrest is supposed to be made on the basis of information that the person is likely to commit some serious offences. There are complaints that this law is misused quite frequently.

3.14.2 While the Commission does not propose to recommend deletion of clauses dealing with preventive detention under article 22, **it recommends the following changes :-**

(i) **The first and second provisos and Explanation to article 22(4) as contained in section 3 of the Constitution (44th Amendment) Act, 1978 should be substituted by the following provisos and the said section 3 of the 1978 Act as amended by the proposed legislation should be brought into force within a period of not exceeding three months :-**

"Provided that an Advisory Board shall consist of a Chairman and not less than two other members, and the Chairman and the other members of the Board shall be serving judges of any High Court :

Provided further that nothing in this clause shall authorize the detention of any person beyond a maximum period of six months as may be prescribed by any law made by Parliament under sub-clause(a) of clause (7)".

(ii) **In clause (7) of article 22 of the Constitution, in sub-clause (b), for the words "the maximum period", the words "the maximum period not exceeding six months" shall be substituted.**

Right to justice and legal aid

3.15.1 **The Commission recommends that after article 30, the following article should be added as article 30A:**

> **"30A: Access to Courts and Tribunals and speedy justice**
>
> **(1) Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before an independent court or, where appropriate, another independent and impartial tribunal or forum.**
>
> **(2) The right to access to courts shall be deemed to include the right to reasonably speedy and effective justice in all matters before the courts, tribunals or other fora and the State shall take all reasonable steps to achieve the said object."**

3.15.2 Legal aid is essential for effective implementation of the various rights included in Part III to help the needy and the indigent. **The Commission recommends that article 39A in Part IV be shifted to Part III as a new article 30B to read as under:-**

> **"39B. Equal justice and free legal aid: The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."**

Right to property

3.16.1 After the 44th Amendment of the Constitution, right to property has ceased to be a fundamental right. Under article 300A, it has become a constitutional right. One other important aspect is with regard to deprivation or acquisition of agricultural and homestead land belonging to weaker sections. Before such deprivation takes place, the persons so deprived must be provided lands of quality as nearly as may be equal to the lands such persons were previously occupying or otherwise adequately rehabilitated.

3.16.2 The Commission recommends that article 300-A should be recast as follows:-

"300-A (1) Deprivation or acquisition of property shall be by authority of law and only for a public purpose.

(2) There shall be no arbitrary deprivation or acquisition of property:

Provided that no deprivation or acquisition of agricultural, forest and non-urban homestead land belonging to or customarily used by the Scheduled Castes and the Scheduled Tribes shall take place except by authority of law which provides for suitable rehabilitation scheme before taking possession of such land."

Article 31B and Ninth Schedule

3.17 A number of enactments unrelated to the rationale underlying articles 31B have come to be included in the Ninth Schedule with a view to keep them secure from attack on the ground that such enactment or a provision thereof is inconsistent with any provision of Part III of the Constitution. In the Consultation Paper[5] on 'Enlargement of Fundamental Rights', it was proposed that article 31B be suitably amended to provide that the laws to be included in the Ninth Schedule must, in pith and substance, relate to agrarian reforms or land reforms or laws to give effect to the directive principles in article 39(b) and 39(c). After further discussion, **the Commission recommends that in article 31-B, the following proviso should be added at the end, namely :-**

"Provided that the protection afforded by this article to Acts and Regulations which may be hereafter specified in the Ninth Schedule or any of the provisions thereof, shall not apply unless such Acts or Regulations relate –

(a) in pith and substance to agrarian reforms or land reforms;

[5] See Volume II (Book 1) of the Report.

1206 LJ&CA/2002—8A

(b) to reasonable quantum of reservation under articles 15 and 16;

(c) to provisions for giving effect to the policy of the State towards securing all or any of the principles specified in clause (b) or clause (c) of article 39."

Suspension of articles 17, 23, 24, 25 and 32 during emergency

3.18.1 Article 359 deals with "Suspension of the enforcement of the rights conferred by Part III during emergencies". Clause (1) permits suspension of the right to move court but excludes article 20 (retrospectivity of law relating to offences, double jeopardy and self-incrimination) and article 21 (Life and liberty not to be deprived except according to procedure established by law which after Maneka Gandhi's case[6] means fair, reasonable and just procedure).

3.18.2 **The Commission recommends that clauses (1) and (1A) of article 359 should be amended by substituting for "(except articles 20 and 21)", the following-**

"(except articles 17,20,21,23,24,25 and 32)"

Capital Punishment

3.19 Section 121 of the Indian Penal Code permits death sentence or life imprisonment to be imposed for the offences of waging war against the Government of India, or attempts to wage such a war or abetment of such a war. The Commission, after due deliberations, has not thought it appropriate to recommend, at this stage, any change in the existing law relating to imposition of death penalty.

Right to Education

3.20.1 At the time when the Commission released its Consultation Paper on the subject, Constitution (93rd Amendment) Bill was under consideration. But the proposed Amendment covers the Right to Free and Compulsory Education only

[6] AIR 1978 SC 597

between the years 6 and 14 years. The Commission is of the view that the Right to Free and Compulsory Education should also be extended to the children upto the age of fourteen years and that the right to education beyond the age of 14 years may depend upon the economic capacity and the stage of development of the State.

3.20.2 **The Commission feels that the constitutional commitment for free and compulsory education for all children until the age of fourteen should under no circumstances be diluted and the State should fulfill this solemn obligation to the nation. The responsibility for the universalisation of elementary education should be entrusted to Panchayats and local self government institutions. It is recommended that the relevant provisions in the Constitution (93rd Amendment) Bill, 2001 making the right to education of children from six years till the completion of fourteen years as a Fundamental Right should be amended and enlarged to read as under:-**

> **"30-C Every child shall have the right to free education until he completes the age of fourteen years; and in the case of girls and members of the Scheduled Castes and the Scheduled Tribes, until they complete the age of eighteen years.".**

Rights of Children

3.21.1 Article 39(e) in the Directive Principles in Part IV refers to the duty of the State to direct its policy to see that children of tender age are not abused. Article 39 (f) refers to a similar duty on the State to give opportunities and facilities to children to develop in a healthy manner and with dignity and in conditions which are free and where childhood and youth are protected against exploitation and moral and material abandonment.

3.21.2 **The Commission recommends that the following article should be added -**

"Art. 24A. Every child shall have the right to care and assistance in basic needs and protection from all forms of neglect, harm and exploitation."

Right to safe drinking water, clean environment, etc.

3.22.1 Gandhiji had once said that freedom for him would mean the availability of safe drinking water to every person in every village of India. This has still not become a reality.

3.22.2 Right to healthy environment and its protection and the right to development are group-rights and are loosely described as 'third generation rights'. The right to sustainable development has been declared by the UN General Assembly as an inalienable human right[7]. The Declaration recognizes that 'human being is the central subject of the development process and that the development policy shall make the human being the main participant and beneficiary of development'. "Development" is defined as a 'comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well being of the entire population in development and in the fair distribution of benefits therefrom[8]. The Rio Conference of 1992 declared human beings as centres of concern for sustainable development. Human beings are, it is said, entitled to a healthy and protective life in harmony with nature (Principle 1). "In order to achieve 'sustainable development' environmental protection shall constitute an integral part of the development process and cannot be considered in isolation of it". The 1997 Earth Summit meeting of 100 nations in New York affirmed these principles[9].

3.22.3 **The Commission recommends that after the proposed article 30-C, the following article may be added as article 30-D :-**

"Art. 30-D. Right to safe drinking water, prevention of pollution, conservation of ecology and sustainable development. -

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[7] See Declaration on the Right to Development, 1986.
[8] Development, Human Rights, etc. by. S.K. Verma, vol. 40, 1998 JILI, pp. 217 to 229.
[9] A.P. Pollution Control Board vs Prof. M.V. Nayudu [2001 (2) SCC 62].

Every person shall have the right –

(a) to safe drinking water;

(b) to an environment that is not harmful to one's health or well-being; and

(c) to have the environment protected, for the benefit of present and future generations so as to –

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.":

Right to Freedom of Religion

3.23.1 A number of institutions of Sikhs and Buddhists suggested certain changes in article 25(2). Explanation II to article 25 provides that reference to Hindus in sub-clause (b) of clause (2) should be construed as including a reference to Sikhs etc.

3.23.2 **The Commission, without going into the larger issue on which the contention is based, is of the opinion that the purpose of the representations would be served if Explanation II to article 25 is omitted and sub-clause (b) of clause (2) of that article is reworded as follows:-**

> **"(b) providing for social welfare and reform or the throwing open of Hindu, Sikh, Jaina or Buddhist religious institutions of a public character to all classes and sections of these religions."**

Special provision relating to language spoken by a section of population of a State

3.24 In order to make the rights available to minorities under articles 29 and 30 meaningful, the Commission feels that the provisions contained under article 347 need some modification. Before the President directs that use of any language spoken by a section of the population of a State be recognized in a State for such purposes as he may specify, he has to ensure that a substantial proportion of the population of that State so desires. The explanation "substantial proportion of

the population" had been a subject matter of controversy and different constructions have been placed up on it. **It shall be desirable that some optimum level of population with a view to take necessary action under this constitutional provision is prescribed. In article 347 of the Constitution, for the words "a substantial proportion of the population", the words "not less than ten per cent of the population" should be substituted.**

D. Directive Principles

Principles of Governance

3.25.1 It is only during the last two or three decades that there has been a perceptible shift in intellectual discourse in the academia towards problems and principles of good governance as contradistinguished from issues of government and politics. Our founding fathers, however, were far-sighted people. They realised even in the late 1940s the difference and in article 37 specifically spoke of certain "principles" being "fundamental" in the "governance of the country". Also, the State was enjoined "to apply these principles in making laws."

3.25.2 The founding fathers were conscious of the fact that mere political democracy, *i.e.*, getting the right to vote once in five years or so was meaningless unless it was accompanied by social and economic democracy. Political equality was not possible unless men were made equal on the social and economic plane as well. Right to vote for a hungry and illiterate man without clothing and shelter meant little. Dr. Ambedkar had said:

> "We do not want merely to lay down a mechanism to enable people to come and capture power. The Constitution also wishes to lay down an ideal before those who would be forming the government. That ideal is of economic democracy."

3.25.3 The Supreme Court has, in a number of judgements, referred to the importance of the Directive Principles. It has called these principles the

"conscience" of the Constitution and also as the core of the Constitution. These principles are the "goals" to be achieved by Part III of the Constitution. They are intended to ensure "distributive justice" for removal of inequalities and disabilities and to achieve a fair division of wealth amongst the members of the society. The Supreme Court held that the courts can look at the Directive Principles for the purpose of interpretation of the fundamental rights. The courts will adopt that interpretation which makes the fundamental rights meaningful and efficacious. The courts have to make every attempt to reconcile the fundamental rights with the Directive Principles remembering that the reason why the Directive Principles were left by the founding fathers as non-enforceable was to give the Government sufficient latitude to implement them.

3.25.4 The Directive Principles are indeed the precursor to the Economic, Social and Cultural Rights specified in the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR). They reflect the consensus on the intrinsic necessity of these means and envisage State action which would facilitate the transfer and distribution of power – leading to transmission of power to the citizens and this is loosely called "empowerment" of the people. Democracy will become real when in practice there is sharing of power and responsibility by all sections of the people and it becomes illusory when it is about pursuit of power by the dominant sections alone. The Directive Principles cannot be confined to mere rhetoric or to *ad hoc* policies of electoral appeasement or handouts.

3.25.5 The comparable provisions of the Directive Principles of State Policy enshrined in the Constitution of India and the ICESCR are given below :-

Articles of the Constitution	Articles of ICESCR
Article 39	Articles 3, 6 (1) and 7
Article 41	Article 6 and 7
Article 42	Articles 7 and 10.2
Article 43	Articles 11 (1), 11(2) and 15
Article 45	Articles 13 (1), (2)(a), (3) and (4) and

Articles of the Constitution	Articles of ICESCR
	14
Article 47	Articles 12(1), (2), (a) to (d)
Article 51	Articles 1.3 and 2 (1)

3.25.6 The concept of a division among human rights is no longer accepted in contemporary human rights discourse. Further, recent constitutional changes in the East European states have set at naught some of the reasons for the divide. Again, the description of the Civil and Political rights as 'negative' rights which prohibit the State from interfering with rights of the individuals and the description of the Economic, Social and Cultural rights as 'positive' rights which require affirmative action by the State is not accepted by jurists any longer. The theory that the former rights are justiciable and the latter rights are not justiciable has not also been accepted by scholars. The existence of any basis for such division is described as a 'myth' and inaccurate generalization[10].

3.25.7 The Vienna World Conference on Human Rights, 1993 reaffirmed that the Civil, Political and the Economic, Social and Cultural Rights are 'universal, interdependent and indivisible.' The European Social Charter 1961 (revised charter 1996) and Protocols; the American Convention on Human Rights, 1969 (effective from 1978); the African Charter of Human Rights and Peoples' Rights, 1981 (effective from 1986) and finally the Human Rights Act, 1998 (UK) (which incorporates several provisions of the European Convention) and the South African Convention, 1996 deal with Civil, Political and Economic, Social and Cultural Rights covering the whole gamut of rights.

3.25.8 The Father of the Nation, Mahatma Gandhi stated in the Second Round Table Conference in London, long before the UN Declaration of Human Rights, 1948 that his aim was "to establish a political society in India in which there

[10] See vols: 18 to 21 of Human Rights Quarterly for a number of articles; "International Covenant on Economic, Social and Cultural Rights' by Mathew Craven (1995); Economic, Social and Cultural Rights, edited by Ralph Baddard 199; special issue on these rights by International Commission of Jurists 1995; International Human Rights Context, 2nd Ed. Henry Steiner and Philip Alston, 1999.

would be no distinction between high class of people and low class of people, that women should enjoy the same rights as men; and dignity, justice, social, economic and political, would be ensured to the teeming millions of India."

3.25.9 In the Annual Report of the National Human Rights Commission 1997-98, this is what is stated about our country:

> "It is said that one third of the world's poor are Indians, who lacked clean drinking water, basic sanitation and minimum standards of health care, food and nutrition....Persistence of such a situation constitutes a failure of governance which had urgently to be remedied for it is on the pillars of good governance that promotion of human rights in the final analysis rests."

Justiciability and Enforceability

3.26.1 The judiciary is not suited, according to several writers to enforce some of the ICESCR rights. Where the resources of the nation are involved and a question of priority arises, the remedy cannot be judicial. However, the concept here is not "justiciability" at the instance of individuals in courts of law, but the concept is one of "enforceability" which means that the State must "recognize", and "take steps", by adopting "legislative" or other measures for the "full realisation" and "to the maximum of the State's available resources, both "individually and through international assistance and co-operation". These are the words actually used by the ICESCR and have been the subject matter of voluminous literature. These rights are described as "entitlements" of the people and give rise to "obligations" on the part of the State parties. The enforcement must first be of the "minimum core obligations" as stated in Para 10 of the General Comment No.3 of 1990 of the U.N. Committee on Economic, Social and Cultural Rights.

3.26.2 It is felt that an appropriate mechanism must be devised to oblige the State to take action step by step and progressively for the realisation of these rights to the maximum within the resources of the State.

3.26.3 **The Commission recommends that the heading of Part IV of the Constitution should be amended to read as "DIRECTIVE PRINCIPLES OF STATE POLICY AND ACTION".**

Right to Social Security and to Work

3.27.1 Article 41 directs the State to make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want. This is social security in its widest sense. It is a measure of the distance the country still has to travel to build a good society. The present situation, as revealed by successive UNDP reports, is one of hardship and deprivation for very large sections of our people. Poverty eradication continues to be a major challenge for social and economic policy. The 'trickle-down' theory did not work but neither did the direct anti-poverty programmes.

3.27.2 Safety nets like the Public Distribution System (PDS), the Integrated Rural Development Programmes, and the targeted programmes for women and children have also not had the measure of success that was hoped for. Even the step up in growth rates following the introduction of the new economic strategy of liberalization has not succeeded in generating substantial increases in employment that alone would reduce poverty and increase the sense of security among the people. It is clear that a many-sided approach has to be developed to increase growth rates, to structure labour intensive projects spread through the length and breadth of the country and to help the vulnerable sections of the people to take advantage of government programmes intended for their welfare.

3.27.3 **The Commission, therefore, recommends the initiation of a strategic Plan of Action to create a large number of employment opportunities in five years to realize and exploit the enormous potential in creating such employment opportunities. The components of this plan may include:**

(1) **Improvement of productivity in agriculture that will activate a chain of activities towards increased income and employment opportunities.**
(2) **Integrated horticulture that will include production of fruits, vegetables and flowers, cut-flowers for export and medicinal plants as well as establishment of bio-processing industries aimed primarily at value-addition of agricultural products.**
(3) **Intensification of animal husbandry programs and production of quality dairy products.**
(4) **Integrated Program of Intensive Aquaculture including use of common property resources like village ponds and lakes.**
(5) **Afforestation and Wasteland Development to bring an additional 12 million hectares under forest plantation and contribute to rural asset building activity.**
(6) **Soil and Water Conservation to support afforestation and Natural Resource Conservation towards eco-friendly agriculture.**
(7) **Water Conservation and Tank Rehabilitation.**
(8) **Production and use of organic manures through vermiculture and other improved techniques and production of organic health foods from them.**

3.27.4 The State should provide opportunity to every person to gain his living by work which he freely chooses or accepts – which shall include the technical and vocational guidance and training programmes, polices and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedom to the individual. The right to work does not mean that everybody is to be employed by the State. It only means that the State has to develop "employment opportunities" both in the public and private sector[11].

3.27.5 The resource requirement for the implementation of this plan can be met by integrating the plethora of government programmes and changing their focus towards employment generation and income enhancing activities. Institutionally, this plan of action can succeed only if programmes are people-oriented and developed in a participatory mode. A change in mindset where people are regarded as "partners in development" rather than "beneficiaries" is necessary.

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[11] Chapter V on 'Right to Work' by Mathew Craven in the International Covenant on Economic, Social and Cultural Rights, 1995, p.199 to 225; Human Rights and World of Work by Kamala Sankaran, vol. 40, 1998 JILI, pp. 284 to 294.

3.27.6 The foregoing considerations suggest a comp[illegible]e in emphasis insofar as growth strategy is concerned. What is important is how work, productive work, will enhance incomes for the individual and the community. It is essential to make a beginning toward making the right to work the integral component of growth and development strategy. The Commission has carefully examined the relevant economic data on the subject and has come to the conclusion that a realistic approach to the right to work is not only desirable, it is entirely feasible.

Right to Health

3.28.1 The right to health has been treated by the Supreme Court as part of the right to 'life' in article 21[12]. But, the right to health is not a right to be 'healthy'. It means a right both to certain 'freedoms' and 'entitlements'. The freedoms include the right to control ones' health and body, including sexual and reproductive freedom and the right to be free from interference, such as by non-consensual medical treatment and experimentation. Entitlements include a right to a system of health protection with equality of opportunity to enjoy the highest attainable level of health – a right to the enjoyment and availability of facilities, good services and conditions such as physical accessibility, economic accessibility and information accessibility. It must be qualitative and should include the right to healthy working conditions and preventive medicine.

3.28.2 The State has to "respect, protect and fulfill" its obligations in these areas for children, adults and those in old age[13]. As of today, free medical treatment in government hospitals is totally inadequate. Nor is it available always in close neighbourhood. It is not possible to deal extensively with the pathetic conditions of medical care provided by government hospitals in our country. It is a fact of life that the poorer and weaker sections of society are unable to afford the

[12] State of Punjab v. Mahinder Singh Chawla, AIR 1997 SC 1225.

[13] See General comment No. 14., 22nd Session of Committee on ICESCR Rights (IHRR, Vol. 8, No. 1 (2001), p.1.

extraordinary expense involved in the medical care provided by private hospitals. There is, therefore, an urgent need to see that, progressively, the State allocates adequate funds in this behalf[14].

Right to Food and Freedom from Hunger, Clothing and Housing or Shelter

3.29.1 The State must recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions; the State shall also have to recognize the right of everyone to be free from hunger. It shall then have to initiate programmes to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian system in such a way as to achieve the most efficient development and utilization of natural resources; and to take into account, the problem of both food-importing and food-exporting countries and to ensure an equitable distribution of world food supplies in relation to need.

3.29.2 It is well-known that while the godowns of the Food Corporation of India are overflowing and even rotting with excess food grains, there are reports of starvation deaths across the country. Further, quite a good percentage of food grains are lost due to inadequate conservation and also during distribution. This must be avoided by introducing proper systems.

3.29.3 The State must ensure right to housing or shelter. The Government of India formulated the National Housing Policy, 1988, 1994, and the National Housing and Habitat Policy, 1998. There are various schemes for weaker sections, slum developments, etc.[15]. As already stated, this right has been

[14] Chapter X in 'Right to Health' on Economic, Social and Cultural Rights by Ralpt Beddard, & Dilys' Hill. 1992; 'Towards an Improved Understanding of the International Human Right to Health by Brigit Toebes. vol. 21, (1999), Human Rights Quarterly, pp.661 to 679, for a detailed discussions.

[15] Right to Shelter, A Human Rights Perspective, by Prafulla C. Mishra; vol. 40 (1998), JILI, pp. 230 to 242.

recognized by the Supreme Court of India as part of the right to life under article 21[16].

3.29.4 The Commission is convinced that the realization of the right to food, clothing and housing requires the State to prepare long range and short range plans for proper allocation of necessary funds.

Right to Education

3.30.1 Article 45 under the Directive Principles had envisaged free and compulsory education within ten years for all children till the age of 14. The national goal of universalisation of elementary education has still not been reached. Education for all remains an objective with the target date being pushed forward after every review. Increase in literacy rates to 72 per cent by 2007 and to 80 per cent by 2012, and universal access to primary education by 2007, have been set as goals in the approach paper to the Tenth Plan.

3.30.2 It should also be laid down in article 45 that the State shall make provision for education beyond the age of fourteen years within the limits of its economic capacity and stage of development.

New Challenges to Education Policy

3.31.1 We live in an age of rapid social, economic and technological change. Educational policy and programmes have to reflect the changed requirements in content and techniques of delivery. There has been a paradigm shift from a teaching to a learning process. Information and communication technology have to be harnessed to the goal of achieving education for all. The need for autonomy, continuous review, flexibility and clarity have to be built into policy. The educational system should impart moral and ethical values essential for good citizenship.

[16] UP Avas Avam Vikas Parishad v. Friends Co-operative Hous ıg Society Ltd., AIR 1996 SC 114.

3.31.2 Autonomy for the education budget should be ensured. Some sanctity should be attached to the core provisions, such as teachers' salaries. There is a strong case for constitutional protection for the service conditions of teachers. Moreover, there is need to insulate educational institutions from needless litigation.

3.31.3 The Commission recommends that an independent National Education Commission should be set up every five years to report to Parliament on the progress of the constitutional directive regarding compulsory education and on other aspects relevant to the knowledge society of the new century. The model of the Finance Commission may be usefully looked into.

Control of Population

3.32 The Commission noted with concern that proper planning and monitoring of the socio-economic development of the country is considerably hampered and neutralized by the exponential growth of population.

The Commission, therefore, recommends that the following article should be added as a directive principle of state policy after article 47 of the Constitution:

> **"Art. 47A. Control of Population:- The State shall endeavour to secure control of population by means of education and implementation of small family norms."**

Right to Culture

3.33.1 Article 49 of the Directive Principles requires the State to protect monuments and places and objects of national importance. For the purpose of protecting culture in all its facets and in developing it, the State has to set apart necessary resources.

3.33.2 More than five decades of experience with the working of our Constitution and the laws has borne out that democracy in a meaningful sense, depends on a pluralistic ethos permeating the polity. Our national life must be accommodative of the myriad variegations that make up the unique mosaic of India's society. The framework of our many and elaborate structures of government must exemplify the architecture of an inclusive society and one of the means is to promote civil society initiatives for inter-religions and social harmony.

3.33.3 All considered, as advised by experience and by present and emerging needs, it is felt that a mechanism may be brought into being which can advance the cause of inter-faith harmony and solidarity. This can be done under the auspices of the National Human Rights Commission.

Promotion of Inter-Religious harmony and inter-faith values

3.34.1 Past experience indicates that in sensitive areas and localities of the country where inter-religious conflicts have sprung up out of trivial incidents resulting in conflagration, extensive damage to life and property. The setting up of "*Mohalla* Committees" with the participation of prominent members of different communities to take note of early warning symptoms and alerting the administration in preventing them have produced enduring beneficial results. In particular, the endeavours made in Bhiwandi, in the State of Maharashtra, after the tragic riots there, have emphasised the value of such measures.

3.34.2 **The Commission, therefore, recommends the setting up of an inter-faith mechanism to promote such civil society initiatives. In the Commission's view, this can be done under the auspices of the National Human Rights Commission set up under section 3 of the Protection of Human Rights Act, 1993** which, *inter* alia, provides for the participation of "the Chairpersons of the National Commission for Minorities, the National Commission for Scheduled Castes and Scheduled Tribes and the National Commission for Women" who shall be deemed to be the Members of the Commission for the discharge of functions specified in clauses (b) to (j) of the

section 12 of the said Act. The Chairpersons of the National Commission for Backward Classes and National Commission for Safai Karamcharis should be co-opted to this body. This body could, in addition to its other statutory functions, also function as mechanism for promotion of inter-religious harmony. With an appropriate statutory enablement by way of enlargement of section 12 of the said Act, the purpose could be achieved **without additional expenditure for setting up a separate mechanism. Section 12 of the said Act could be amended by the addition of clause (k), which shall read as under:**

> **"(k) promoting through civil society initiatives, inter-faith and inter-religious harmony and social solidarity".**

By this simple statutory enablement, **with consequential amendment in Section 3(3),** the Chairpersons of all the aforesaid Commissions who meet and interact would, in collaboration with the National Foundation for Communal Harmony (established under the Ministry of Home Affairs, Government of India), would be able to oversee the installation and working of "*Mohalla* Committees" and other civil society initiatives in sensitive areas which particularly require promotion of inter-faith harmony.

Mechanism for realisation of Directive Principles

3.35.1 The State should devise appropriate mechanisms for realisation of Directive Principles. The Commission does not propose to recommend a complaints procedure inasmuch as it is more concerned with a procedure which will ensure proper allocation of resources for the realization of the right to work, health, food, clothing, housing, education and culture. Domestic bodies in various countries have different composition, membership and powers.

3.35.2 **In the view of the Commission, there must be a body of high status which first reviews the state of the level of implementation of the Directive Principles and Economic, Social and Cultural Rights and in particular (i) the right to work, (ii) the right to health, (iii) the right to food, clothing and shelter, (iv) Right to Education upto and beyond the 14th year, and (v) the**

1206 LJ&CA/2002—9A

Right to Culture. The said body must estimate the extent of resources required in each State under each of these heads and make recommendations for, allocation of adequate resources, from time to time. For ensuring that the Directive Principles of State Policy are realized more effectively, the following procedure is suggested:-

(i) **The Planning Commission shall ensure that there is special mention/emphasis in all the plans and schemes formulated by it, on the effectuation/realization of the Directive Principles of State Policy.**

(ii) **Every Ministry/Department of the Government of India shall make a special annual report indicating the extent of effectuation/realization of the Directive Principles of State Policy, the shortfall in the targets, the reasons for the shortfall, if any, and the remedial measures taken to ensure their full realization, during the year under report.**

(iii) **The report under item (ii) shall be considered and discussed by the Department Related Parliamentary Standing Committee, which shall submit its report on the working of the Department indicating the achievements/failures of the Ministry/Department along with its recommendations thereto.**

(iv) **Both the above Reports *i.e.* (ii) and (iii) above shall be discussed by the Planning Commission in an interactive seminar with the representatives of various NGOs, Civil Society Groups, etc. in which the representatives of the Ministry/Department and the Departmental Related Parliamentary Standing Committee would also participate. The report of this interaction shall be submitted to the Parliament within a time bound manner.**

(v) **The Parliament shall discuss the report at (iv) above within a period of three months and pass a resolution about the action required to be taken by the Ministry/Department.**

3.35.3 **A similar mechanism as mentioned above may be adopted for the States.**

Credibility of Socio-economic Data

3.36 **The Report of the National Statistical Commission (2001) stresses the importance of availability of adequate, credible and timely socio-economic data generated by the statistical system, both for policy**

formulation and for monitoring progress of the sectors of economy and pace of socio-economic change. The Commission endorses the recommendations of the National Statistical Commission and stresses the importance of their implementation.

E. Fundamental Duties

The Background

3.37.1 Ten Fundamental Duties of the citizen are incorporated in article 51A, Part IVA of the Constitution. Inserted by the Constitution (Forty-second Amendment) Act, 1976 it was part of a large number of changes brought about during the Emergency. But after the end of the Emergency, when the new Parliament reviewed the whole position and in most cases restored the pre-emergency position, article 51A was one that emerged unscathed because it was considered by all parties to be an unexceptionable charter of principles which citizens could usefully absorb and practice.

3.37.2 Constitutions of some countries of the world contain provisions for Fundamental Duties. The inclusion of Fundamental Duties in our Constitution also brings it in line with Article 29(1) of the Universal Declaration of Human Rights which says: "Everyone has the duties to the community in which alone the free and full development of the personality is possible." Exercise of fundamental rights entails duties to the community which ensures the free and full development of human personality.

3.37.3 In the last quarter-century since the Amendment, several judgments of High Courts and the Supreme Court have quoted these Fundamental Duties, where applicable, to lend further support to their decisions.

3.37.4 A consultation paper on the subject of "Effectuation of Fundamental Duties" prepared for the Commission by the Citizenship Development Society was circulated for eliciting public opinion. Responses received were carefully

examined by the Commission along with the report of the Justice Verma Committee on Fundamental Duties.

3.37.5 The Government of India appointed the committee "to operationalise the suggestions to teach Fundamental Duties to the citizens of India" in the year 1998 under the chairmanship of Justice J.S. Verma. The Committee submitted its report in October 1999. The Commission feels that it is, therefore, not necessary for it to cover the same ground again. It finds itself in full agreement with the report of the Verma Committee. The salient recommendations of the Committee are at Annexure 1[17] to the Consultation Paper on "Effectuation of Fundamental Duties of Citizens".

Usefulness of Duties

3.38.1 Fundamental Duties of citizens serve a useful purpose. In particular, no democratic polity can ever succeed where the citizens are not willing to be active participants in the process of governance by assuming responsibilities and discharging citizenship duties and coming forward to give their best to the country. Some of the fundamental duties enshrined in article 51A have been incorporated in separate laws. For instance, the first duty includes respect for the National Flag and the National Anthem. Disrespect is punishable by law. To value and preserve the rich heritage of the mosaic that is India should help to weld our people into one nation but much more than article 51A will be needed to treat all human beings equally, to respect each religion and to confine it to the private sphere and not make it a bone of contention between different communities of this land. In sum, the Commission believes that article 51A has travelled a great distance since it was introduced in the Forty-second Amendment and further consideration should be given to ways and means to popularise the knowledge and content of the Fundamental Duties and effectuate them.

[17] *See* Volume II (Book 1) of the Report.

3.38.2 The most important task before us is to reconcile the claims of the individual citizen and those of the civic society. To achieve this, it is important to orient the individual citizen to be conscious of his social and citizenship responsibilities and so shape the society that we all become solicitous and considerate of the inalienable rights of our fellow citizens. Therefore, awareness of our citizenship duties is as important as awareness of our rights. Every right implies a corresponding duty but every duty does not imply a corresponding right. Man does not live for himself alone. He lives for the good of others as well as of himself. It is this knowledge of what is right and wrong that makes a man responsible to himself and to the society and this knowledge is inculcated by imbibing and clearly understanding one's citizenship duties. The fundamental duties are the foundations of human dignity and national character. If every citizen performs his duties irrespective of considerations of caste, creed, colour and language, most of the malaise of the present day polity could be contained, if not eradicated, and the society as a whole uplifted. Rich or poor, in power or out of power, obedience to citizenship duty, at all costs and risks, is the essence of civilized life.

Spirit of Harmony and Dignity of Women

3.39.1 Some further thought needs to be given to clauses (e) and (f) of article 51A. Article 51A(e) desires the promotion of harmony and the spirit of common brotherhood among all the people of India transcending religious, linguistic and regional or sectional diversities and renunciation of practices derogatory to the dignity of women. It is couched in broad terms but it should be clear that attacks on minority communities or minority opinions are frowned upon. Respect for both are essential and the wording lends support to a broad humanism to cover such differences as may exist or better still, co-exist. Two thoughts can be distilled. The first is that the objective will not be reached unless there is a determined effort to restrict religious practices to the home on the justified premise that one's religion is a personal matter and is not conducive to mass assertiveness. The other is the status of women.

3.39.2 Lip service is being paid to the doctrine of gender equality. The fact emains that generally women are still regarded as inferior both at home and workplace although the Commission has noticed an improvement, however dissatisfied it may be with the degree of the improvement.

3.39.3 It is necessary to separate religious precepts from civil law. Civil law as the name implies is a matter for society not for religious leaders and it would seem to us to be axiomatic that in matters of civil rights, laws of property and inheritance and marriage and divorce, although practices may differ, legal rights that accrue must be the same. For example, a marriage may be solemnised according to religious or social custom but the rights of a woman in the case of divorce must be the same no matter what her religion is. As the Supreme Court held in the *Shahbanoo case*, an abandoned wife is an abandoned wife and it does not matter whether she professes one religion or another. She is entitled to alimony. Progress in these directions will be slow but it is necessary that progress is seen to be made. The key lies in education.

3.39.4 Clause (e) of article 51A also seems to cover the need to regard all human beings equally. In this connection, it is necessary to consider the question of the upliftment of the Scheduled Castes and other disadvantaged sections of our society. The scourge must be eradicated. The Constitution gave us ten years to do the job; the provision has been extended to fifty years and we are in our sixth ten-year period but we are no nearer the goal. The discrimination is two-fold. It is economic-condemning whole sections of our society numbering millions to menial jobs as part of the evil of treating them as sub-human. We have provided for reservation of jobs to these people, we have even given them separate constituencies to represent them. It has created a vested interest in backwardness. The other adverse result is that it has had no effect on their status in society, which continues to be determined by birth and not human worth and human personality. It is this social stigma which still plagues our people and the struggle to restore to them basic human dignity has made no significant

progress. While the Commission appreciates the context in which affirmative action became necessary, it feels that reservation of jobs and seats in the legislatures will not help this aspect of the matter.

3.39.5 It is quite clear to the Commission that the disease of considering human beings as high or low based on the accident of birth is a disease rooted in the mind and it is in the mind that the defences of a society based on human dignity and equality must be constructed. Logically this leads directly to the conclusion that the key lies in education. The time to begin training our young people to respect the National flag and sing the National anthem, to respect women, to hold all religions equal and deserving of as much respect as one's own, to accept that all human beings are born equal and are entitled to equal treatment are among principles best taught by examples when the child is too young to understand but not too young to obey. The focus must, therefore, shift to education which has suffered from serious neglect. Schools restrict admissions on unacceptable criteria, teachers themselves are untrained and often politicised, as is the curriculum. Despite these hardships, many of our young people have done well.

Composite culture

3.40.1 Clause (f) of article 51A requires us to value and preserve the rich heritage of our composite culture. It follows that we may not break each other's places of worship, set fire to religious texts, or beat up one another's priests or obstruct those who exercise their Fundamental Right under article 25 to profess, practice and propagate religion. Composite culture means culture drawn from many strands. Here again education in its broadest and best sense can provide the corrective to the aberrations that have occurred.

3.40.2 Education is not confined only to the time spent in schools and colleges. Education begins at birth in the subconscious and continues till death. Anyone who says that he has nothing more to learn is already brain-dead. It follows that the influences that play on a child at home are of great importance. Parents

should understand that education begins at home, the examples they set, the environment of enlightenment and tolerance that is necessary to produce good citizens cannot be sub-contracted to formal schooling important though this is. Schemes should, therefore, be framed that include parents in social activities that have as their objective the country's age-old traditions, its welcome to the persecuted of every faith, its virtues of tolerance of and respect for all religions and a certain pride in belonging to this land and in being considered as Indian. The highest office in our democracy is the office of citizen; this is not only a platitude, it must translate into reality. The distinction is not illusory. This country has given far too much indulgence to an attitude of mind that acts on the question - what is there in it for me? Education and the process of inculcating unselfishness and a sense of obligation to one's fellowmen should inspire the question – where does my duty lie? The transformation has the potential to make our nation strong, invincible and able to command the respect of the world.

3.40.3 **(i) The Commission recommends that the first and foremost step required by the Union and State Governments is to sensitise the people and to create a general awareness of the provisions of fundamental duties amongst the citizens on the lines recommended by the Justice Verma Committee[18] on the subject. Consideration should be given to the ways and means by which Fundamental Duties could be popularized and made effective; (ii) right to freedom of religion and other freedoms must be jealously guarded and rights of minorities and fellow citizens respected; (iii) reform of the whole process of education is an immediate but immense need, as is the need to free it from governmental or political control; it is only through education that will power to adhere to our Fundamental Duties as citizens can be inculcated; and (iv) duty to vote at elections, actively participate in the democratic process of governance and to pay taxes should be included in article 51A. The Commission fully endorses the other recommendations of the Justice Verma Committee on**

[18] See Annexure 1 to the Consultation Paper on 'Effectuation of Fundamental Duties of Citizens' in Volume- II (Book 1) of the Report.

operationalisation of Fundamental Duties of Citizens and strongly suggests their early implementation.

3.40.4 **The Commission also recommends that the following should be incorporated as fundamental duties in article 51A of the Constitution -**

(i) **To foster a spirit of family values and responsible parenthood in the matter of education, physical and moral well-being of children.**

(ii) **Duty of industrial organizations to provide education to children of their employees**

CHAPTER 4

ELECTORAL PROCESSES AND POLITICAL PARTIES

CONTENTS

A. Electoral Processes

4.1 ➢ Objectives of the Founding Fathers

4.2 ➢ Provisions of the Constitution

4.3 ➢ Magnitude of the task

4.4 ➢ Successes and failures

4.5 ➢ Identifying the problem areas

4.6 ➢ Attempts at reforms

4.7 ➢ Suggested reform options

4.8 ➢ Electoral rolls and voter ID

4.9 ➢ Electronic Voting Machines (EVMs)

4.10 ➢ Booth capturing and rigging

4.11 ➢ Caste and communal hatred

4.12 ➢ Criminalisation

4.13 ➢ Corrupt practices and election petitions

4.14 ➢ High cost of elections and abuse of money power

4.15 ➢ Reducing the cost of elections

4.16 ➢ Question of representational legitimacy

4.17 ➢ Delimitation of constituencies

4.18 ➢ Defections

4.19 ➢ Oversized Council of Ministers

4.20 ➢ Problems of Instability

4.21 ➢ The eligibility of non-Indian born citizens to hold high offices

4.22 ➢ Appointment of the Election Commissioners and State Election Commissioners

4.23 ➢ Candidates owing Government dues

4.24 ➢ Office of profit

B. Political Parties

4.25 ➢ Background and objectives

4.26 ➢ Constitution and Law in relation to Political Parties

4.27 ➢ The present scenario

4.28 ➢ Studies and reports

4.29 ➢ Identifying the problem areas

4.30 ➢ Law for political parties

4.31 ➢ Recognition of parties

4.32 ➢ Rules and regulations

4.33 ➢ Needs for stability

4.34 ➢ Scourge of criminalisation

4.35 ➢ Funding political parties

4.36 ➢ Election returns

4.37 ➢ Educational training and developmental activities

4.38 ➢ Leadership conventions

CHAPTER 4

ELECTORAL PROCESSES AND POLITICAL PARTIES[1]

A. Electoral Processes

Objectives of the Founding Fathers

4.1 The founding fathers of our Republic conceived of representative parliamentary democracy as the polity most suited to India's ethos, background and needs. They envisaged equal participation of all the adult citizens in the democratic process without any discrimination. Selection of representatives of the people through universal adult franchise and free and fair elections was for them an act of faith. Universal adult franchise was a bold and ambitious political experiment and a symbol of the abiding faith that the founders reposed in the great masses of the country and in their innate wisdom.

Provisions of the Constitution

4.2 To achieve these objectives, article 326 of the Constitution enfranchises for all the adult citizens (not less than 18 years of age) and empowers them to vote at the elections to the Lok Sabha and the State Assemblies. Article 324 vests the superintendence, direction and control of the preparation of electoral rolls and conduct of elections in an independent Election Commission. Under articles 243K and 243ZA, elections to local bodies – Panchayats and Municipalities – are the responsibility of State Election Commissions.

Magnitude of the Task

4.3 A general election to Lok Sabha is a gigantic exercise. It has been said that holding general elections in India is equal to holding them for Europe, United

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[1] *See* also the Consultation Papers on "Review of the Working of Political Parties specially in relation to Elections and Reform Options" and "Review of Election Law, Processes and Reform Options" released by the Commission in Volume II (Book 1).

States, Canada and Australia all put together. Statistically, the number of voters in India is in excess of 600 million (60 crores). The number of polling booths all over the country adds up to about 900,000 (9 lakhs). To manage these polling booths about five million election personnel and an additional two million security personnel have to be mobilized. Taking State and local elections into account, the figures become more staggering. Today, India is unique in having upwards of about 3.2 million (32 lakhs) directly elected representatives of the people spread over various tiers of governance.

Successes and Failures

4.4 During the last half-a-century, there have been thirteen general elections to Lok Sabha and a much larger number to various State Legislative Assemblies. We can take legitimate pride in that these have been successful and generally acknowledged to be free and fair. But, the experience has also brought to fore many distortions, some very serious, generating a deep concern in many quarters. There are constant references to the unhealthy role of money power, muscle power and mafia power and to criminalisation, corruption, communalism and casteism.

Identifying the Problem Areas

4.5 More specifically, the Commission has found that the main problem areas may be identified to be as follows:

- Increasing cost of elections leading to unethical, illegal and even mafia provided electoral funding, corruption, criminalisation and black money generation in various forms.
- With the constituents/electors being the same for all directly elected representatives from the lowest Panchayat level to the Lok Sabha level, there are competing role expectations and conflict of perceptions *e.g.* the constituents expect even members of the Union Parliament to attend to their purely local problems.

- With the electorate having no role in the selection of candidates and with majority of candidates being elected by minority of votes under the first-past-the-post system, the representative character of the representatives itself becomes doubtful and their representational legitimacy is seriously eroded. In many cases, more votes are cast against the winning candidates than for them. One of the significant probable causes may be the mismatch between the majoritarian or first-past-the-post system and the multiplicity of parties and large number of independents.
- The question of defections and the Tenth Schedule.
- Inaccurate and flawed electoral rolls and voter identity leading to rigging and denial of voting rights to a large number of citizens.
- Booth capturing and fraudulent voting by rigging and impersonation.
- Use of raw muscle power in the form of intimidation of voters either to vote against their will or not to vote at all, thus taking away the right of free voting from large sections of society and distorting the result thereby.
- Involvement of officials and local administration in subverting the electoral process.
- Engineered mistakes in counting of votes.
- Criminalisation of the electoral process – increasing number of contestants with serious criminal antecedents.
- Divisive and disruptive tendencies including the misuse of religion and caste in the process of political mobilization of group identities on non-ideological lines.
- An ineffective and slow judicial process of dealing with election petitions, rendering the whole process quite often meaningless.
- Fake and non-serious candidates who create major practical difficulties and are also used indirectly to subvert the electoral process.
- Incongruities in delimitation of constituencies resulting in poor representation.

- Problems of instability, hung legislative houses and their relation to the electoral laws and processes.
- Last but not the least, loss of systemic legitimacy due to decay in the standards of political morality and decline in the spirit of service and sacrifice in public life.

Attempts at Reforms

4.6 The question of bringing about comprehensive changes in the election laws and electoral processes has been receiving the attention at various levels right from the time of the first general election. The most recent official exercises in this regard have been:

(1) The Goswami Committee on Electoral Reforms (1990)

(2) The Indrajit Gupta Committee on State Funding of Elections (1998)

(3) The Law Commission's report on Reform of the Electoral Laws (1999).

(4) The Election Commission's comments on the recommendations of the above three and its own proposals based on experience of ground realities.

Suggested Reform Options

4.7.1 After a review of various reports, research papers by activist organizations and concerned citizens, newspaper analyses, and other literature available on the subject of elections, a comprehensive consultation paper alongwith a Questionnaire and a Bibliography was prepared and issued by the Commission for generating debate and eliciting public response. One of the radical reform suggestions was that of the Gandhian model of decentralization whereunder village is at the centre and power flows upwards from the grassroots to concentric circles of multi-tier governance. The model envisages direct elections at the Panchayat and Nagarpalika levels and indirect elections to the District,

State and Union levels by all the lower tiers. The Commission carefully considered the strong presentations and representations made in support of the model but, as the consultation paper itself had anticipated and pointed out, in the present situation, the model is not feasible.

4.7.2. Some of the other suggestions for reform not found acceptable by the Commission on grounds of being either impracticable or unnecessary related to (i) negative voting, (ii) multi-member constituencies, (iii) recall, (iv) proportional representation, (v) list system, (vi) President's rule in the States during elections, (vii) putting a limit of two terms for any political position, (viii) prescribing literacy qualifications for legislators, (ix) direct election of the Chief Ministers in the States, etc.

4.7.3. **The Commission reached the conclusion that while some far reaching reforms in the electoral processes were necessary, no major constitutional amendment was called for. The necessary correctives could be achieved by ordinary legislation modifying the existing laws or, in many cases, merely by subordinate legislation and executive action.** The Commission is happy to note that some of the suggestions mentioned in the consultation papers released by it are already under implementation.

Electoral Rolls and Voter ID

4.8.1 The electoral process begins with the preparation of electoral rolls. If the rolls are incomplete or defective, the whole electoral process is vitiated. Any serious attempt at electoral reform, therefore, must first tackle the question of faulty electoral rolls. At present, the Election Commission (EC) is responsible for preparing the electoral rolls for assembly and parliamentary constituencies. The State Election Commissions are responsible for electoral rolls for local body elections. In some States, the EC and State Election Commissions (SECs) have agreed to coordinate the preparation of electoral rolls.

4.8.2 Given the technology today, an automated and well designed online system broken down to district level can be created without much hassle. The database would be centrally computerized by the EC and each voter/ adult citizen would have a unique bar-coded ID number. This ID number would be for life and in the long run the best bet against any impersonation. In course of time, possession of such an ID card should be made mandatory for all elections. It might even be possible to have hand held devices which would eliminate any invalid card automatically. This would improve public access to this, now hard to get, information and serve the objective of contributing to cleaning up the electoral process and curbing impersonation and rigging. Also, it would add to creating widespread trust in the fairness of our electoral process thereby providing it a high degree of institutional legitimacy.

4.8.3 **The Commission recommends a foolproof method of preparing the electoral roll right at the Panchayat level constituency of a voter and supplementing it by a foolproof voter ID card which may in fact also serve as a multi-purpose citizenship card for all adults. A single exercise should be enough for preparing common electoral rolls and ID cards. The task could be entrusted to a qualified professional agency under the supervision of the EC and in coordination with the SECs. The rolls should be updated constantly and periodically posted on the web site of the Election Commission and CD ROMs should be available to all political parties or anyone interested. Prior to elections, these rolls should be printed and publicly displayed at the post offices in each constituency, as well as at the panchayats or relevant constituency HQs. These should be allowed to be inspected on payment of a nominal fee by anyone. Facilities should also be provided to the members of the public at the post offices for submitting their applications for modification of the electoral rolls.**

Electronic Voting Machines (EVMs)

4.9 EVMs have been used successfully in limited areas in sensitive constituencies and in bye-elections. Any doubts about this technology were amply removed during the deliberations of the Goswami Committee. Not only were the EVMs satisfactorily demonstrated to all politician members, several electronic experts of the Government of India also testified that the machines could be used at all our elections without any misgivings. The advantages of EVMs in preventing large-scale rigging are quite apparent as the machine locks up and will permit only one hit every so many seconds. Wherever these EVMs have been used in urban and in rural areas, there have been no complaints of large scale rigging. This also makes counting easy and non-contestable and theoretically the results could be available within a very short time if the system wanted to make prompt announcement of the winning candidates.

The Commission recommends the introduction of EVMs in all constituencies all over the country for all elections as rapidly as possible.

Booth Capturing and Rigging

4.10 On the question of booth capturing, rigging and intimidation of voters, the proposals of the Goswami Committee to the effect that EC should be empowered to take more stringent action should be accepted and implemented in full.

The Commission recommends: (i) Under section 58A of the Representation of the People Act, 1951, the Election Commission should be authorised to take a decision regarding booth capturing on the report of the returning officers, observers or citizen groups. Also, the Commission should be empowered to countermand the election and order a fresh election or to declare the earlier poll to be void and order a re-poll in the entire constituency; (ii) EC should consider the use of tamper-proof video and other electronic surveillance at sensitive polling stations/ constituencies.

Caste and Communal Hatred

4.11 Campaigns which are crafted to create or exacerbate tensions between communities and/or to incite feelings of hatred on the basis of caste, community, religion, race or language attract disqualification at present but effective implementation of laws is lacking. This deserves the highest degree of attention.

The Commission recommends that any election campaigning on the basis of caste or religion and any attempt to spread caste and communal hatred during elections should be punishable with mandatory imprisonment. If such acts are done at the instance of the candidate or by his election agents, these would be punishable with disqualification.

Criminalisation

4.12.1 The entry of criminals in politics is a matter of great concern. The Vohra Committee appointed by the Government had stated in strong terms that the nexus between crime syndicates and political personalities was very deep. According to the Central Bureau of Investigation (CBI) report to the Vohra Committee: "all over India, crime syndicates have become a law unto themselves. ..... Even in the smaller towns and rural areas, muscle-men have become the order of the day. Hired assassins have become part of these organizations. The nexus between the criminal gangs, police, bureaucracy and politicians has come out clearly in various parts of the country." The Committee quoted other agencies to state that the Mafia network is "virtually running a parallel government, pushing the State apparatus into irrelevance." The report also says "in certain States like Bihar, Haryana and Uttar Pradesh, these gangs enjoy the patronage of local politicians cutting across party lines and the protection of the functionaries. Some political leaders become the leaders of these gangs/armed senas and over the years get themselves elected to local bodies, State assemblies and national parliament."

4.12.2 There were grave incongruities in the existing provisions of sub-sections (1), (2) and (3) of Section 8 of the Representation of the People Act, 1951 (RPA 1951), illustrating the case of a rapist, convicted and sentenced to ten years' imprisonment, being disqualified only for six years under sub-section (1) and while not able to vote, being free to contest elections even while serving the last four years of his sentence in prison.

The Commission recommends that the Representation of the People Act be amended to provide that any person charged with any offence punishable with imprisonment for a maximum term of five years or more, should be disqualified for being chosen as, or for being, a member of Parliament or Legislature of a State on the expiry of a period of one year from the date the charges were framed against him by the court in that offence and unless cleared during that one year period, he shall continue to remain so disqualified till the conclusion of the trial for that offence. In case a person is convicted of any offence by a court of law and sentenced to imprisonment for six months or more the bar should apply during the period under which the convicted person is undergoing the sentence and for a further period of six years after the completion of the period of the sentence. If any candidate violates this provision, he should be disqualified. Also, if a party puts up such a candidate with knowledge of his antecedents, it should be derecognised and deregistered.

4.12.3 Any person convicted for any heinous crime like murder, rape, smuggling, dacoity, etc. should be permanently debarred from contesting for any political office.

4.12.4 Criminal cases against politicians pending before Courts either for trial or in appeal must be disposed off speedily, if necessary, by appointing Special Courts.

4.12.5 A potential candidate against whom the police have framed charges may take the matter to the Special Court. This court should be obliged to enquire into and take a decision in a strictly time bound manner. Basically, this court may decide whether there is indeed a *prima facie* case justifying the framing of charges.

4.12.6 The Special Courts should be constituted at the level of High Courts and their decisions should be appealable to the Supreme Court only (in similar way as the decisions of the National Environment Tribunal). The Special Courts should decide the cases within a period of six months. For deciding the cases, these Courts should take evidence through Commissioners.

4.12.7 As per the provisions contained in sub-section (4) of section 8 of the Representation of the People Act, 1951, the disqualification referred to in sub-sections (1) and (2) of that section shall not take effect for a period of three months from the date of conviction if the person convicted is a member of Parliament or the Legislature of a State. However, if within the said three months an appeal or application for revision is brought in respect of the conviction or sentence, the disqualification will not operate until that appeal or application is disposed of by the court.

The Commission feels that the benefit of this provision should be available only for the continuance in office by a sitting Member of Parliament or a State Legislature. The Commission recommends that the aforesaid provision should suitably be amended providing that this benefit shall not be available for the purpose of his contesting fresh elections.

4.12.8 The Commission feels that the proposed provision laying down that a person charged with an offence punishable with imprisonment which may extend to five years or more should be disqualified from contesting elections after the expiry of a period of one year from the date the charges

were framed in a court of law should equally be applicable to sitting members of Parliament and State Legislatures as to any other such person.

Corrupt Practices and Election Petitions

4.13.1 Section 8A of the Representation of the People Act, 1951 (RPA) provides for disqualification on ground of corrupt practices. The current practice is that once the High Court hands out the judgement on an election petition holding the candidate guilty of corrupt practices, the case goes to the Secretary of the concerned State Legislature or the Secretary General Lok Sabha or Rajya Sabha, as the case may be. It is then forwarded to the President who in turn forwards it to the EC. Only then does the EC get jurisdiction to tender its opinion to the President based on which the disqualification order is issued.

The Commission recommends that in matters of disqualification on grounds of corrupt practices, the President should determine the period of disqualification under Section 8A on the direct opinion of the EC and avoid the delay currently experienced. This can be done by resorting to the position prevailing before the 1975 amendment to RPA, 1951.

4.13.2 Election petitions at present are considered by the High Court. The High Court is expected to give judgement on all election petitions within 6 months, but in actual practice, it takes much longer and often the petitions remain pending for years and in the meantime even the full term of the House expires. (For data on disposal of Election Petitions, see Consultation Paper, Table under para 15.2) In the opinion of many activists and eminent persons, all election-related petitions should be heard by a separate judicial set up and these petitions should be decided within a time bound period within 6 to 12 weeks by dedicated benches of special courts.

The Commission recommends that the election petitions also be decided by special courts proposed above. In the alternative, special

election benches may be constituted in the High Courts and earmarked exclusively for the disposal of election petitions and election disputes.

High Cost of Elections and Abuse of Money Power

4.14.1 One of the most critical problems in the matter of electoral reforms is the hard reality that for contesting an election one needs large amounts of money. The limits of expenditure prescribed are meaningless and almost never adhered to. As a result, it becomes difficult for the good and the honest to enter legislatures. It also creates a high degree of compulsion for corruption in the political arena. This has progressively polluted the entire system. Corruption, because it erodes performance, becomes one of the leading reasons for non-performance and compromised governance in the country. The sources of some of the election funds are believed to be unaccounted criminal money in return for protection, unaccounted funds from business groups who expect a high return on this investment, kickbacks or commissions on contracts etc. No matter how we look at it, citizens are directly affected because apart from compromised governance, the huge money spent on elections pushes up the cost of everything in the country. It also leads to unbridled corruption and the consequences of wide spread corruption are even more serious than many imagine. Electoral compulsions for funds become the foundation of the whole super structure of corruption.

4.14.2 The present provisions of law have a significant loophole in the shape of Explanation 1 to section 77(1) of the Representation of the People Act, 1951, under which the amounts spent by persons other than the candidate and his agent themselves, are not counted in his election expenses. This means that there can be never any violation of the expenditure limits. All extra expenditure, even when known and proven, can be shown to have been spent by the party or by any friends and it remains outside of the enforceable limits. In view of the increasing cost of the election campaigns, it is desirable that the **existing ceiling on election expenses for the various legislative bodies be suitably raised to**

a reasonable level reflecting the increasing costs. However, this ceiling should be fixed by the Election Commission from time to time and should include all the expenses by the candidate as well as by his political party or his friends and his well-wishers and any other expenses incurred in any political activity on behalf of the candidate by an individual or a corporate entity. Such a provision should be the part of a legislation regulating political funding in India. The Commission recommends that Explanation 1 to section 77(1) of the Representation of the People Act, 1951 should be deleted.

4.14.3 Transparency in the context of election means both the sources of finance as well as their utilization as are listed out in an audited statement. If the candidates are required to list the sources of their income, this can be checked back by the income tax authorities.

The Commission recommends that the political parties as well as individual candidates be made subject to a proper statutory audit of the amounts they spend. These accounts should be monitored through a system of checking and cross-checking through the income-tax returns filed by the candidates, parties and their well-wishers. At the end of the election each candidate should submit an audited statement of expenses under specific heads.

The EC should devise specific formats for filing such statements so that fudging of accounts becomes difficult. Also, the audit should not only be mandatory but it should be enforced by the Election Commission. Any violation or misreporting should be dealt with strongly.

4.14.4 The Commission recommends that every candidate at the time of election must declare his assets and liabilities along with those of his close relatives. Every holder of a political position must declare his assets and

liabilities along with those of his close relations annually. Law should define the term 'close relatives'.

4.14.5 In order to ensure that State funding of elections is not abused and misused, it is necessary to put in place an effective mechanism for audit of party funds and their combined funds. It is further necessary that Explanation 1 to section 77(1) of the Representation of the People Act, 1951 is deleted and a full foolproof mechanism to curb violations on the limits of election expenses is created.

The Commission recommends that any system of State funding of elections bears a close nexus to the regulation of working of political parties by law and to the creation of a foolproof mechanism under law with a view to implementing the financial limits strictly. Therefore, proposals for State funding should be deferred till these regulatory mechanisms are firmly in position.

4.14.6 All candidates should be required under law to declare their assets and liabilities by an affidavit and the details so given by them should be made public. Further, as a follow up action, the particulars of the assets and liabilities so given should be audited by a special authority created specifically under law for the purpose. Again, the legislators should be required under law for the purpose. Again, the legislators should be required under law to submit their returns about their liabilities every year and a final statement in this regard at the end of their term of office.

Reducing the Cost of Elections

4.15.1 There should be a systematic attempt under law to reduce election expenditure. Modes of electioneering which create public nuisance, namely, wall writings, campaign through loudspeakers, holding rallies on the roads and parks, creating traffic jams, etc. can very conveniently be curbed by making necessary provisions under law or the rules framed under the parent legislation. Ferrying

people on automobiles to the polling booths can very conveniently be curbed by making necessary provisions in law. There does exist some legal mechanism in these areas and what is needed is better enforcement of the provisions so made.

4.15.2 Wall writings, display of cut-outs, hoardings and banners, hoisting of flags (except at party offices, public meetings and other specified places), use of more than a specified number of vehicles for election campaign and for processions, announcements or publicity by more than a specified number of moving vehicles, holding of public meetings beyond the specified hours, display of posters at places, other than those specified by the district/electoral authorities, should be banned and strong penalty provided for violation of expenditure ceiling. A suitable law should be enacted providing penalties against damaging or desecrating public or private property by candidates, political parties or the agents, through painting of slogans or erecting cut-outs and hoarding or putting banners and buntings. The law should also provide for special courts to ensure strict compliance of the aforesaid provisions of law, should any dispute arise in respect of the alleged violations of provisions of law by any candidate, political party or his agents and well-wishers.

4.15.3. With a view to reducing election costs and strain on human and other resources, State and Parliamentary level elections, to the extent possible, should be held at the same time.

4.15.4 Campaign period should be reduced considerably.

4.15.5 Candidates should not be allowed to contest election simultaneously for the same office from more than one constituency.

4.15.6 The election code of conduct which should come into operation as soon as the elections are announced should be given the sanctity of law and its violation should attract penal action.

4.16.1 **Winning by minority vote**: The multiplicity of political parties, combined with our Westminster based first-past-the-post system results in a majority of legislators and parliamentarians getting elected on a minority vote. In other words, they usually win by obtaining less than 50% of the votes cast, i.e. with more votes cast against them than in their favour. There are States where 85% to 90% of the legislators have won on a minority vote. At the national level, the proportion of MPs who have won on a minority vote is over 67% at an average for the last three Lok Sabha elections. In extreme cases, some candidates have won even on the basis of 13% of the votes polled. (For relevant data, see Tables in Annexures to the Consultation Paper on the subject).

4.16.2 In a pluralistic society such as ours, some political parties have found it advantageous to develop a vested interest in progressively appealing to narrower and narrowing loyalties. Clearly, if a candidate can win on less than one-third share of the votes polled, he does not need to generate a wider appeal. By making caste and community a factor in political power play, we have made the divide even wider and deeper in the Indian society and made it nearly impossible for Babasaheb Dr. Ambedkar's vision of a casteless and classless society ever coming true.

4.16.3 It is strange that most people of the constituency do not vote for the particular candidate who becomes their representative. Whose representatives are such candidates when a majority of voters did not want them? The seriousness of this issue has generated suggestions from many quarters focussed primarily on some possibilities.

4.16.4 It has been suggested from several quarters that this principle of representativeness will be fulfilled if the elected representatives win on the basis of 50% plus one vote. If, in the first round, no body gets over 50% of the votes polled, then according to this view, there should be a run-off contest held the very next day or soon thereafter between the top two candidates so that one of them

will necessarily win on the basis of 50% plus one votes polled. Several representations from various organizations favoured this option to achieve the objective of better representative democracy. The Chief Election Commissioner is reported to have confirmed that the task of run-off elections can be managed. Actually, the run-off vote is analogous to a re-poll. There is no revision of electoral rolls, no fresh nominations, no fresh campaigning or the like. The Commission is of the view that there are substantial advantages of following the policy of 50% plus one vote. On the one hand, it resolves the problem of inadequate representation. On the other, it also makes it in the self-interest of various political parties themselves to widen their appeal to a wider electorate. It can help push political rhetoric in a direction of mobilizing language might take on comparative 'universal' tone as opposed to 'sectoral' tones of the present day. With the need to be more broad-based in their appeal, issues that have to do with good governance rather than with cleavages and narrow identities might start to surface in the country.

4.16.5 Despite the suggested merits of this system, the Commission refrains from making a positive recommendation for its acceptance straightaway, as the Commission cannot put out of consideration certain apprehensions expressed by several sections, particularly, in regard to the implications of a repoll. The pros and cons of the proposal need and merit a closer and more careful evaluation.

4.16.6 In the circumstances, the Commission while recognizing the beneficial potential of this system for a more representative democracy, recommends that the Government and the Election Commission of India should examine this issue of prescribing a minimum of 50% plus one vote for election in all its aspects, consult various political parties, and other interests that might consider themselves affected by this change and evaluate the acceptability and benefits of this system. The Commission recommends a careful and full examination of this issue by the Government and the Election Commission of India.

Delimitation of Constituencies

4.17 Since 1971, the number of seats in the Lok-Sabha allocated to different States has been frozen. No fresh Delimitation Commission has been formed.

The Commission recommends that intra-State delimitation exercise may be undertaken by the Election Commission for Lok Sabha and assembly constituencies and the Scheduled Castes and Non-Scheduled Area Scheduled Tribe seats should be rotated. The Delimitation Body should, however, reflect the plural composition of society.

Defections

4.18.1 The question of defections has now haunted the Indian polity for over three decades. This was sought to be eliminated by the Tenth Schedule but all that has happened is that while individual defections have become rare, *en bloc* defections are permitted, promoted and amply rewarded. Despite the Tenth Schedule, or because of it, countless defections have taken place without incurring any disqualification. In fact, on an average more defections per year took place after the Anti-defection Law as laid down in the Tenth Schedule came into force than ever earlier. What has been even more disconcerting is that some of the Speakers have tended to act in a partisan manner and without a proper appreciation - deliberate or otherwise - of the provisions of the Tenth Schedule. Almost everyone dealing with this subject agrees that defections flout people's mandate and cannot and should not be permitted, neither singly nor in a group. The fact is that most candidates get elected on the basis of the party that has given them a ticket. Defections allow these candidates to theoretically go to the pole opposite of this party, which is not the basis on which people elected them. Simply because there is no accountability *vis-à-vis* the people, such a practice continues unabated. Defections encourage corruption at the highest levels. Defectors usually are rewarded with political positions and other such perquisites so openly that it really makes a mockery of our democracy.

4.18.2 The Commission recommends that the provisions of the Tenth Schedule of the Constitution should be amended specifically to provide that all persons defecting - whether individually or in groups - from the party or the alliance of parties, on whose ticket they had been elected, must resign from their parliamentary or assembly seats and must contest fresh elections. In other words, they should lose their membership and the protection under the provision of split, etc. should be scrapped. The defectors should also be debarred to hold any public office of a minister or any other remunerative political post for at least the duration of the remaining term of the existing legislature or until, the next fresh elections whichever is earlier. The vote cast by a defector to topple a government should be treated as invalid. The Commission further recommends that the power to decide on questions as to disqualification on ground of defection should vest in the Election Commission instead of in the Chairman or Speaker of the House concerned.

Oversized Council of Ministers

4.19. The practice of having oversized Council of Ministers must be prohibited by law. A ceiling on the number of Ministers in any State or the Union government be fixed at the maximum of 10% of the total strength of the popular house of the legislature. In this connection, reference is also invited to clause 4 of article 239AA of the Constitution, which limits the size of the Council of the Ministers to not more than 10% of the total number of members in the Legislative Assembly of the National Capital Territory of Delhi.

Also, the practice of creating a number of political offices with the position, perks and privileges of a minister should also be discouraged and at all events their number should be limited to 2 per cent of the total strength of the lower house.

Problems of Instability

4.20.1 The last few decades have seen a great deal of political instability in India. During ten years, there were seven governments at the Union level. Being minority governments, these were unable to provide stable administration and stable policies. The reasons are not far to find. We adopted the Westminster model of FPTP system of elections but forgot that it works mainly in communion with a two party system or a limited number of parties. The political system and the politicization of caste and communal identities have proved to be very divisive of society and disruptive of the national ethos. It has become increasingly difficult to get a workable majority to form a government and make a success of coalition arrangements.

4.20.2 This has had very negative repercussions on the quality of governance because to cobble up a workable majority to form government, compromises had to be made and ideology or notions of quality of governance sometimes might have taken a back seat. The consequences are severe. Law and order suffers because control mechanisms break down or become very loose. It becomes difficult to take strong measures to curb corruption and provide clean and quality governance. In the end, it is the citizen who is the victim of all the misgovernance.

4.20.3 Out of 1900 independent candidates who contested the general election in 1998, only 6(0.65%) succeeded, 885(47%) lost their deposits. Likewise out of the 10635 candidates, who contested the 1996 Lok-Sabha elections, only 9(0.08%) won and 10,603(99.7%) lost their deposits. It is also known that most of these so-called independent candidates are in fact dummy candidates or defectors from their parties on being denied party tickets. These candidates only vitiate the sanctity of the electoral process and involve waste of resources. This was carried to ridiculous limits when a Lok Sabha constituency in Andhra

Pradesh (Nalgonda, in 1996) had 480 contestants. Similarly there have been assembly constituencies reaching over 1000 candidates.

The Commission recommends that independent candidates be discouraged and only those who have a track record of having won any local election or who are nominated by at least twenty elected members of Panchayats, Municipalities or other local bodies spread out in majority of electoral districts in their constituency should be allowed to contest for Assembly or Parliament.

4.20.4 **In order to check the proliferation of the number of independent candidates and the malpractices that enter into the election process because of the influx of the independent candidates, the existing security deposits in respect of independent candidates may be doubled. Further, it should be doubled progressively every year for those independents who fail to win and still keep contesting elections. If any independent candidate has failed to get at least five percent of the total number of votes cast in his constituency, he/she should not be allowed to contest as independent candidate for the same office again at least for 6 years.**

4.20.5 **An independent candidate who loses election three times consecutively for the same office as such candidate should be permanently debarred from contesting election to that office.**

4.20.6 **The minimum number of valid votes polled should be increased to 25% from the current 16.67% as a condition for the *deposit* not being forfeited. This would further reduce the number of non-serious candidates.**

4.20.7 **In the considered view of the Commission, it should be possible without any constitutional amendment to provide for the election of the Leader of the House (Lok Sabha/State Assembly) along with the election of the Speaker and in like manner under the Rules of Procedure. The person so elected may be appointed the Prime Minister/Chief Minister.**

1206/LJ&CA/2002—11A

The eligibility of non-Indian born citizens to hold high offices

4.21. It was suggested that the highest offices in the realm such as President, Vice-President, Prime Minister and Chief Justice of India should be open only to natural born citizens of India or those whose parents or grandparents were citizens of India. The matter was discussed at more than one sittings of the Commission. The Commission found that the said suggestion was not without force. At the same time, the other point of view put forward was that denial of the said high offices solely on account of the fact that the person was not a natural born citizen of India or his parents or grand-parents were not citizens of India, might deprive some citizens from occupying these high offices even if they were otherwise worthy and acceptable. The opinion in the Commission was equally divided. **The Commission recommends that this issue be examined in depth through a political process after a national dialogue.**

Appointment of the Election Commissioners and State Election Commissioners

4.22 The Commission recommends that the Chief Election Commissioner and the other Election Commissioners should be appointed on the recommendation of a body consisting of the Prime Minister, Leader of the Opposition in the Lok Sabha, Leader of the Opposition in the Rajya Sabha, the Speaker of the Lok Sabha and the Deputy Chairman of the Rajya Sabha. Similar procedure should be adopted in the case of appointment of State Election Commissioners.

Candidates owing Government Dues

4.23 It is recommended that all candidates should be required to clear government dues before their candidatures are accepted. This pertains to payment of taxes and bills and unauthorised occupation of accommodation and availing of telephones and other government facilities to which they

1206 LJ&CA/2002—11B

are no longer entitled. The fact that matters regarding Government dues in respect of the candidate are pending before a Court of Law should be no excuse.

Office of Profit

4.24.1 Article 102 (1)(a) of the Constitution, *inter alia*, provides that a person shall be disqualified for being chosen as, and for being, a member of either House of Parliament if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder. There are similar provisions in relation to State Legislatures in article 191 (1)(a). Thus the Parliament or a State Assembly, as the case may be, can provide by law certain offices not to be offices of profit. However, the Constitution nowhere provides as to what offices shall be deemed to be offices of profit. This has led to great amount of uncertainty and avoidable disputes.

4.24.2 The Commission received suggestions to the effect that the Constitution may be suitably amended with a view to provide necessary power in the Election Commission to identify/provide from time to time the offices which shall be deemed to be offices of profit under the Government of India or the Government of any State.

4.24.3 **In order to obviate the uncertainty, the Commission recommends that by suitable amendment in the Constitution, the Election Commission may be empowered to identify and declare the various offices under the Government of India or of a State to be offices of profit for the purposes of being chosen, and for being, a member of the appropriate legislature.**

B. Political Parties

Background and Objectives

4.25 Political parties are an essential concomitant of elections in a representative parliamentary democracy. The quintessential precondition for the success of the Westminster model is a political system of two major parties based on ideological and programmatic orientation. The origin and growth of political parties in India can be traced to the days of her struggle for freedom. The overriding passion with the fighters for India's freedom and the founding fathers of her Constitution was to build a united nation and an integrated society while retaining its rich diversity and pluralism. They expected that an ideologically oriented healthy party system would soon evolve in independent India and that it would contribute to societal integration, nation building and strengthening the edifice of democracy. Unfortunately, this did not happen. The source of many of our troubles during the post independence period has been our failure to evolve a healthy party system based on a just and widely acceptable political-economic national agenda.

Constitution and Law in relation to Political Parties

4.26.1 Although political parties were not mentioned in the Constitution until the fifty-second constitutional amendment of 1985, the existence of some well-organised political parties was presumed as these were already functioning. The Constitution only guaranteed freedom of association as a fundamental right. Section 29A of the Representation of the People Act, 1951 provides for registration with the Election Commission of associations and bodies of individual citizens of India as political parties. The Tenth Schedule to the Constitution which was added by the Constitution (52nd Amendment) Act, 1985 mentions political parties only for the specific purpose of considering disqualification of a person for membership of either House of Parliament or of the Legislative Assembly or Legislative Council of a State on the ground of defection from his

political party. With that exception, even today, there is no law governing the formation, registration, functioning or regulation of political parties.

4.26.2 The Election Commission accords recognition to political parties as national or state parties in accordance with the norms laid down in the Election Symbols (Reservation and Allotment) Order, 1968. This is for the very limited purpose of allocation of symbols. The number of parties recognised as national parties has been varying from 14 to 4 owing to continuous review of the status based on their performance at the polls.

The Present Scenario

4.27.1 The evolution of party system after independence is a picture of transformation from one-party dominant system to a complex of multi-party system in which strong trends of fragmentation, factionalism and regionalism coupled with the desire to form alliances for seeking a share in power are increasingly occurring. This trend culminated in 'hung' Houses after last few general elections. Another significant development affecting the party system is the emergence of coalition politics.

4.27.2 In recent years, there has been sharp increase in political mobilization of the electorate on the basis of social cleavages based on ascriptive identities, in particular of religion and caste. Casteism, communalism and personality domination have been the main planks around which the fragmentation of political parties has taken place. Political parties have invariably exploited these sentiments for gaining support of the voters. These developments have necessitated a need for a review of the working of the political parties and their role and performance in the scheme of Indian polity and Constitution.

Studies and Reports

4.28 The Commission had the opportunity to examine the suggestions made by a number of academic and research institutions, political observers and analysts, scholars, journalists and academicians and Committees and Commissions appointed by the Government of India. These included the studies conducted by

Centre for Policy Research (Lok Raj Baral on Party Reforms, 2000), V.M. Tarakunde Committee (1974-75), Dinesh Goswami Committee Report (1990), Justice V.R. Krishna Iyer Committee (1994) and 170th Report on "Reform of the Electoral Laws" (1999) of the Law Commission. The Consultation Paper[2] on "Review of the Working of Political Parties specially in relation to Elections and Reform Options" makes a brief survey of the various issues and the recommendations discussed in these studies and in the large number of representations and memoranda received by the Commission from eminent persons, political parties, institutions and the general public.

Identifying the Problem Areas

4.29 Having regard to the prevailing political scenario in the country and the hard fact that no electoral reforms can be effective without reforms in the political party system, the Commission identified the following as some of the areas of immediate concern:-

- Institutionalization of political parties - need for a comprehensive legislation to regulate party activities, criteria for registration as a national or State party - de-recongition of parties.
- Structural and organizational reforms - party organizations - National, State and local levels - inner party democracy - regular party elections, recruitment of party cadres, socialization, development and training, research, thinking and policy planning activities of the party.
- Problems of party funding - need for a legislation to regulate party funds - distribution and spending of party funds during non-election and election times.
- Maintenance of regular accounts by the political parties - auditing and publishing - making audited accounts available for open inspection.

[2] *See* Volume II (Book 1) of the Report.

- To what extent and in what way party system could be reformed so as to pave the way for the establishment of stable governments based on the concept of two party system or dual party alliance system.
- Steps to check criminalisation of political parties.
- Steps to curb the role of casteism and communalism.
- Steps to encourage gender participation in the political organizations.
- Party system and governance – Mechanisms to make parties viable instruments of good governance?

Law for Political Parties

4.30.1 **The Commission recommends that there should be a comprehensive legislation [may be named as the Political Parties (Registration and Regulation) Act], regulating the registration and functioning of political parties or alliances of parties in India.**

4.30.2 The proposed legislation should provide for compulsory registration for every political party or pre-poll alliance. It should lay down conditions for the constitution of a political party or alliance and for registration, recognition and de-registration and derecognition.

4.30.3 **The Commission recommends that every political party or alliance should, in its Memoranda of Association, Rules and Regulations provide for its doors being open to all citizens irrespective of any distinctions of caste, community or the like. It should swear allegiance to the provisions of the Constitution and to the sovereignty and integrity of the nation, regular elections at an interval of three years at its various levels of the party, reservation/representation of at least 30 percent of its organizational positions at various levels and the same percentage of party tickets for parliamentary and State legislature seats to women. Failure to do so should invite the penalty of the party losing recognition.**

4.30.4 **The law should make it compulsory for the parties to maintain accounts of the receipt of funds and expenditure in a systematic and regular way.** The form of accounts of receipt and expenditure and declaration about the sources of funds may be prescribed by an independent body of Accounts & Audit experts, created under the proposed Act. **The accounts should also be compulsorily audited** by the same independent body, created under the legislation which should also prepare a report on the financial status of the political party which along with the audited accounts **should be open and available to public for study and inspection.**

4.30.5 **The Commission recommends the enactment of an appropriate provision making it compulsory for the political parties requiring their candidates to declare their assets and liabilities at the time of filing their nomination before the returning officers for election to any office at any level of government.**

4.30.6 The authority for registration, de-registration, recognition and derecognition of parties and for appointing the body of auditors should be the Election Commission whose decisions should be final subject to review by the Supreme Court on points of law.

Recognition of Parties

4.31.1 It is a desirable objective to promote progressive polarisation of political ideologies and to reduce less serious political activity. The process of recognition of political parties by the Election Commission is an important and effective tool in this task. While proliferation of smaller political parties add to political confusion, at the same time the Commission is aware that 'political parties, with all their well-known human and structural shortcomings, are the only devices (that can) generate countervailing collective power on behalf of the many individually powerless against the relatively few who are individually – or organizationally – powerful'. The approach, therefore, needs to balance

considerations of stability on the one hand and the need to reflect the aspirations of a plural society, on the other.

4.31.2 At present, for the allotment of an exclusive symbol, State Parties need 6% of the votes polled **plus** 2 members in the Legislative Assembly. The alternative criteria for recognition is at least 3% of the seats in the Lower House. At the national level such a recognition would require 6% of the votes polled in at least 4 States **plus** 4 members in the Lok Sabha, or alternatively at least 2% of membership of the Lok Sabha drawn from at least 3 States.

The Commission recommends that the Election Commission should progressively increase the threshold criterion for eligibility for recognition so that the proliferation of smaller political parties is discouraged. Only parties or a pre-poll alliance of political parties registered as national parties or alliances with the Election Commission be allotted a common symbol to contest elections for the Lok Sabha. State parties may be allotted symbols to contest elections for State Legislatures and the Council of States (Rajya Sabha).

Rules and Regulations

4.32 The rules and by-laws of the parties seeking registration should include provisions for:

(a) a declaration of adherence to democratic values and norms of the Constitution in their inner party organizations,

(b) a declaration to shun violence for political gains,

(c) a declaration not to resort to casteism and communalism for political mobilisation, but to adhere to the principles of secularism in the achievement of their objectives,

(d) a provision for party conventions to nominate and select candidates for political offices at the grass root and State levels,

(e) a code of conduct (which each political party should evolve for itself),

(f) some institutional mechanism for planning, thinking and research on crucial socio-economic issues facing the nation and educational cells for socializing their party cadres and preparing them for responsibilities of governance,

(g) implementation of legal provisions regarding representation to women and weaker sections of society in party offices and in candidacy for elections to Houses of Legislatures.

Needs for Stability

4.33.1 In a situation where no single political party or pre-poll alliance of parties succeeds in securing a clear majority in the Lok Sabha after elections, instead of involving the highest office of the President in the controversies of finding out who could command the confidence of the House, it would be best to leave it to the House itself to determine majority support to a leader. It would remove uncertainty and also obviate the need for the President asking his appointee as Prime Minister to seek a vote of confidence within certain number of days.

4.33.2 **The Commission, therefore, recommends that in a situation where no single political party or pre-poll alliance of parties succeeds in securing a clear majority in the Lok Sabha after elections, the Rules of Procedure in Lok Sabha may provide for the election of the Leader of the House by the Lok Sabha along with the election of the Speaker and in the like manner. The Leader may then be appointed as the Prime Minister. The same procedure may be followed for the office of the Chief Minister in the State concerned.**

4.33.3 The Commission further recommends an amendment in the Rules of Procedure for adoption of a system of constructive vote of no confidence. **For a motion of no-confidence to be brought out against a government at least**

20% of the total number of members of the House should give notice. Also, the motion should be accompanied by a proposal of alternative Leader to be voted simultaneously.

Scourge of Criminalisation

4.34 **The Commission recommends that the proposed law on political parties should provide that no political party should sponsor or provide ticket to a candidate for contesting elections if he was convicted by any court for any criminal offence or if the courts have framed criminal charges against him. The law should specifically provide that if any party violates this provision, the candidate involved should be liable to be disqualified and the party deregistered and derecognised forthwith.**

Funding Political Parties

4.35.1 The problem of political funding is a complex one and there are no panaceas. Political parties need hefty contributions from companies and from other less desirable sources. The greater the contribution, the greater the risk of dependence, corruption and lack of probity in public life. The demand for transparency must be conceived as a democratic value in itself, a tool designed to avoid any wrongful influences of money in politics. If laws are intended to be effective with regard to transparency, they should be general in nature and enforced with respect to everyone, and not just political parties or candidates, but also to the donors as well. Otherwise, alternate or indirect ways to evade control will be devised. In fact, while it is essential to strengthen regulation and the mechanisms and capabilities of supervision and controlling entities, all this only addresses part of the problem. Quite often, funding and commitments do not reach the parties, but rather go directly to the candidate and his/her inner circle of supporters. This is truer today in the context of the image and credibility crisis that party organisations have been undergoing, and the emergence of regional leaders due to the regionalisation process. This usually tends to make

transactions between donors and beneficiaries become even more secretive. Hence; the senior leaders or party members may often not be aware of private contributions (many of them dubious in origin and in quite large sums). Consequently, any proposals for reforms concerning political funding should revolve, among other things, around the following four main objectives:

(i) reducing the influence of money by diminishing its impact (by shortening campaigns, establishing ceilings on expenditure and limiting individual contributions);

(ii) improving the use of money by investing it on more productive activities for the sake of democracy, and not just squandering it on propaganda and negative campaigns;

(iii) stopping, or at least curtailing, as much as possible, current levels of influence peddling and political corruption; and

(iv) strengthening public disclosure and transparency mechanisms with respect to both the origin and the use of funds.

4.35.2 At present, different Acts regulate the flow of funds to political parties both from internal as well as external sources. **The Commission recommends that a comprehensive legislation providing for regulation of contributions to the political parties and towards election expenses should be enacted by consolidating such laws. The new law should aim at bringing transparency into political funding. It should permit corporate donations within higher prescribed limits and keep them transparent. It should make all legal and transparent donations upto a specified limit tax exempt and treat this tax loss to the state as its contribution to state funding of elections.** For example, tax exemptions could be limited to say Rs.25,000 for individuals and Rs.10,00,000 for companies provided that the contributions are made to party funds and not to individuals. In the case of corporate contributions, the Board of Directors may approve up to say Rs.10,00,000 and anything over this amount may be approved by the shareholders. Political funding should be a separate head in the accounts and annual reports of the company. This will ensure

transparency. This will be in addition to the existing conditions laid down in the Companies Act, 1956 for making donations to political parties.

4.35.3 **The law should contain provisions for making both donors and donees of political funds accountable. The Government should encourage the corporate bodies and agencies to establish an electoral trust which should be able to finance political parties on an equitable basis at the time of elections.**

4.35.4 **Audited political party accounts like the accounts of a public limited company should be published yearly with full disclosures under predetermined account heads.**

Election Returns

4.36 **The proposed law should provide for immediate de-recognition of the party and enforcement of penalties for filing false or incorrect election returns.**

Educational Training and Developmental Activities

4.37 Political parties should in their rules and regulations provide for establishing some institutional mechanism for planning, thinking and research on crucial socio-economic issues facing the nation and educational cells for socializing their party cadres and preparing them for responsibilities of governance.

Leadership Conventions

4.38 Parties should seriously consider adopting the leadership convention system. This would have the advantage first, of making the leadership election process more open, democratic and federal. Second, the people will know in advance of the prospective Prime ministerial candidates. Third, it would introduce a nationally aggregative mechanism in major parties and curb the

tendency of regionalisation and fragmentation. If the national convention is found too expensive, a series of staggered State conventions may be held by major parties with their respective slates of candidates (common for all the States in one party). This will go a long way in making parties aggregative and thus more functional in a parliamentary federal system of governance.

CHAPTER 5

PARLIAMENT AND STATE LEGISLATURES

CONTENTS

5.1	➢ Need for Review	5.12	➢ Orientation Programmes for New Members
5.2	➢ Cause for Concern	5.13	➢ Parliamentary Control through PAC
5.3	➢ Aim and objective	5.14	➢ Parliamentary Control over Borrowing
5.4	➢ Instability and Defections	5.15	➢ Parliamentary Privileges
5.5	➢ Hung Houses	5.16	➢ Comptroller and Auditor General (C&AG) and Constitution of Audit Board
5.6.1	➢ Strengthening the Committee System	5.17	➢ Accountability of the C&AG
5.7	➢ Nodal Standing Committee on Economy	5.18	➢ C&AG and Economic Reforms
5.8	➢ The Constitution Committee	5.19	➢ M.P. LAD Scheme
5.9	➢ Rationalising the Parliamentary Committees	5.20	➢ Secretariats of Parliament
5.10	➢ Planning of Legislation and Improving its Quality	5.21	➢ Other Procedural Reforms
5.11	➢ Image of the Parliament	5.22	➢ Conclusion

CHAPTER 5

PARLIAMENT AND STATE LEGISLATURES[1]

Need for Review

5.1 Parliament is the pivotal institution of our representative parliamentary democratic polity. Its role in navigating India's voyage in the post-independence period of momentous developments stands in comparison with the best of legislatures anywhere in the world. We can take legitimate pride and comfort from the impressive record of the uninterrupted continuity of our parliamentary institutions for over half a century. However, like all living institutions, Parliament needs to keep under constant review its structural-functional requirements as also the entire gamut of its operational procedures. Also, it has to be remembered that in parliamentary democracy just as Government is responsible to Parliament, Parliament is also responsible to the people who are the supreme sovereign.

Cause for Concern

5.2 If there is a sense of unease with the way the Parliament and the State legislatures are functioning, it may be due to a decline in recent years in both the quantity and quality of work done by them. Over the years the number of days on which the houses sit to transact legislative and other business has come down very significantly. Even the relatively fewer days on which the houses meet are often marked by unseemly incidents, including use of force to intimidate opponents, shouting and shutting out of debate and discussion resulting in frequent adjournments. There is increasing concern about the decline of

[1] See also the Consultation Papers released by the Commission on "Immunity of Legislators: What do the words 'in respect of anything said or any vote given by him' in article 105(2) signify?" and "Efficacy of Public Audit System in India: C&AG" in Volume II (Book 1). Also see the background papers on "Working of Parliament and Need for Reforms" and "Fiscal and Monetary Policies" in Volume II (Book 3).

1206 LJ&CA/2002—12A

Parliament, falling standards of debate, erosion of the moral authority and prestige of the supreme tribune of the people. Corrective steps are urgently needed to strengthen Parliament's role as the authentic voice of the people as they struggle and suffer to realise the inspiring vision of a free and just society enshrined in the Constitution. Also, it is of the utmost importance for survival of democracy that Parliament continues to occupy a position of the highest esteem in the minds and hearts of the people.

Aim and objective

5.3 The most important function of the Parliament and the State legislatures is to represent the people. It is, however, important to remember that in parliamentary polity the legislature has also to provide from within itself a representative, responsible and responsive government to the people. One way to judge whether the system is working well or not is to see whether it has brought into being governments that last their terms and succeed in providing good governance to the community. The overriding objective has to be to make both government and parliament relevant to meet today's challenges which bear little comparison to those faced by our society in the middle decades of the twentieth century. The fundamental challenges are economic and technological. Parliament has a decisive role in refashioning the national economy, keeping in the forefront the ideals of a self-reliant economy that serves the real needs and aspirations of our vast masses. Parliament can play this historic role only if it consciously reforms its procedures and prioritizes its work.

Instability and Defections

5.4 At the State level since the late sixties and in recent years at the Union level also, we have been faced with the phenomena of governmental instability resulting from hung houses and/or unprincipled defections by legislators. For governments all the time preoccupied with the struggle for their survival, it is unfair to expect good governance in the interests of the people. The anti-

defection law in the Tenth Schedule of the Constitution sought to bring about some stability by providing for disqualification of defectors but it failed to solve any problem. Whereas individual defection was penalised, group defection was not. Indeed splits and mergers, defections by other names, were not only not frowned upon, but were encouraged by the lure of ministerial offices to political adventurers and entrepreneurs resourceful enough and adventurous enough to organise group crossovers. The Commission has dealt with this issue in an earlier chapter (Chapter 4) and made a recommendation to ban all defections[2] whether as individuals or in groups.

Hung Houses

5.5 Since 1989, there have been five general elections for Lok Sabha. In all these elections, no single party emerged with a majority of seats in the House. This has aroused considerable concern about political stability, especially in the context of the needs of national development efforts and the far-reaching changes in international economic and security paradigms. The Commission has analysed this issue also in an earlier chapter (Chapter 4) and made its recommendations[3] for amending the relevant Rules of Procedure to provide for the election of the Leader of the House (Prime Minister) by the Lok Sabha and for the removal of the Council of Ministers only on a constructive vote of no-confidence.

Strengthening the Committee System

5.6.1 The initiative first taken in 1989 culminated in 1993 in seventeen Departmental Standing Committees of Parliament. It was a path-breaking innovation that provided the Parliament with the wherewithal to handle complex economic and social issues with growing levels of competence and sophistication. It is in these committees that the demands for grants of the ministries and departments can be examined in depth in an atmosphere of

[2] See para 4.18 supra.
[3] See paras 4.20.7 and 4.33.3 supra

objectivity and freedom from partisan passions. It is here that the legislative proposals of the government can be scrutinised to ensure their consistency with policy objectives and aims and long-term perspectives assessed for their suitability to serve the societal goals. But, more energy and effort would have to go into the task of making these Committees work. Given the enormous importance of these Committees for the effective functioning of the Parliament, it is obvious that a conscious, coordinated and sustained reform of the committee system is the only way of making Parliament a relevant factor in the democratic set up of the future.

5.6.2 The Departmental Committee system as it is functioning today has many shortcomings. The Committees have too many members - each has 45. There is large scale absenteeism; in 1997-98, for example, average attendance was reported to have been less than 50 percent. Most committees oversee more than one ministry, thus preventing more focussed work. Most political parties do not follow any norms while nominating members to these committees. They are also handicapped by lack of specialist advisers. Every committee has tenure of one year. This means members have no opportunity of specialising in a particular subject or group of subjects unless they can persuade their whips to let them continue to serve on a particular committee. This adhocism tells on the quality of work done by the committees whose reports suffer from absence of critical analysis of the work of the ministries under their supervision. Parliamentary oversight, essential for enforcing accountability of the executive, is worse than useless if it degenerates into a meaningless routine. Then it is only adding to the cost of parliament without any benefit to the people. [For a Background Paper on the subject of 'Parliamentary Reforms' including suggestions regarding these committees, see Vol.2].

5.6.3 **The Commission recommends that presiding officers, the minister for parliamentary affairs, and the chief whips of parties should periodically meet to review the work of the departmental parliamentary committees and**

take remedial action. It should be entirely possible for the Parliament to sanction budgets to secure the services of specialist advisors to assist these committees in conducting their inquiries, holding public hearings, collecting data about legislation and administrative details pertaining to countries which have relevance to our conditions.

Nodal Standing Committee on Economy

5.7 In view of the fact that economic policy is the most important topic for the future of our society, it is a major gap in our institutional set up that we do not have a powerful and prestigious committee of parliament to oversee major macroeconomic issues of fiscal, monetary, financial, industrial and trade policies in an integrated manner. Government's handling of critical macroeconomic issues escapes a thorough and well-informed analysis by the Parliament which does not have the benefit of airing of different points of view and perspectives in the context of the data made available by government. The parliament has only the mainstream government view to go by. It has no opportunity to question the major actors on the official scene like the Governor of the Reserve Bank of India or the Chief Economic Adviser to the Government on the major trends in the economy. Due to this lacuna, parliamentary interventions are confined to invocations of the themes of inflation and the like. Most of the members are satisfied by raising issues pertaining to their constituency or at most to their region in their State. This gap needs to be filled.

The Commission recommends that immediate steps be taken to set up a Nodal Standing Committee on National Economy with adequate resources in terms of both in house and advisory expertise, data gathering and computing and research facilities for an ongoing analysis of the national economy for assisting the members of the Committee to report on a periodic basis to the full House. These reports would gradually come to claim the same degree of respect and attention that now attaches to the Economic Survey published annually by the Department of Economic Affairs and

would constitute a valuable reference point for analysts, commentators, researchers, political activists and social workers throughout the country. Since it would be a parliamentary publication, its findings and observations need not be identical with those of the Economic Survey. It would help both government and parliament in orchestrating opinion on important policy issues for building a national consensus, especially in areas where vital national interests have to be forcefully articulated in international fora like the WTO, the IMF and the G-15 or the G-77.

The Constitution Committee

5.8.1 While executive power of the Union is coextensive with its legislative power, the constituent power under the Constitution belongs exclusively to Parliament. The responsibility of Parliament therefore becomes much greater in the case of Constitution (Amendment) Bills. At present all Constitution (Amendment) Bills are introduced in Parliament like ordinary pieces of legislation, often at short notice. Sometimes an important amendment bill may be rushed through the two Houses of Parliament without even a cursory discussion. This does not speak well of the way parliament is exercising its constituent power.

5.8.2 In view of the importance to be attached to the fundamental law of the country, it stands to reason that the process of amending the Constitution should begin with the Parliament. **The Parliament should be associated with the initial stage itself in the matter of formulating proposals for constitutional amendment. The actual drafting should be taken up only after the principles underlyng the amendment have been thoroughly considered in a parliamentary forum and subjected to a *priori* scrutiny by the constituent power.** The proposed involvement of Parliament and a *priori* scrutiny can be achieved through the device of a Standing Constitution Committee. This process will enhance the legitimacy and acceptability of constitutional change. As an alternative, after a Constitutional Amendment Bill has been formulated but before it has been introduced, it may be subject to a *priori* scrutiny of the Constitution

Committee.

5.8.3 The Committee is important from another angle as well. Many laws are struck down as being *ultra vires* the Constitution. It can examine legislation from the point of view of constitutional validity. Furthermore, scrutiny by a parliamentary committee will ensure that legislation purporting to be in furtherance of the Directive Principles does, in fact, have a reasonable nexus with the objectives in view and does not curtail the fundamental rights beyond what is reasonable. **The Commission recommends the setting up of a Standing Constitution Committee of the two Houses of Parliament for a *priori* scrutiny of amendment proposals.**

Rationalising the Parliamentary Committees

5.9.1 **With the proposed establishment of three new Committees, namely, the Constitution Committee, the Committee on National Economy and the Committee on Legislation, it may not be necessary to continue the existing Committees on Estimates, Public Undertakings and Subordinate Legislation.** The topics covered by them could be covered either by the Departmental Standing Committees or by the three proposed Committees. This would rationalise the Parliamentary Committee structure. The development of an integrated system of committees would reduce the pressures on floor time and strengthen parliamentary surveillance over the functioning of the executive and contribute to overall efficiency of public administration.

5.9.2 **The Petitions Committee of Parliament has tremendous potential as a supplement to the proposed Lok Pal institution. It should be made more widely known and used for ventilation, investigation and redressal of people's grievances against the administration.**

5.9.3 **The Commission also recommends that major reports of all Parliamentary Committees ought to be discussed by the Houses of**

Parliament especially where there is disagreement between a Parliamentary Committee and the Government.

Planning of Legislation and Improving its Quality

5.10.1 Our legislative enactments betray clear marks of hasty drafting and absence of parliamentary scrutiny from the point of view of both the implementers and the affected persons and groups. It is as true of the taxation Bills whose intent and exact implications are sometimes not clear even to those who pilot the legislation, as it is of other categories of laws. The bills are often rushed through Parliament with unbelievable speed and then found wanting in one respect or another. **A more systematic approach to the planning of legislation is needed to provide adequate time for consideration in committees and on the floor of the house as also to subject the drafts to thorough and rigorous examination by experts and laymen alike. It is important to ensure that all major social and economic legislation should be circulated for public discussion by professional bodies, business organistions, trade unions, academics and other interested persons.**

5.10.2 The Commission recommends (a) streamlining the functions of the Parliamentary and Legal Affairs Committee of the Cabinet; (b) making more focussed use of the Law Commission; (c) setting up of a new Legislation Committee of Parliament to oversee and coordinate legislative planning; and (d) referring all Bills to the Departmental Related Parliamentary Standing Committees for consideration and scrutiny after public opinion has been elicited and all comments, suggestions and memoranda are in. The Committees may schedule public hearings, if necessary, and finalise with the help of experts the second reading stage in the relaxed Committee atmosphere. The time of the House will be saved thereby without impinging on any of its rights. The quality of drafting and the content of legislation will necessarily be improved as a result of following these steps.

5.10.3 The Commission had issued a consultation paper on Treaty Making

Powers for eliciting public opinion. After examining the responses and full deliberations, the Commission decided to drop the proposals contained in the consultation paper. However, **the Commission recommends that the Parliament may consider enacting suitable legislation to control and regulate the treaty-power of the Union Government whenever appropriate and necessary after consulting the State Governments and Legislatures under article 253 "for giving effect to international agreements".**

Image of the Parliament

5.11.1 **The Parliamentarians have to be like Caesar's wife, above suspicion. They must voluntarily place themselves open to public scrutiny through a parliamentary ombudsman. Supplemented by a code of ethics which has been under discussion for a long time, it would place Parliament on the high pedestal of people's affection and regard.**

5.11.2 Mass media should be encouraged to accurately reflect the reality of Parliament's working and the functioning of Parliamentarians in the Houses. Televising all important debates nationwide in addition to the Question Hours, publication of monographs, handouts, radio, TV, press interviews, use of audio-visual techniques, especially to arouse curiosity and interest of the younger generation, and **regular briefing of the press will go a long way in making people better acquainted with the important national work that is being done inside the historic parliament building.**

5.11.3 A matter affecting the image of our legislators concerns the salaries, allowances and perks that from time to time they vote for themselves. There may be different views on whether our legislators are under-paid or cost too much. **It is a legitimate public expectation that membership should not be converted into an office of lucrative gain but remain an office of service. The Commission feels that the question of salaries, allowances, perks and pensions of law makers should be looked into on a rational basis and**

healthy conventions built.

5.11.4 To ensure that the Parliament and the State Legislatures assemble and transact business for not less than a minimum number of days, **the Commission recommends that the Houses of State Legislatures with less than 70 members should meet for at least 50 days in a year and other Houses for at least 90 days while the minimum number of days for sittings of Rajya Sabha and Lok Sabha should be fixed at 100 and 120 days respectively.**

5.11.5 Recently a parliamentary legislation was initiated seeking to do away with the domiciliary qualification for being chosen as a representative of any State or Union Territory in the Council of States.

The Commission is of the view that the basic federal character of the Council of States (Rajya Sabha) will be affected by this move.

The Commission, therefore, recommends that in order to maintain basic federal character of the Rajya Sabha, the domiciliary requirement for eligibility to contest elections to Rajya Sabha from the concerned State is essential.

Orientation Programmes for New Members

5.12 **Better and more institutionalized arrangements are necessary to provide the much needed professional orientation to newly elected members.** The curriculum should include, among other things, adequate knowledge of the political system, the Constitution, the rules of procedure and conduct of business, practices and precedents, mechanisms and modalities of working of the Houses and the Parliamentary Committees, the rules of parliamentary etiquette, and, what is even more important, the unwritten rules of parliamentary conduct and speech. **The emphasis should be on imparting practical knowledge on how to be an effective member.**

Parliamentary Control through PAC

5.13. At the national and State levels the Public Accounts Committees are the keystone of the arch of parliamentary control of public finances. If the PACs do not function well, financial discipline and accountability will suffer. At present, only a miniscule fraction of the reports submitted to these committees are considered and reported on. It is imperative to evolve a system whereby the PACs consider all reports submitted to them and report to the legislature within a time limit of 12 to 18 months. If necessary, the burden can be shared with the departmental standing committees of the legislature so that the time frame may be observed. For this to happen the number of reports has to be reduced and their content and quality have to be considerably improved. They have to concentrate on substantive issues of critical importance to the financial administration of the country. **The Commission recommends that the findings and recommendations of the PACs be accorded greater weight. A convention should be developed with the cooperation of all major parties represented in the legislature to treat the PACs as the conscience-keepers of the nation in financial matters.**

Parliamentary Control over Borrowing

5.14 Article 292 provides that Parliament may set limits from time to time on the extent of governmental borrowing and guarantees that the Union may resort to on the security of the Consolidated Fund of India. There is a corresponding provision in article 293 relating to States. The Fiscal Responsibility Bill (FRB) currently before the Parliament deals with the set of issues that have posed a threat to financial stability in India. It is a major step in recognizing the gravity of the situation and initiating action to restore the norms of fiscal prudence that had characterized India's policy since Independence. **The Commission endorses the approach contained in the Fiscal Responsibility Bill and would request**

the Parliament to enact it as expeditiously as possible. It seems to the Commission that it may not be necessary to provide for express authority to Parliament to legislate the purposes for which borrowings should be made inasmuch as the FRB does not go beyond the ambit of article 292. The Commission would request the State Assemblies to enact similar legislation as provided in article 293 to put their respective fiscal houses in order. The Commission does not favour any further amendment of article 293(3) with a view to curbing lapses that may have been noticed in regard to borrowings at the State level.

Parliamentary Privileges

5.15.1 Article 105 of the Constitution defines the powers, privileges and immunities of the Houses of Parliament and of the members and committees of the two Houses. The more important of the privileges, namely, freedom of speech in Parliament and immunity of members from any proceedings in any court of law in respect of anything said or any vote given by them in Parliament, are specified in this article. In other respects, powers and privileges of each House, its Committees and its members are, in effect, identical to the powers and privileges enjoyed by the British House of Commons as on 26 January 1950.

5.15.2 The basic law is that all citizens including members of Parliament are equal before the law. The members of Parliament have the same rights and privileges as ordinary citizens except when they perform their duties in Parliament. The privileges do not exempt the members from their normal obligations to society.

5.15.3 The founding fathers envisaged codification of parliamentary privileges by Parliament by law. But so far no law has been made and these privileges remain undefined. It is a somewhat curious situation that even after more than 50 years after the commencement of the Constitution we are unable to lay down precisely by law when a Member of Parliament is not subject to the same legal

obligations as any ordinary citizen is. The only idea behind parliamentary privileges is that members who represent the people are not in any way obstructed in the discharge of their parliamentary duties and are able to express their views freely and fearlessly inside the Houses and Committees of Parliament without incurring any legal action on that account. Privileges of Members are intended to facilitate them in doing their work to advance the interests of the people. They are not meant to be privileges against the people or against the freedom of the press. **The Commission recommends that the time has come to define and delimit privileges deemed to be necessary for the free and independent functioning of Parliament. It should not be necessary to run to the 1950 position in the House of Commons every time a question arises as to what kind of legal protection or immunity a Member has in relation to his or her work in the House.**

5.15.4 The law of immunity of members under the parliamentary privilege law was tested in *PV Narsimha Rao Vs. State (CBI/SPE), (AIR 1998 SC 2120).* The substance of the charge was that certain members of Parliament had conspired to bribe certain other members to vote against a no-confidence motion in Parliament. By a majority decision the Court arrived at the conclusion that while bribe-givers, who were members of Parliament, could not claim immunity under article 105, the bribe-takers, also members of Parliament, could claim such immunity if they had actually spoken or voted in the House in the manner indicated by the bribe-givers. It is obvious that this interpretation of the immunity of members of Parliament runs counter to all notions of justice, fair play and good conduct expected from members of Parliament. Freedom of speech inside the House cannot be used by them to solicit or to accept bribes, which is an offence under the criminal law of the country. The decision of the court in the aforesaid case makes it necessary to clarify the true intent of the Constitution. To maintain the dignity, honour and respect of Parliament and its members, it is essential to put it beyond doubt that the protection against legal action under article 105 does not extend to corrupt acts.

5.15.5 A second issue that was raised in this case concerned the authority competent to sanction prosecution against a member in respect of an offence involving acceptance of a consideration for speaking or voting in a particular manner or for not voting in either House of Parliament. A Member of Parliament is not appointed by any authority. He is elected by his or her constituency or by the State Assembly and takes his or her seat on taking the oath prescribed by the Constitution. While functioning as a Member he or she is subject to the disciplinary control of the presiding officer in respect of functions within the Parliament or in its Committees. It would, therefore, stand to reason that sanction for prosecution should be given by the Speaker or the Chairman, as the case may be.

5.15.6 **The Commission recommends that article 105(2) may be amended to clarify that the immunity enjoyed by Members of Parliament under parliamentary privileges does not cover corrupt acts committed by them in connection with their duties in the House or otherwise. Corrupt acts would include accepting money or any other valuable consideration to speak and/or vote in a particular manner. For such acts they would be liable for action under the ordinary law of the land. It may be further provided that no court will take cognisance of any offence arising out of a Member's action in the House without prior sanction of the Speaker or the Chairman, as the case may be. Article 194(2) may also be similarly amended in relation to the Members of State Legislatures.**

Comptroller and Auditor General (C&AG)

5.16.1 Public audit is a powerful instrument of good governance. It ensures parliamentary control over expenditures voted by the legislature and renders public authorities accountable for the public moneys raised and spent by them to implement policies and programmes approved by the legislature. Accountability and transparency, the two cardinal principles of good governance in a democratic

set-up, depend for their observance, to a large extent, on how well the public audit function is discharged. It is for this reason that the C&AG has been given special status by the Constitution in articles 148 to 152. It is his responsibility to ensure that money is spent and revenue raised not only in accordance with the law, but also with due regard to economy, efficiency and effectiveness. The C&AG is the constitutional authority entrusted with the high responsibility of maintaining probity in the use of public funds.

5.16.2 A view has been expressed that there is excessive centralisation of authority in the existing organisation of the C&AG and that it should be addressed by constituting an Audit Board, comprising of the Comptroller and Auditor-General of India as the Chairperson and such number of members as the President may determine from time to time to facilitate a territorial and/or functional distribution of functions and powers with a view to enhancing the efficiency and effectiveness of the office of the C&AG. **The Commission recommends the constitution of an Audit Board for better discharge of the vital function of public audit, but the number of members to be appointed, the manner of their appointment and removal and other related matters should be dealt with by appropriate legislation, keeping in view the need for ensuring independent functioning of the Board.**

5.16.3 A fairly persuasive school of thought has argued that to uphold transparency and integrity in public life, the appointment of the C&AG should not be the exclusive preserve of the executive but a committee consisting of the Prime Minister, the Union Finance Minister, the Speaker of the Lok Sabha, the Leader of the Opposition and the Chairman of the Public Accounts Committee should be empowered to make the appointment. It is, however, felt that in our situation it would be counter-productive to undermine the constitutional and moral authority of the Prime Minister by stipulating a mechanism that would supplant his decision-making. **The Commission is of the view that no change is needed in the existing provisions of the Constitution insofar as**

appointment of the C&AG and other related matters are concerned. The Commission would, however, recommend that a healthy convention be developed to consult the Speaker of the Lok Sabha, before the Government decides on the appointment of the C&AG so that the views of the P.A.C. are also taken into account.

5.16.4 The considerations that apply at the central level in regard to the functioning of the office of C&AG apply with equal force at the State level. A vast country like ours can ill afford to neglect the legislative oversight of State finances; which in turn requires appropriate legal recognition of the important role of the Accountants General (AGs) to enable them to perform their duties as the friends, guides and philosophers of the State Public Accounts Committees. **The State AGs need to be given greater authority by the C&AG, while maintaining its general superintendence, direction and control to bring about a broad uniformity of approach in the sphere of financial discipline. By the same token, the C&AG should evolve accounting policies and standards and norms for all bodies and entities that receive public funds, such as autonomous bodies and the Panchayat Raj institutions.**

5.16.5 In regard to proposals mooted to confer quasi-judicial powers on audit officers to summon witnesses, to record evidence on oath and to ask delinquent officials to make good the loss sustained by public organizations, authorities or institutions, the Commission feels that the infirmities and deficiencies of the present system in obtaining precise and accurate information in regard to questions and issues formulated by the audit organizations, and subsequent lack of disciplinary action in respect of officials shown to have caused loss of public money, is not so much on account of lack of legal powers of the audit agencies as due to a general atrophy of administrative organisations. Merely providing more legal powers for the present audit functionaries will not restore administrative vitality and vigour needed for prudent and effective implementation of policies in the public realm. This is an issue that is better addressed by

administrative reform than by accumulation of legal powers in the hands of authorities that have not used their already existing powers as well as they should have.

Accountability of the C&AG

5.17 The operations of the office of the C&AG itself should be subject to scrutiny by an independent body. **To fulfil the canons of accountability, the Commission recommends that a system of external audit of C&AG's organization be adopted for both the Union and the State level organizations.**

C&AG and Economic Reforms

5.18 It is necessary to consider what changes are needed in the policies and procedures governing public audit in the light of far-reaching changes that have taken place in the economic policy environment in our country. The growing role of market economy, liberalization of price and exchange controls, beginnings of diversified ownership patterns in entities formerly owned by the State, privatization of State-owned entities, entry of the private sector in areas formerly reserved for State monopolies and the appointment of regulators with authority to lay down tariffs in such areas as power and telecom, operations of public sector undertakings in a competitive environment, demand a new approach. The Commission, however, makes no recommendation in this regard and would only like to draw the attention of the policy makers to it.

M.P. LAD Scheme

5.19.1 The M.P. LAD Scheme places two crores of rupees each year at the disposal of every member of Parliament to be spent on what is called Local Area Development (LAD) at his/her discretion. Similar schemes have been started for state level legislators also. The amount involved is believed to be about three thousand crores of rupees each year. Adverse remarks about the misutilization

1206 LJ&CA/2002—13A

or non-utilization of these funds have been made in the reports of the C&AG. Insofar as these schemes involve the legislators in exercise of executive powers, they militate against the demarcation of responsibilities between the legislature and the executive. Also, almost all the items on which the funds under the MP LAD Scheme are to be spent are in the State List and, in fact, many are in the Eleventh and the Twelfth Schedules. The role of a Member of Parliament must undergo some change as a result of Panchayat Raj institutions taking charge of some local matters. The MP LAD Scheme is inconsistent with the spirit of federalism and distribution of powers between the Union and the States. It also treads into the areas of local government institutions.

5.19.2 **The Commission recommends immediate discontinuance of the MP LAD Scheme as being inconsistent with the spirit of the Constitution in many ways.**

Secretariats of Parliament

5.20.1 No law has so far been passed under article 98(2) to regulate the recruitment and the conditions of service of persons appointed to the secretarial staff of either House of Parliament. The Constitution provides for such a law being passed and it would be desirable to do so. **The Commission recommends that legislation envisaged in article 98(2) be undertaken to reorganise the Secretariats as independent and impartial instruments of Parliament, with special emphasis on upgrading professional competence.** Parliament does not need a big staff. It needs a small staff of high calibre. If this matter is not taken in hand now, chances are that the professional quality of staff recruited to serve Parliament will suffer. Moreover, their independence and impartiality may on occasions be questioned.

Other Procedural Reforms

5.21.1 Some of the archaic practices and time-consuming procedures may not be

1206 LJ&CA/2002—13B

suitable to present day needs of parliamentary institutions. A number of small but effective reforms can be carried out to make the functioning of Parliament more efficient and economical. These are not spectacular things that catch headlines, but solid, modest steps that build up to an efficient use of time and to a bigger focus on substantive discussions on policy and legislation. They have to do with reorganisation of parliamentary time table, the question hour, the 'Zero Hour', adjournment motions, absenteeism etc.

5.21.2 It would be useful to reform the budgetary procedure for streamlining the work of Parliament.

5.21.3 The number of days on which voting is considered essential should be reduced to the barest minimum and the time for such voting in a given session be fixed in advance with appropriate whips requiring full attendance of members.

5.21.4 Also, to ensure better scrutiny of administration and accountability to Parliament, parliamentary time in the two houses may be suitably divided between the government and the opposition.

5.21.5 As a general guideline, members have to ensure that the houses of Parliament are allowed to run and conduct their business with dignity and decorum in order to most vigorously exercise vigilance, surveillance and control over the government. Anything that makes the houses dysfunctional is a disservice to the basic values of parliamentary polity. At the same time it has to be realised and accepted by all concerned that the purpose of rules of procedure etc. is to enable and facilitate members to freely and fearlessly express themselves on the floor of the house. It is not to prevent them from having their say. **The best way to deal with issues of procedural reforms in a professional (and not political) manner is to have them studied by a Study Group outside Parliament as was done in U.K. The conclusions and suggestions of the Group can be considered by the Rules Committees of**

the houses of Parliament. The Commission recommends the setting up of a study Group of Parliament outside Parliament.

5.22 ***Conclusion:*** Our parliamentary institutions have much to be proud of. They have come through periods of exceptional stress and strain with positive achievements. One of the most important gains of the working of the Constitution during the last half-a-century and more has been that the habit of parliamentary institutions and democracy have struck deep roots in our country and society. Parliament has played the role of a great unifier amid all the diversities. The Parliament is the guardian of our great traditions of national unity, democracy and secularism. The Commission cognisant of this vital truth has ventured to suggest only for the consideration of Parliament a few areas of action to strengthen its hands for the challenging tasks that lie ahead.

CHAPTER 6

EXECUTIVE AND PUBLIC ADMINISTRATION

CONTENTS

6.1 ➢ The Constitution and articulation of goals of governance

6.2 ➢ Conceptual Weaknesses & failure to ensure socio-economic goal

6.3 ➢ Devolution, Decentralization and Democratization

6.4 ➢ District as the unit of Development Administration and Planning

6.5 ➢ Civil Society

6.6 ➢ Administrative Reforms and All India Services

6.7 ➢ Modernizing the Civil Services – Creation of new Services and curtailment of undue safeguards

6.8 ➢ Central Administrative Tribunal

6.9 ➢ Union Public Service Commission

6.10 ➢ The Right to Information

6.11 ➢ Freedom of Information Bill, 2000

6.12 ➢ Challenge of Globalisation

6.13 ➢ Common Market

6.14 ➢ Duality in Foreign and Domestic Policies

6.15 ➢ The Institution of the Prime Minister

6.16 ➢ Probity in Governance

6.17 ➢ Misfeasance in Public Office

6.18 ➢ Liability in Tort

6.19 ➢ Benami Transactions (Prohibition) Act, 1988

6.20 ➢ Confiscation of illegally acquired assets

6.21 ➢ Lok Pal Bill

6.22 ➢ Central Vigilance Commission

6.23 ➢ Status of Lokayuktas

6.24 ➢ Commissions of Inquiry

CHAPTER 6

EXECUTIVE AND PUBLIC ADMINISTRATION[1]

The Constitution and articulation of goals of governance

6.1 The Constitution of India has clearly articulated the social and economic goals and has specified agents for achieving the promised social revolution. Matters concerning formation and working of the executive agencies (both political and civil) are spelt out. Citizens have been assured that the Executive together with other organs of the State (Legislature & Judiciary) would uphold their rights and remove the inequities from which the anti-democratic forces derive their sustenance. Good Governance, it was hoped, would transform the social, political and economic life of the people, within the framework of democracy.

Conceptual Weaknesses & failure to ensure Socio-Economic goals

6.2.1 In the beginning the constitutional arrangements relating to governance worked more or less to general satisfaction and provided the people with a fairly safe and secure life. However, as time passed their inadequacies have become evident and Government has lost its élan as it has failed to live up to the expectations of the Constitution to give real substance to the policies designed to promote social well being. Even the most modest expectations have remained unfulfilled.

6.2.2 The present situation is characterised by a pervasive disenchantment with the way things have worked out. It is futile to debate whether it is the institutions provided by the Constitution that have failed or whether the men who work these institutions have failed. While we cannot abolish the men and the women who command the strategic heights of governance, we can

[1] See also the Consultation Papers on "Efficacy of Public Audit System in India : C&AG", "Probity in Governance" and "Liability of State in Tort" in Volume II (Book I) and the Background Paper on "Some ideas in Governance" in Volume II (Book-3).

improve and update the present Institutions, which have developed visible fault lines.

6.2.3 Inability to ensure the socio-economic goals cannot be attributable to scarcity of resources but to the failure of Governance. It is the insufficient attention paid to such a transformation that has deepened the fissures between the people and the administration. The failure to regenerate society lay in the basic conceptual weakness that encouraged the untested assumption that people are best served when the ruling classes originate, execute and administer policies, plans and programmes for their welfare from above. This misconceived paternalism has reinforced the tyranny of the *status quo* and has gravely weakened forces of change. The 'Law and Order' pre-occupation of the bureaucratic mind has led to the entrenchment of the system that the Constitution had promised to transform.

6.2.4 Another fundamental flaw vitiating governance emanated from the lack of conviction that the consent of the people is the basis of democratic government. The over-arching theme, a legacy from the colonial days, that people remain a passive category subjects rather than citizens remained firmly rooted on official mind. People were aroused only at intervals of five years or there about to choose their rulers and to go back again to a life of political passivity. Political mobilisation of masses mostly remained neglected. This produced all manner of infirmities and has given rise to alienation of the people from the political system.

6.2.5 Rights of the people are inalienable. The words **"We, the people"** signify not only the moral and historical insight of founding fathers but they serve to reaffirm they are the source of all constitutional authority and that the test of Good Governance was measure of people's well being. However, the functionaries of the State have failed to realize that they are servants of the people and not their masters. Test of a vibrant democracy is the degree of success in calling its Executive to be accountable to the people.

6.2.6 The new administrative class, working under the mesmeric spell of colonial attitudes, was reluctant to consider the people as citizens. They continued to treat them as subjects or '*ryots*' both owing allegiance to a superior master. This denial robbed them of power and made it possible for the Executive to diminish the significance of the people. It is the possession of power that gives people control over their destiny and authority over those whom they have chosen to serve them.

6.2.7 Another fundamental flaw in governance outlined above is inherent in the centralized nature of the Indian State which lays down the parameters of the administration. There is an indissoluble link between the two. This was evident when the norms of colonial administration, with their long ancestry, came early to stamp their features on the post-independence dispensation. Colonial administration had created a top-down system of command and obedience in which State and local units of government were treated as subordinate to the Central Government. There is no reason why the Central Government should have large and unwieldy ministries handling subjects like education, health, agriculture, rural development, social welfare, industry, power, etc. when these areas can more conveniently and appropriately be handled at the State, regional or district levels. The Centre can at best be a clearing house of ideas and knowledge but for it to be actually involved in shaping policy and in allocation of resources is an over-lapping of jurisdiction. Reallocation of subjects from the three Lists given in the Seventh Schedule could be looked into in this context. Downsizing of the Government should also follow. Big Governments are not always conducive to efficiency and promptness. People should know where the buck stops. But it should always be kept in view that when the Centre does not hold, societies become polarised.

6.2.8 Democracy implies intellectual acceptance of the position that self government is better than even good governance. Unless self government is ensured by clear devolution of power from the centre to the periphery, people are prevented from participation in Governance. They can not eliminate arbitrariness in executive actions which generally tilts the balance in favour of

the privileged. Moreover the 'top-down' state of affairs does not legitimise self-government' which is of primordial value. 'Top-down' administration stifles public initiative. To make people effective they must consciously enjoy and assert their constitutional entitlements and not be mere supplicants for or objects of administrative largesse. That is the rationale of the 73rd and 74th amendments to the Constitution. A strong sense of public duty comes from empowerment. People's attitude changes from one of obedience to authority to active participation in governance. It is only when the gap between the executive and the people is narrowed down through decentralisation that democratisation can occur. The whole configuration of governance changes if democratic order is conceived not as a 'once in five year ritual' of changing the guard but as a continuous renewal of democratic life from a knowledgeable and participative citizen body. A citizen as a political and social unit could alone take responsibility for transformation of the state of the society. The essence of the matter is that there should be effective participative democracy at all levels; once people become the fountainhead of power, their role in governance becomes meaningful and effective. It encourages an active sense of public duty, replacing emphasis from authority and obedience to active participation. **The Commission holds that while improving the nature and institutional response of administration to the challenges of democracy is imperative, the system can deliver the goods only through devolution, decentralisation and democratisation thereby narrowing the gap between the base of the polity and the super structure.**

Devolution, Decentralisation and Democratisation

6.3 The new architecture of governance has to be built on the basis of devolution of authority, responsibility and resources to appropriate levels. If corresponding dispersion of resources and personnel is not accompanied with devolution of authority it perpetuates mentality of dependency. Resources do not mean only financial resources. Human resources are as important. Experience shows that monitored and supervised by the local authorities, who are also their employers, the professionals at the district and

local levels have performed better. If a primary school teacher looks to a distant education director for his promotion or any other improvement in his conditions of service, he is not going to be accountable and responsive to the needs of the local community he is supposed to serve. This simple example brings to the fore the question of the present structure of social and economic services and how it needs to be remodelled or refashioned to bring it in line with the requirements of the age of decentralization. There is no reason why the District Councils cannot recruit, train, manage cadres of school teachers, supervisors, administrators for primary and secondary education leaving the areas of high speciality to professionals like curriculum developers. Coordination functions can be handled by regional or state level bodies. Similar logic can be applied in regard to other services which are needed at the district levels and it can be extended upwards to the State level.

District as the unit of Development Administration & Planning

6.4.1 What is urgently required at this juncture is a straightforward recognition at the highest policy level that a district is a basic unit of planning for development – social, cultural, economic and human. **Functions, finances, and functionaries relating to such programmes would have to be placed under the direct supervision and command of elected bodies at the district levels of operation to give content and substance to the different programmes of development and public welfare. This would to a substantial degree, correct the existing distortions and make officials directly answerable to the people to ensure proper implementation of development programmes under the direct scrutiny of people.**

6.4.2 Land is the most valuable natural resource whose planning and development offer major prospects for increases in output and incomes for the people, especially for those who are near or below the poverty line. For efficient land planning and optimum use, it is essential that there be clarity and certainty about title to land. In India land records are in a very poor shape and there is maximum litigation in the rural areas about ownership. It has been estimated by reputed agencies that India loses 1.3 per cent

economic growth as a result of disputed land titles, which inhibits supply of capital and credit for agriculture. It is therefore exceedingly important that a fundamental change is brought about in the way land records are maintained. At present land records are presumptive in character. In August 1989, the Supreme Court stated that "revenue records are not documents of title". Millions of productive man-hours are lost in time consuming litigation. **The Commission recommends that we move to a system where the State guarantees the title to land after carrying out extensive land surveys and computerizing the land records. It will take some time but the results would be beneficial for investment in land. This will be a major step forward in revitalizing land administration in the country as it would enable Right to access, Right to use, Right to enforce decisions regarding land. Similar rationalization of records relating to individuals rights in properties other than privately held lands (which are held in common) would improve operational efficiency which left unattended foment unrest. The Commission is of the view that a coherent public policy addressed to the modern methods of management would contribute to better use of assets and raise dynamic forces of individual creativity. Run away expansion in bureaucratic apparatus of the State would also get curtailed by new management system.**

Civil Society

6.5.1 Dispersal of power through local autonomy maximizes opportunities for popular participation and helps change the nature of the relationship between the State and civil society. Instead of being merely passive recipients of welfare, citizens become active agents. A democratic society cannot function properly if everything in it is left only to the State or even to statutory bodies. Statutory action itself will be infructuous if it is not underpinned by voluntary action. The exercise of political power through civil society opens the way for concomitant democracy. Civil society consists of open and secular institutions that mediate between the citizen and the State. In the absence of civil society, the State machinery and civil servants become the dominant repository of power. The modern idea of civil government requires

emergence of civil society which would make people self-reliant rather than remain dependent on State institutions and subject to their all pervasive control.

6.5.2 One of the marked weakness of the present regime has been its failure to effectively play its role in the socializing process. It has failed to use the machinery of the state to create a society of equals founded on the principles of social justice, secularism and eradication of casteism. In this regard, the situation of the Dalits and backward castes points to glaring failure of the state. In spite of several programmes launched by it, the state has failed to energetically lift up the Dalits and members of other lower castes and also failed to liberate a large sections of society from gender discrimination. As the executive has overwhelmingly identified itself with the stratified sections of the privileged few, it remained insensitive to the calamities that befell the weaker sections of the society and reluctantly took steps to repel the most injurious actions perpetrated against them. Large sections of these people remained docile, submissive, passive and tame. Piecemeal changes improved the conditions slightly, but the very spirit of the people by which the Constitution was to be sustained continued to rap.

6.5.3 It is the civil society that has to take the lead in helping create a society based on principles of social justice, secularism and non-casteist approaches to social action. It should be one of the serious endeavours of civil society to strengthen the mosaic of India's pluralism and not let it be broken up lest endless tensions and increasing violence come in the way of peoples' progress. In India the relationship between the civil society and the State may have moved some distance from distrust and antagonism to a more tolerant status but the continuing ambivalence comes in the way of a full blown cooperation for chosen ends.

6.5.4 The procedures and the processes adopted for executing policies supposedly designed to help the poorer sections to regain control over their social and economic circumstances have accentuated the distance between the haves and the have-nots. The barriers come not only from old vested interests but also from new sources of privilege. The instrumentalities of the

State appear substantially inadequate to cope with the challenge of change. In fact some of the institutional devices intended to be remedial measures against inequities had regressive consequences reinforcing socio-economic barriers. In several cases, programmes adopted by the administration to handle issues of inequity failed to deliver. Bureaucracy cannot deliver unless countervailing power of the interest group most directly involved is harnessed. **The Commission recommends that energetic efforts be made to establish a pattern of cooperative relationship between the State and associations, NGOs and other voluntary bodies to launch a concerted effort to regenerate the springs of progressive social change. State and civil society are not to be treated antithical but complementary.**

Administrative Reforms and All India Services

6.6.1 The structural problem of two of the All India Services, namely, the Indian Administrative Service and the Indian Police Service, is that they were founded on the imperial idea of territorial control. It was at the district level that the Raj became an operational reality. This colonial idea was not abandoned when the country became independent for reasons which emerge clearly from the Constituent Assembly debates. Thus the present structure of the All India Services would appear to be incompatible with the development of full fledged democratic representative government at the district level. In plain language it means that 'law and order' has also to be brought within the ambit of the elected district panchayat which is constitutionally entrusted with responsibility for developmental activity. It is only thus that public service at the district level would acquire significance and be the real stepping stone for political leadership at higher levels.

6.6.2 The absence of clear cut relationship between the people and the state functionaries is responsible for much which has gone wrong. All this happened because, inadvertently or otherwise, we allowed the colonial legacy of administration to continue to hold sway in the post-independence era as well. For instance, the change of nomenclature from ICS to IAS did not even

constitute a cosmetic change. The so-called 'steel frame' of the British Empire became the role model for the fledgling IAS fraternity. The '*guru mantra*' of the old guard, viz, the I.C.S., was the maintenance of the *status quo* and the new guard, viz. the IAS, was only too willing to oblige and follow suit. It is a naïve hope to expect status quoist to initiate or welcome changes for a variety of reasons. First, they have a vested interest in perpetuating their dominant advantageous position along with the privileges flowing from it. Second, being bureaucrats rather than intellectual leaders, they lack the vision and imagination to devise new and innovative policies, preferring to tread the beaten track, follow precedents and to continue familiar programmes.

6.6.3 The end of the imperial continuum in the administrative set up may require a different conception of the generalist services. The brightest university graduates who wish to enter the Indian Administrative Service could then be trained in a variety of subjects having to do with the economic and financial administration of the States and the Union and policy making in higher branches of administration such as security, science and technology, international trade, international monetary system, alternative approaches to energy and environmental issues, social and economic issues connected with affirmative action, etc. to constitute a truly elite corps of administrators. They would be mobile within defined fields but would not perform the present generalist jig of moving from animal husbandry to defence or to women welfare which makes a total mockery of any concept of administrative policy making in the present age of knowledge explosion.

Modernizing the Civil Services – Creation of new services & curtailment of undue safeguards

6.7.1 Arbitrary and questionable methods of appointments, promotions and transfers of officers by political superiors also led to corrosion of the moral basis of its independence. It has strengthened the temptation in services to collusive practices with politicians to avoid the inconvenience of transfers and to gain advantages by ingratiating themselves to political masters. They would do the politicians' biddings rather than adhere to rules. Lest the

situation becomes more vicious, it is necessary that a better arrangement be conceived under the Constitution. The question of appointments, transfers and placements is not to be left to the discretion of the politicians or administrative bosses but be entrusted to independent and autonomous boards. **The Commission, therefore, recommends that the questions of personnel policy including placements, promotions, transfers and fast-track advancements on the basis of forward-looking career management policies and techniques should be managed by autonomous Personnel Boards for assisting the high level political authorities in making key decisions. Such civil service boards should be constituted under statutory provisions.** They should be expected to function like the UPSC. Reputed management experts from institutes of management, well known for their excellence, should be inducted into these boards to provide a broad based pool of expertise. The principle is not to take politics out of personnel policy but to make knowledge and information institutionally available to the political decision-makers on the basis of appropriate parliamentary legislation under article 309. **The sanctity of parliamentary legislation under article 309 is needed to counteract the publicly known trends of the play of unhealthy and destabilizing influences in the management of public services in general and higher civil services in particular.**

6.7.2 **Above a certain level--say the Joint Secretary level-all posts should be open for recruitment from a wide variety of sources including the open market. We should specialize some of the generalists and generalize some of the specialists through proper career management which has to be freed from day to day political manipulation and influence peddling.**

6.7.3 Social audit of official working would be another way of developing accountability and answerability. **Officials, before starting their career, in addition to the taking of an oath of loyalty to the Constitution, should swear to abide by the basic principles of good governance. This would give renewed sense of commitment by the executives to the basic**

tenets of the Constitution. It is important to recognize that change in existing policies and procedures will not come from the initiatives of those who stand to benefit from the existing arrangements. It needs the combined efforts of political avant-garde, activists in diverse fields, academic, and civil society institutions to generate pressures for change. Otherwise institutional decay will proceed apace with distressing consequences.

6.7.4 Systematic debasement as a consequence of high handed conduct by certain sections of the executive has seriously dented the moral authority of the government. The functioning of the civil and police services have been far from satisfactory. Hence a negative perception of the Police that it ill serves the people has become deeply rooted in the psyche. The letter of the law may have been observed, but the spirit has been emasculated. Corruption and illegality have vitiated the course of justice. All this has contributed to a massive decline in the prestige of the public office. Evidence of moral and professional failure of administrative apparatus is too overwhelming to ignore. Yet the services have remained largely immune from imposition of penalties due to the complicated procedures that have grown out of the constitutional guarantee against arbitrary and vindictive action (article 311). The constitutional safeguards have in practice acted to shield the guilty against swift and certain punishment for abuse of public office for private gain. A major corollary has been erosion of accountability. **It has accordingly become necessary to re-visit the issue of constitutional safeguards under article 311 to ensure that the honest and efficient officials are given the requisite protection but the dishonest are not allowed to prosper in office. A comprehensive examination of the entire corpus of administrative jurisprudence has to be undertaken to rationalize and simplify the procedure of administrative and legal action and to bring the theory and practice of security of tenure in line with the experience of the last more than 50 years.** The need is not to discourage the good people; the need is to discourage the bad people which objective can be served only by sufficient and speedy procedures to bring the guilty to the book.

6.7.5 The present methods of evaluation of performance need drastic reform. At present neither the quantity nor the quality of output of individuals and collective units is properly measured. The result is that the good, the bad and the indifferent are all lumped together. Mostly chronology determines who goes ahead and who does not. **The civil service regulations need to be changed radically in the light of contemporary administrative theory to introduce modern evaluation methodology.**

6.7.6 The administrative structure and systems have to be consciously redesigned to give appropriate recognition to the professional and technical services so that they may play their due role in modernizing our economy and society. **The specialist should not be required to play second fiddle to the generalist at the top. Conceptually we need to develop a collegiate style of administrative management where the leader is an energizer and a facilitator, and not an oracle delivering verdicts from a high pedestal.**

6.7.7 **It is essential to bring forward a parliamentary Bill under article 312(1) and to have it extensively debated in professional circles as well as by the general public.**

6.7.8 The professional bodies like the Institution of Engineers, the Chartered Accountants, Medical Council, Bar Council of India, etc. which could have played a vital role in buttressing the role of civil society in governance have been content to act as lobbyists fighting for benefits to their constituency but not much else beyond narrow self-interest. Thus we have arrived at a situation in the judicial administration where courts are deemed to exist for judges and lawyers and not for the public seeking justice.

Central Administrative Tribunal

6.8 The Central Administrative Tribunal and various State Administrative Tribunals were established under the Administrative Tribunals Act, 1985 which was enacted in pursuance of article 323A of the Constitution. Since their decisions are subject to the supervisory jurisdiction of the High Courts, a

suggestion was made that the institutions of these tribunals had not served the purpose for which they were established. The Commission examined the matter with reference to the actual results and felt that there is a case for their continuance.

Union Public Service Commission

6.9 The Commission has carefully examined the suggestions made by a delegation of UPSC Members led by their Chairperson in regard to the proviso to article 320, the jurisdiction of the UPSC and its reports, the rank of the UPSC Members, the composition of UPSC and its powers regarding recruitment of its own personnel. It feels that some suggestions like laying of the UPSC reports on the table of each House of Parliament can be implemented through executive orders. Others depend on development of healthy conventions regulating the relations between the UPSC and the executive branch. The Commission does not see any need for change in the existing provisions concerning the UPSC (or other Public Service Commissions).

The Right to Information

6.10 Major assumption behind a new style of governance is the citizen's access to information. Much of the common man's distress and helplessness could be traced to his lack of access to information and lack of knowledge of decision-making processes. He remains ignorant and unaware of the processes which vitally affect his interest. Government procedures and regulations shrouded in a veil of secrecy do not allow the clients to know how their cases are being handled. They shy away from questioning officers handling their cases because of the latter's snobbish attitude and bow-wow style. **Right to information should be guaranteed and needs to be given real substance. In this regard, government must assume a major responsibility and mobilize skills to ensure flow of information to citizens. The traditional insistence on secrecy should be discarded. In fact, we should have an oath of transparency in place of an oath of secrecy. Administration should become transparent and participatory.**

Right to information can usher in many benefits, such as speedy disposal of cases, minimizing manipulative and dilatory tactics of the babudom, and, last but most importantly, putting a considerable check on graft and corruption.

Freedom of Information Bill, 2000

6.11 The object of the Freedom of Information Bill, 2000 now pending before Parliament is to promote transparency in government activity. The public has a right to know what decisions are being taken and why. Dissemination of information about policies and actions in the public realm leads to a more accountable government. This deserves full support. **The Commission recommends that the Union Government should take steps to move the Parliament for early enactment of the Freedom of Information Legislation. It will be a major step forward in strengthening the values of a free and democratic society.**

The Challenge of Globalisation

6.12 The advent of globalisation presents a new series of challenges to the administration. Activated by technological improvements, a new international relationship of our interests across issues and boundaries has come into being. Trade and financial developments have tightened to mesh the economic linkages across boundaries and regardless of preferences. The new state of affairs just cannot be wished away but must be engaged with. We should build up expertise to ensure that the interests of our country and the people are not overwhelmed by the forces of globalisation. We must evolve our foreign and domestic policies to control our future. We cannot mortgage our interests nor can our security be left to the mercy of others. Government cannot abdicate its responsibility to affect international events and conditions to our advantage. Without the capacity to handle this new situation, we would be striking empty postures and would fail to seize the opportunity to develop in the context of globalisation. The executive of the State should learn to anticipate global developments and endow our policy

with more knowledge-packed inputs to handle them to our advantage. At the same time, the aim has to be to tap the wellsprings of patriotism and give our people a sense of patriotic duty to harness the energy for economic and social development to spearhead programmes and develop national pride and self-confidence. Mass political education and raising of political consciousness become inescapable. This is the task to be performed by political parties. **To remain actively involved in new development programmes the people would also need the support of well organized, well prepared, knowledge-oriented personnel and well thought out policies. Think-tanks and organized intellectual groups would have to be promoted through state funding, etc. without abridging their autonomy.**

6.12.1 The survival and competitiveness in the emerging global economic order requires resources that are knowledge based and outcomes which are knowledge driven. **It is, therefore, recommended that the Union Government having regard to the importance of the higher scientific and technological research should have an apex body called the National Science and Technology Commission as an umbrella organization for policy making, planning, promoting and funding of higher scientific and technological research. This is necessary that such a body should have the Prime Minister as its Head.** However, National Commission on Science and Technology will retain the distinct identity from the Departments/Organization of Atomic Energy, Space, Defence Research and Development, Scientific and Industrial Research, Bio-Technology, Ocean Development, etc. Their present internal structures, some of whom have the management structure of Commissions with delegated powers, will not be disturbed but the Commission will deal with overall common issues bringing about greater co-ordination and integration in planning, promoting, policy making, funding and securing unified vision of the future and the future technologies. **The Commission should also take into account the funding priorities in the private sector and provide over all policy guidance. The principal functions will include evaluation of science and technology policy for the country, evaluation of the models of appropriate**

managerial structures in scientific/research organizations and responsibility for rationalizing allocation of funds. The Commission, therefore, recommends that a funding pattern for investment of about 2% of the GNP exclusively for scientific and technological research and development needs to be examined.

Common Market

6.13 A major achievement since the attainment of freedom has been the creation of a common Indian market that approaches in size to some of the biggest markets in the world. This is the foundation of our political unity. Anything that weakens or threatens to weaken or destroy India's political unity has to be prevented. Therefore, no unit of the Union can be empowered to weaken the foundation of the common market. However the Commission has recommended certain measures in para 8.8.2 to remove the barriers to smooth flow of goods and services which would reflect a seamless flow of inter-state trade and commerce.

Duality In Foreign and Domestic Policies

6.14 The structural problems of foreign policy would be to constantly aim at making the best possible use of the international order and use it to our advantage. **In the country's governance, the duality of foreign and domestic policy should end.** The two should not be antithetical. A serious effort is required to combine the two to recast relations and launch a creative initiative to achieve strategic partnerships the world over on the principles of inter-dependence without domestic interests being relegated to the background. **This calls for a thorough change in the form, working and structuring of Foreign Affairs mechanisms including the External Affairs Ministry. Foreign policy implementation is now more than mere diplomacy. It calls for cutting through the mind-set of a generation.**

The Institution of the Prime Minister

6.15 The question of prerogative of the Prime Minister in the Parliamentary System to advise the dissolution of the House was raised. It was urged that

one of the methods of restoring stability and cohesion of functioning in Parliamentary system of Government was to strengthen the Institution of the Prime Minister and one of the ways of doing so is to empower the Prime Minister to advise dissolution of the House whenever he thinks that House has exhausted its mandate and a fresh appeal to the electorate is called for. The proposition as raised contemplates such a power in the Prime Minister even after he has lost confidence of the House. This proposition has the familiar ring of the Parliamentary convention in Britain. One learned Member was strongly of the view that recognition of such a power in the Prime Minister would impart much needed stability to the political system in the country and would enable the Leader of the House to address determinedly towards issues of development, national security etc.

On a consideration of the matter, the Commission is of the view that the present constitutional position needs no modification.

Probity In Governance

6.16.1 Integrity in the widest sense of the term, in the holders of public offices is what distinguishes a good public administration from a bad one. There may be other indicators but in the absence of integrity other competencies are not capable of yielding the desired results. Integrity is much more than financial honesty in official dealings. Unless public office is regarded as a trust that a public servant holds for public good, even the most enlightened policies for promoting the welfare of the society will not work. How to restore this ethical and moral dimension to public life in India is one of the most crucial issues of governance at present.

6.16.2 We cannot hope to succeed in this endeavour if we rely solely on legislation. For instance, the spirit of cooperative, team work, helping the deprived and the weak to obtain the protection and the benefit of the law require a vigorous social and political movement to really become part of our work culture and social behaviour. However, we should at the same time block some of the escape routes that the dishonest find to their advantage in the existing laws.

6.16.3 One of the measures adopted in several western countries to fight corruption and mal-administration is enactment of Public Interest Disclosure Acts which are popularly called the Whistle-blower Acts. **Similar law may be enacted in India also. The Act must ensure that the informants are protected against retribution and any form of discrimination for reporting what they perceived to be wrong-doing, i.e., for *bona fide* disclosures which may ultimately turn out to be not entirely or substantially true.**

Misfeasance in Public Office

6.17 The current situation is that public servants cannot be held personally responsible for their arbitrary, malicious, and outrageously unfair actions that cause injury to the public and loss to the State. A person can be detained illegally and subjected to unauthorised violence in custody, resulting in death, without any individual being called to account and having to pay damages for this patently illegal and arbitrary action. Other such examples can be cited. There is no law at present that defines the principles on the basis of which misfeasance can be rendered punishable. Time has come to consider framing a law that would place responsibility on public servants for damages/compensation for patently *mala fide* actions. The basis for action under the law may be an audit report or a report by a commission, committee or body competent to examine the relevant facts. **The Commission recommends that the Government examine the proposal for enacting a comprehensive law to provide that where public servants cause loss to the State by their *mala fide* actions or omissions, they would be made liable to make good the loss caused and, in addition, would be liable for damages.**

Liability in Tort

6.18 The Commission had issued a consultation paper on 'Liability of State in Tort' for eliciting public opinion. After considering the responses and fully

discussing the matter, the Commission decided that no recommendation in regard to the suggestions made in the consultation paper was necessary.

Benami Transactions (Prohibition) Act, 1988

6.19 This law was enacted to penalise public servants and others who acquire property in a clandestine manner out of ill gotten money. The property thus acquired stands in the name of others but the real beneficiary is the person who has used illegitimate funds to acquire it. The law provides that *benami* properties can be acquired by the government without any compensation. But this provision which is under Section 5 can be implemented only if rules are made under Section 8 for prescribing the authority, the manner and procedure for acquiring *benami* properties by the State. Such rules have not been made so far. **The Commission recommends that the Union Government frame rules, without further loss of time, under Section 8 of the Benami Transactions (Prohibition) Act, 1988 for acquiring *benami* property and that a law be enacted to provide for forfeiture of benami property of corrupt public servants as well as non-public servants.**

Confiscation of illegally acquired assets

6.20.1 The Supreme Court has urged in *Delhi Development Authority v. Skipper Construction Co. (P) Ltd*[2]., a well known case of abuse of authority and corruption, that "...a law providing for forfeiture of properties acquired by holders of public offices (including the offices/posts in the public sector corporations) by indulging in corrupt and illegal acts and deals, is a crying necessity in the present stage of our society." **The Commission recommends that Government examine enacting a law for confiscation of illegally acquired assets on the lines suggested by the Supreme Court.**

6.20.2 **There is perhaps no need to set up an additional independent Authority to determine this issue of confiscation. There is already,**

[2] AIR 1996 SC 2005

under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, (SAFEMA) 1976, a Tribunal to deal with similar situation arising out of other statutes. The same Tribunal may be conferred additional jurisdiction to determine cases of confiscation arising out of the Benami Transactions (Prohibition) Act, 1988 and the Prevention of Corruption Act, 1988, (as may be amended) and other legislations which empower confiscation of illegally acquired assets. The Tribunal will exercise distinct and separate jurisdictions under separate statutes.

6.20.3 **The Commission also recommends that the Prevention of Corruption Act, 1988 be amended to provide for confiscation of the property of a public servant who is found to be in possession of property disproportionate to his/her known sources of income and is convicted for the said offence. In this case, the law should shift the burden of proof to the public servant who was convicted. In other words, the presumption should be that the disproportionate assets found in possession of the convicted public servant were acquired by him by corrupt or illegal means. A proof of preponderance of probability shall be sufficient for confiscation of the property. The Commission recommends that the law should lay down that the standard of proof in determining whether a person has been benefited from an offence and for determining the amount in which a confiscation order is to be made, is that which is applicable to civil cases, i.e. a mere preponderance of probability only. A useful analogy may be seen in Section 2(8) of the Drug Trafficking Act 1994 in United Kingdom.**

Lok Pal Bill

6.21.1 The Lok Pal Bill has a long and chequered history. An agency like the Lok Pal would help forces working for a cleaner government. The most recent Bill introduced in Parliament is the Lok Pal Bill 2001, introduced in the Lok Sabha on 14 August, 2001. It follows the pattern of the 1998 Bill especially insofar as it includes the Prime Minister within its purview. The Commission has carefully examined the point relating to the inclusion of the Prime Minister

within the jurisdiction of Lok Pal. In the parliamentary system, the Prime Minister occupies a unique position. He is the kingpin of the entire governmental structure. It is his personality, his image and his leadership that drives the government and, indeed, other major institutions of the State. Major threats of destabilisation and subversion of democratic governments cannot be ignored. In this context, the Prime Minister as the symbol of the stability and continuity of the regime, should not be exposed to the risks of well orchestrated and well planned attempts to malign his image and reputation on which the entire functioning of government depends. The entire structure can be undermined by malicious character assassination. **The Commission recommends that the Constitution should provide for appointment of Lok Pal. It also recommends that the Prime Minister should be kept out of the purview of the Lok Pal.**

6.21.2 With the above amendment, the Lok Pal Bill needs to be expeditiously considered and passed by Parliament. If possible, it may be further strengthened by providing that its findings should be final and form the basis for action by government. The Commission thinks that a start should immediately be made on the basis of the Bill. Let experience be gained of working a high level body to enforce standards of rectitude and propriety in the conduct of public affairs.

Central Vigilance Commission

6.22 **The Commission recommends that the Central Vigilance Commission Bill, already introduced in Parliament, be passed as speedily as possible.**

Status of Lokayuktas

6.23.1 The Conference of the Lokayuktas and Upa-Lokayuktas at their Sixth All India Conference had passed a resolution requesting this Commission to take up for consideration the issue of conferment of a constitutional status on the institution of Lokayuktas and Upa-Lokayuktas.

6.23.2 After considering the matter, **the Commission recommends that the Constitution should contain a provision obliging the States to establish the institution of Lokayuktas in their respective jurisdictions in accordance with the legislation of the appropriate legislatures.**

Commissions of Inquiry

6.24.1 The Commissions of Inquiry Act, 1952 enables both the State and Central Governments to appoint Commissions of Inquiry to inquire into and report on definite mattes of public importance within a specified time. The Commission has noted that even though these Commissions have to submit their report in a specified time, yet they take unduly long time in submission of their report. Such delays cause disillusionment and loss of faith of the people in such Commissions of Inquiry.

6.24.2 **It is, therefore, recommended that when once a Commission of inquiry is constituted under the Commissions of Inquiry Act, 1952 or otherwise, the Government should consult the Chairperson of the Commission in respect of time required for completion / finalisation of the report Once such a time is specified, the Commission should adhere to it. It is also recommended that Action Taken Report should be announced by the Government within a period of three months from the date of submission of the report.**

CHAPTER 7

THE JUDICIARY

CONTENTS

7.1 ➢ Background

7.2 ➢ Structure

7.3 ➢ Appointment, Transfer and Removal of Judges

➢ Removal of Judges and remedies for deviant behaviour.

➢ Age of retirement

7.4 ➢ Contempt of Court

7.5 ➢ Judicial Review of Legislation

7.6 ➢ Financial Planning and Judicial Autonomy

7.7 ➢ Judicial Councils

7.8 ➢ Budgets for Subordinate Judiciary

7.9 ➢ Functioning of the Judiciary

7.10 ➢ Judicial Delays

7.11 ➢ Costs of Litigation

7.12 ➢ Priority in Hearings

7.13 ➢ ADR Systems for Urban Litigation

➢ Strategic Action Plans for time-bound clearance of Arrears

7.14 ➢ Criminal Justice Administration

7.15 ➢ Victim Orientation and Victomology

7.16 ➢ All India Judicial Service

7.17 ➢ Digital Legal Information System

7.18 ➢ Subordinate Judiciary

7.19 ➢ *Habeas Corpus* and the Human Rights Courts

CHAPTER 7

THE JUDICIARY[1]

Background

7.1.1 Among the noble aims and objectives of the Constitution, the founding fathers accorded the highest place to 'Justice'. The Preamble speaks of "We, the people of India" resolving to secure *inter alia* "Justice – social, economic and political" to "all its citizens". The juxtaposition of words and concepts in the Preamble is important. Most significantly, 'Justice' is placed higher than the other principles of 'Liberty', 'Equality' and 'Fraternity'. Again, the Preamble clearly enjoins precedence to social and economic justice over political justice. People turn to the judiciary in the quest of justice. There is need to review the working of the judiciary during the last half-a-century and more, to assess how far our justice delivery system has been able to ensure equal social, economic and political justice to all the people as ordained by the Constitution and its Preamble.

7.1.2 The Constitution lays down the structure and defines, delimits and demarcates the role and functions of every organ of the State including the judiciary and establishes norms for their inter-relationships, checks and balances. Independence of judiciary is essential to the rule of law and constitutional norms.

The Structure

7.2 Provisions in regard to the judiciary in India are contained in Part V ('The Union') under Chapter IV titled 'The Union Judiciary' and Part VI ('The States') under Chapter VI titled 'Subordinate Courts' respectively. It is, however important to emphasize that unlike other federal systems, for example, that of the United States, we do not have separate hierarchies of federal and State Courts. In India,

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[1] *See* also the Consultation Papers on "Superior Judiciary", "All India Judicial Service" and "Financial Autonomy of the Indian Judiciary" issued by the Commission in Volume II (Book 1).

though the polity is dual, the judiciary is integrated. For the entire republic of India, there is one unified judicial system – one hierarchy of courts – with the Supreme Court as the highest court and also as the arbiter in matters of relations between the Union and the States and the States *inter se.*

7.2.1 The Supreme Court and the High Courts as the custodians and watchdog of the fundamental rights and freedoms of the people and their constitutional rights have an awesome responsibility. The Superior Judiciary has successfully preserved and protected the fundamental rights of the citizens and vulnerable groups against the innovations of "an excited democracy" and for that purpose, it has drawn substantially upon the Directive Principles.

7.2.2 Speaking of the Supreme court of the United States, a writer said, "the Court has not been infallible. It has made mistakes. It sometimes has run counter to the deliberate and better judgement of the community. But the final judgement of the American people will unquestionably be that their constitutional rights are safe in the hands of the federal judiciary. Throughout the whole history of the United States, it furnishes the highest example of adequate results of any branch of our government. It has averted many a storm which was threatening our peace and has lent its powerful aid in uniting the whole country in the bonds of justice. To paraphrase the language of William Wirt, 'if the judiciary were struck from our system', there would be little of value that would remain."[2].

7.2.3 This tribute can fittingly be addressed to the Supreme Court of India too. The Supreme Court of India has admirably discharged its onerous obligations sentinel of the *qui vive*.

7.2.4 But then, there are voices of detraction. Judicial activism has not gone too well with groups of democratic theorists who object to the kind of judicial activism which has tended to turn social and political processes to legal processes and obliterating the then line of demarcation between interpretation and adjudication

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2 Constitution Law of the United States by Hugh Evander Willis.

and exhibiting an ever eager tendency to intervene in the governing process. Constitutional adjudications do have an inevitable legislative element. Judges need great wisdom and restraint in wielding this great judicial powers lest they erect their own predilections into principles. "The irreplaceable value of the power of judicial review", said a judge, "lies in the protection which it has accorded to constitutional rights that has maintained public esteem for the judiciary and has permitted peaceful existence of counter majoritarian implications of judicial review and the democratic principles on which our federal government rests".

Appointment, Transfer and Removal of Judges of the Superior Courts

Appointment

7.3.1 Article 124 vests the power of appointment of the Chief Justice of India (C.J.I.) and the Judges of the Supreme Court in the President. The President shall by warrant, make the appointment after consultation with such of the judges of the Supreme Court and the High Courts of the States, as he may deem necessary. Also, the provision speaks of 'after' consultation and not 'in' consultation. In the case of appointment of a judge other than the Chief Justice of India, the C.J.I. shall always be consulted. On a plain reading of the provision, the power of appointment vests in the President. The President, of course, means the Executive *i.e.* The President acting on the advice of Council of Ministers. The C.J.I. and other such judges of the Supreme Court and the High Courts shall be consulted by the President, as he may deem necessary.

7.3.2 The appointment of judges of the High Courts is also made by the President (Executive). The President has to consult the C.J.I., the Governor of the State and the Chief Justice of the High Court.

7.3.3 In *S.P. Gupta's Case*[3] (popularly referred to as the *First Judges' Case*) one of the points decided was whether, as among the three consultees, the C.J.I. has primacy. The Court by a majority ruled that article 217(1) of the Constitution

[3] AIR 1982 SC 149

1206 LJ&CA/2002—15A

placed all the three constitutional functionaries on the same pedestal and that there is no primacy given to the C.J.I. In *S.P. Gupta's Case* no question arose with respect to the appointment of the Judges of the Supreme Court.

7.3.4 In the *Second Judges' Case*[4], *inter alia*, the Supreme Court examined as to who, under the Constitution, has the power of appointment of the judges of the Supreme Court and of the High Courts. By a majority, it ruled that the C.J.I. while focusing his opinion as part of the consultative process must take into account the views of the two senior most judges of the Supreme Court, to ensure that the opinion is not merely his own individual opinion but is in fact the collective opinion of a body of men at the apex level in the judiciary. Also, the opinion of C.J.I. so formed should be determinative and almost binding on the President. The judgement also laid down the procedure.

7.3.5 With regard to the appointment of judges of the High Court, the majority of the judges ruled in that case that the C.J.I. might ascertain the views of one or more senior judges of the respective High Courts, whose opinions were likely to be significant in the formation of the opinion of the C.J.I. The opinion of the Chief Justice of the High Court would be entitled to maximum weight and the opinion of the other functionaries involved must also be given due weight. The opinion of the Chief Justice of the High Court must be formed after ascertaining the views of at least two of the senior most judges of that High Court.

7.3.6 Articles 124 and 217, respectively, provide for the manner of appointment of the judges of the Supreme Court and the various High Courts. It is provided that every judge of the Supreme Court or a High Court shall be appointed by the President by warrant under his hand and seal. The persons to be consulted before such an appointment is made by the President has been provided in the said articles. The Supreme Court in the Supreme Court Advocates-on-Records Association v. Union of India[5], (the second judges case) and in re Presidential

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[4] Supreme Court Advocates-on-Record Association vs. Union of India (AIR 1994 SC 268).
[5] AIR 1994 SC 268

reference[6], has in effect emphasized upon "integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment" in which "all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, sub-serving the constitutional purpose, so that the occasion of primacy does not arise" in the matter of appointment of judges. However, in case of disagreement between the President and the Chief Justice of India, the opinion of the latter must prevail. The opinion of the Chief Justice of India means the opinion of a collegium consisting of himself and two senior most judges of the Supreme Court in matter of Second Judges case and himself and four senior-most judges in the matter of Presidential reference case.

7.3.7 The matter relating to manner of appointment of judges had been debated over a decade. The Constitution (Sixty-seventh Amendment) Bill, 1990 was introduced on 18th May, 1990 (9th Lok Sabha) providing for the institutional frame work of National Judicial Commission for recommending the appointment of judges to the Supreme Court and the various High Courts. Further, it appears that latterly there is a movement throughout the world to move this function away from the exclusive fiat of the executive and involving some institutional frame work whereunder consultation with the judiciary at some level is provided for before making such appointments. The system of consultation in some form is already available in Japan, Israel and the UK. The Constitution (Sixty-seventh Amendment) Bill, 1990 provided for a collegium of the Chief Justice of India and two other judges of the Supreme Court for making appointment to the Supreme Court. However, **it would be worthwhile to have a participatory mode with the participation of both the executive and the judiciary in making such recommendations. The Commission proposes the composition of the Collegium which gives due importance to and provides for the effective participation of both the executive and the judicial wings of the State as an integrated scheme for the machinery for appointment of judges. This**

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6 AIR 1999 SC 1

Commission, accordingly, recommends the establishment of a National Judicial Commission under the Constitution.

The National Judicial Commission for appointment of judges of the Supreme Court shall comprise of:

(1) The Chief Justice of India:
Chairman

(2) Two senior most judges of the Supreme Court:
Member

(3) The Union Minister for Law and Justice:
Member

(4) One eminent person nominated by the President after consulting the Chief Justice of India:
Member

The recommendation for the establishment of a National Judicial Commission and its composition are to be treated as integral in view of the need to preserve the independence of the judiciary.

Removal of Judges and remedies for deviant behaviour

7.3.8 **A committee comprising the Chief Justice of India and two senior-most Judges of the Supreme Court shall be exclusively empowered to examine complaints of deviant behaviour of all kinds and complaints of misbehaviour and incapacity against judges of The Supreme Court and the High Courts.** Their scrutiny at this stage would be confined to ascertain whether –

(a) there is substance at all in the complaint; or

(b) there is a *prima facie* case calling for a fuller investigation and enquiry; or

(c) whether it would be sufficient to administer an appropriate advice/warning to the erring Judge or give other directions to the concerned Chief Justice regarding allotment of work to such Judge or to transfer him to some other court.

If, however, the committee finds that the matter is serious enough to call for a fuller investigation or inquiry, it shall refer the matter for a full inquiry to the committee [constituted under the Judges' (Inquiry) Act, 1968]. The committee under the Judges Inquiry Act shall be a permanent committee with a fixed tenure with composition indicated in the said Act and not one constituted ad-hoc for a particular case or from case to case, as is the present position under Section 3(2) of the Act. The tenure of the inquiry committee shall be for a period of four years and to be re-constituted every four years. The inquiry committee shall be constituted by the President in consultation with the Chief Justice of India. The membership of the inquiry committee shall not be full time salaried employment. But the terms and other conditions of service of the Members of the committee shall be such as may be specified in the notification constituting the inquiry committee. **The inquiry committee shall inquire into and report on the allegation against the Judge** in accordance with the procedure prescribed by the said Act, i.e. in accordance with the sub-sections (3) to (8) of Section 3 and sub-section (1) of Section 4 of the said Act and submit their report to the Chief Justice of India, who shall place before a committee of seven senior-most judges of the Supreme Court. The Committee of seven Judges shall take a decision as to whether (a) findings of the inquiry committee are proper and (b) any charge or charges are established against the judge and if so, whether the charges held proved are so serious as to call for his removal (i.e. proved misbehaviour) or whether it should be sufficient to administer a warning to him and/or make other directions with respect to allotment of work to him by the concerned Chief Justice or to transfer him to some other court (i.e. deviant behaviour not amounting to misbehaviour). **If the decision of the said committee of judges recommends the removal of the Judge, it shall be a convention that the judge promptly demits office himself. If he fails to do so, the matter will be processed for being placed before Parliament in accordance with articles 124(4) and 217(1) Proviso (b). This procedure shall equally apply in case of Judges of the Supreme Court and the High Courts**

except that in the case of a Supreme Court Judge the judge against whom complaint is received or inquiry is ordered, shall not participate in any proceeding affecting him.

It shall also be proper, in appropriate cases, for the Chief Justice of the High Court or the Chief Justice of India, to withhold judicial work from the judge concerned after the inquiry committee records a finding against the judge.

7.3.9 Article 124(3) contemplates appointment of Judges of Supreme Court from three sources. However, in the last fifty years not a single distinguished jurist has been appointed. From the Bar also, less than half a dozen Judges have been appointed. It is time that suitably meritorious persons from these sources are appointed.

Age of Retirement of Judges of the Supreme Court and the High Courts

7.3.10 The Commission recommends that the retirement age of the Judges of the High Court be increased to 65 years and that of the Judges of the Supreme Court be increased to 68 years.

7.3.11 The Commission recommends that in the matter of transfer of Judges, it should be as a matter of policy and the power under article 222 and its exercise in appropriate cases should remain untouched. The President would transfer a Judge from one High Court to any other High Court after consultation with a committee comprising the Chief Justice of India and the two senior-most Judges of the Supreme Court.

Contempt of Court

7.4.1 Article 129 recognizes the power of the Supreme Court to punish for contempt of itself and similarly article 215 of the Constitution recognizes the power of the High Court to punish for contempt of itself. Judicial decisions have been

interpreted to mean that the law as it now stands, even truth cannot be pleaded as a defence to a charge of contempt of court. This is not a satisfactory state of law. Article 19(1)(a) of the Constitution guarantees to all citizens the right to freedom of speech and expression. Article 19(2) saves reasonable restrictions on the exercise of such right by the operation of any existing law and enables the legislature to make such law imposing, in public interest, reasonable restrictions on the exercise of the freedom. Therefore, article 19(2) of the Constitution will not save a law in relation to contempt of court if it impinges upon the right to freedom of speech and expression unless the restrictions are reasonable and are in public interest. If the restrictions that operate upon such rights are unreasonable, they will stand annulled by the operation of article 19(1)(a) of the Constitution. A total embargo on truth as justification may be termed as unreasonable restriction. It would, indeed, be ironical if, in spite of the emblems hanging prominently in the court halls, manifesting the motto of "*Satyameva Jayate*", in the High Courts and "*Yatho dharma statho jaya*", in the Supreme Court, the courts could rule out the defence of justification by truth. The Commission is of the view that the law in this area requires an appropriate change.

7.4.2 A mere legislation by the Parliament amending the Contempt of Courts Act, 1971 alone may not suffice because the power of the Supreme Court and the High Courts to punish for contempt is recognized in the Constitution. Therefore, **an appropriate amendment by way of addition of a proviso to article 19(2) of the Constitution, to the effect that, "in matters of contempt, it shall be open to the Court on satisfaction of the *bona fides* of the plea and of the requirements of public interest to permit a defence of justification by truth". The recommendation in this regard has been made in para 3.8.2 earlier.**

Other Courts and Tribunals: Power to Punish for Contempt:

7.4.3 The power of court to punish for contempt of itself is part of sovereign power and can inhere only in a sovereign. Articles 129 and 215 recognize the existence of such power in the Supreme Court and the High Courts as they exercise *inter alia* the sovereign judicial power. Parliament and State Legislatures

exercise sovereign legislative power. It is for that reason that the power to punish for contempt of itself inheres in Parliament and State Legislatures as part of their privilege. No other court, tribunal or authority can have a power to punish for contempt of itself, either inherently or conferred by a law of legislature. It is only the power to punish for contempt of itself mentioned in articles 129 and 215 and the privilege of Parliament and State Legislatures that is implicit in the words "in relation to the contempt of court" occurring in article 19(2) of the Constitution.

7.4.4 The jurisdiction to order arrest of a person or attachment of properties of a person to implement or execute an order of court or tribunal is a sanction of law to enable the enforcement of the orders against those who are bound thereby (example Order XXXIX, Rule 3 of the Code of Civil Procedure). They are remedial in nature.

7.4.5 Courts other than the Supreme Court and the High Courts do not have inherent jurisdiction to exercise a power of 'contempt of itself'. Section 10 of the Contempt of Courts Act, 1971 confers power on the High Court to exercise the same jurisdiction, powers and authority in respect of contempt of the Courts subordinate to it. Under the proviso thereto, no High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it, where such contempt is an offence punishable under the Indian Penal Code, 1860. Section 228 of the IPC provides for such a situation and rightly does not describe it as the contempt of court. (See also illustratively sections 178, 179, 180 of the Indian Penal Code, 1860 and section 10A of the Commissions of Inquiry Act, 1952.

7.4.6 Section 15(2) of the Contempt of Courts Act, 1971 enacts that in the case of criminal contempt of a subordinate court, the High Court may take action on a reference made to it by the subordinate court or on a motion made by the Advocate General, "Criminal Contempt" deals with scandalizing or lowering or tending to lower the authority of any Court (not any Tribunal or other quasi-judicial authority) prejudicing or interfering or tending to interfere or obstructing or tending

to obstruct administration of justice in any other manner. These are the limited areas which could be the subject of legislation in the legislative field of Entry 14 of List III and if necessary, read with Entries 1 and 2 of List III of the Seventh Schedule to the Constitution of India.

7.4.7 **The Commission, therefore, recommends that a proviso be inserted in article 129 that the power of court to punish for contempt of itself inherent only in the Supreme Court and the High Courts and is available as part of the privilege of Parliament and State Legislatures, and no other court, tribunal or authority should have, or be conferred with, a power to punish for contempt of itself.**

Judicial Review of Legislation: Article 13 and the power of the Supreme Court and the High Courts to declare a law unconstitutional or ultra vires or as beyond legislative competence

7.5 Parliament/State Legislatures enact laws in exercise of sovereign power of the State. Their validity either on the ground of unconstitutionality or on the ground of lack of legislative competence can be adjudicated only by another limb of the sovereign power, viz. the Supreme Court and the High Courts. No other authority can exercise such powers and cannot be conferred such powers even by legislation. To so confer and vest a sovereign power in any authority except on another limb of sovereign, viz. the Supreme Court and the High Court, would amount to an impermissible abdication of sovereign power exclusively inhering under the Constitution, only in the Supreme Court and the High Court as judicial limb of sovereign power. The decisions of courts to the effect that an authority constituted under a statute cannot question only those legislative provisions under which they are constituted but can adjudicate on the unconstitutionality and lack of legislative competence of other legislative enactments may be inconsistent with basic postulates of the constitution. Article 228 of the Constitution and Order XXVII-A Rule 1 of the Code of Civil Procedure, 1908 and sections 395 and 396 of the Criminal Procedure Code, 1973 are instances of recognition of this position.

It is, therefore, recommended that a suitable provision may be inserted in the Constitution to the effect that except the Supreme Court and the High Courts no other court, tribunal or authority shall exercise any jurisdiction to adjudicate on the validity or declare an Act of Parliament or State Legislature as being unconstitutional or beyond legislative competence and so *ultra vires*. Such a provision may be made as clause (5) of article 226.

Financial Planning and Judicial Autonomy

7.6.1 Judicial administration in the country suffers from deficiencies due to lack of proper planning and adequate financial support for establishing more courts and providing them with adequate infrastructure. For several decades the courts have not been provided with any funds under the five-year plans nor has the Finance Commission been making any separate provisions to serve the financial needs of the courts.

7.6.2 The Commission had issued a detailed Consultation Paper[7] for eliciting public opinion on financial autonomy for the Judiciary. It considered all the responses and reached certain conclusions.

Judicial Councils

7.7 **The Commission recommends the setting up of a 'Judicial Council' at the Apex level and Judicial Councils at each State at the level of the High Court. There should be an Administrative Office to assist the National Judicial Council and separate Administrative Offices attached to Judicial Councils in States. These bodies must be created under statute made by Parliament. The Judicial Councils will be in charge of the preparation of plans, both short term and long term, and for preparing the proposals for annual budget.**

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[7] See Volume II (Book 2) of the Report.

Budgets for subordinate judiciary

7.8.1 **The Commission is of the view that the budget proposals in each State must emanate from the State Judicial Council, in regard to the needs of the subordinate judiciary in that State, and will have to be submitted to the State Executive.** Once the budget is so finalized between the State Judicial Council and the State Executive, it should be presented in the State Legislature.

7.8.2 Government of India should not throw the entire burden of establishing the subordinate courts and maintaining the subordinate judiciary on the State Governments. **There is a concurrent obligation on the Union Government to meet the expenditure for subordinate courts. Therefore, the Planning Commission and the Finance Commission must allocate sufficient funds from national resources to meet the demands of the State judiciary in each of the States.**

Functioning of the Judiciary

7.9 In terms of performance, there has been a certain amount of uneasy dissatisfaction in the functioning of the judiciary. In particular, the problem areas are:-

i) Undue delays in the disposal of cases and lack of sensitivity (accountability) to the mounting arrears of cases.

ii) Injecting avoidable uncertainties in the law and thereby making the task of the Executive more difficult and sometimes unmanageable.

iii) Lack of transparency in judicial appointments and transfers.

iv) Poor management of resources and ineffective standards of judicial administration including legal aid.

v) Absence of strategic Action Plans for clearance of arrears in courts.

7.10.1 One of the reasons for the delay is often said to be the inadequate judge strength and the inadequacy of the number of courts and the infrastructure facilities in them. According to an eminent member of the Bar, the best solution to tackle the arrears is "to appoint less number of judges and more competent judges". This was the view of the Report of the Arrears Committee (1989-1990) constituted by the Government of India on the recommendation of the Chief Justices' Conference. The Committee said: "the failure on the part of the Executive to produce adequate number of competent judges from time to time has substantially contributed to the mounting arrears." The arrears can be substantially brought down with better management, computerization of court system, increased settlements by Lok Adalats, the effective and greater use of provisions of the Civil Procedure Code with all its congenial amendments with the cooperation of the lawyers and the court staff. The competence of the judges in terms of quality and quantity of disposals should be assessed by the superior court judges and reputed senior advocates.

7.10.2 **The presiding officers in courts should be adequately trained. To ensure competence, there should be a proper selection, freedom of action, training, motivation and experience. To maintain their competence it is necessary to have continuing education for the judges. Some national judicial institutions have to be properly structured to give such training. There should be a proper monitoring of moving the judges where work demands such movement from places where there are no arrears of work. There has to be systematic assessment of training needs of judicial personnel at different levels.**

7.10.3 It is possible for the governments to have a 'litigation policy' directed towards reduction of government litigation and protection of public interest by preventive strategies. For instance, in civil cases when a notice under Section 80 CPC is received, the matter should be thoroughly and carefully examined instead

of the present tendency of giving a routine recording as file without application of mind, that "the threatened suit may be awaited." The filing of appeals irrespective of the merit of the case should be avoided. Appeals are filed mechanically irrespective of the merits, merely to avoid allegations, quite often unjustified, of improper motives when a decision which affects the interests of the Government is allowed to assume finality.

7.10.4 **The Government should ensure basic infra-structure needed to all courts and arrange to ensure that courts are not handicapped for want of infra-structural facilities, Governments, both at the Centre and in the States, should constitute committee of secretaries to review government litigation with a view to avoid adjudication wherever possible, give priority in filling of written statements, wherever required, and instruct government advocates to seek early decision on government litigation.**

7.10.5 In the Supreme Court and the High Courts, **judgements should ordinarily be delivered not later than ninety days from the conclusion of the case. If a judgement is not rendered within such time – it is possible that the complexities of the case and the effect the decision may have on another similar situation might compel greater and larger judicial consideration and contemplation – the case must be listed before the court immediately on the expiry of ninety days for the court to fix a specific date for the pronouncement of the judgement.**

Costs of Litigation

7.11 Trade and industry, which resort to the courts most, must share a greater burden of maintenance of the system. A reasonable share of the judicial budget must come from the resourceful class of public of which the business class forms a segment. There was a time when in all civil proceedings costs were invariably awarded and at least a oneline reason given for not awarding costs. Today costs are rarely awarded. An award of costs is a vindication of the rightful cause and

reparation to him for having had to resort to court or defend a case when his/her cause was a good one and the adversary had an unsustainable case. It was also in the nature of retribution to the party who has approached the court on an untenable case or unsustainable defence. **An award of exemplary costs should be given in appropriate cases of abuse of process of law.**

Priority in hearings

7.12 A civil appeal, however high the stakes may be, unless it involves projects of national and public importance should not have priority over criminal cases where accused are in custody. When constitutional questions arise, it should be expeditiously heard and law settled, as it would be contrary to public interest to keep such questions in suspense. To keep tax cases pending for years causes serious public detriment. When there is no stay operating in the case of indirect taxes, the assessee does not know whether he can pass on the tax or not. If the tax had been passed on; if the levy is struck down, the consumer has already suffered the inflated price. The benefit does not go to the consumer who paid the tax, even if the doctrine of unjust enrichment is applied and the tax is not refunded to the persons who passed it on. It is no consolation for the consumer to whom the tax burden may be passed on to be told that the money has gone to some consumer benefit fund. In the case of direct taxes equally, it would deprive the tax payer, the right to utilize funds in his business or on gainful investments. The grant of stay in taxation matters has serious impact on public exchequer. A budget is made for each year. Taxation matters should therefore receive an appropriate priority in disposal of cases. Though the Representation of the People Act, 1951 enacts a provision for disposal of election disputes within a time schedule, the same is invariably breached. A mechanical queue for all cases would not meet the ends of justice.

7.13.1 The Gram Nyayalayas as contemplated by the Law Commission will process 60 to 70 per cent of rural litigation leaving the regular courts in districts and sub-divisions to devote their time to complex civil and criminal matters. With a participatory, flexible machinery available at the village level where non-adversarial, settlement-oriented procedures are employed, the rural people will have a fair, quick and inexpensive system of dispute settlement. Only revision jurisdiction on civil matters and that also on questions of law may be left to the district courts.

7.13.2 Today, the pendency in various courts in urban areas is staggering. Rent and eviction suits constitute a considerable chunk of litigation in urban courts, and that they take on an average three or more years to get adjudicated in the court at first instance, the Law Commission felt that an alternative method for these disputes is imperative. The Law Commission examined several alternatives and preferred to recommend the model of Conciliation Court along with a participatory model where a professional judge interacts with two lay judges and evolves a reasonable solution. There will not be any appeal against the decision and only a revision petition will be permissible on questions of law to the district Court.

7.13.3 **The Law Commission recommendations in regard to the Nagar Nyayalayas, Conciliation Courts, ADR systems of urban litigation, evidence recording by Commissioners etc. as incorporated in the Code of Civil Procedure (Amendment) Act, 2000 should be brought into force with such modifications as would take care of a few serious objections.**

7.13.4 The Commission noted that in all developed systems normally not more than 15% of the cases go for final adjudication. The rest of the cases are resolved by alternate dispute resolution mechanisms like conciliation, mediation and arbitration. Pre-trial conciliation accounts for the disposal of a large number of cases.

The Commission recommends that the provisions relating to conciliation in the Arbitration and Conciliation Act, 1996 should suitably be amended to provide for obligatory recourse to conciliation or mediation in relation to cases pending in courts. The Commission further recommends that scope and functions of the Legal Services Authorities constituted under the Legal Services Authorities Act, 1987 be enlarged and extended to enable the Authority to set up conciliation and mediation fora and to conduct, in collaboration of other institutions wherever necessary, training courses for conciliators and mediators.

Strategic Action Plans for time-bound clearance of Arrears

7.13.5 **The Commission recommends that each High Court should, in consultation with the judicial councils referred to in para 7.7, prepare a strategic plan for time-bound clearance of arrears in courts under its jurisdiction. The plan may prescribe annual targets and district-wise performance targets. High Courts should establish monitoring mechanisms for progress evaluation. The purpose is to achieve the position that no court within the High Court's jurisdiction has any case pending for more than one year. This should be achieved within a period of five years or earlier.**

Criminal Justice Administration

7.14.1 Criminal Justice System in India requires a strong second look.

7.14.2 **The criminal investigation system needs higher standards of professionalism and it should be provided adequate logistic and technological support. Serious offences should be classified for purpose of specialized investigation by specially selected, trained and experienced investigators. They should not be burdened with other duties like security, maintenance of law and order etc., and should be entrusted exclusively with investigation of serious offences.**

7.14.3 The number of Forensic Science Institutions with modern technologies such as DNA fingerprinting technology should be enhanced.

7.14.4 The system of plea-bargaining (as recommended by the Law Commission of India in its Report) should be introduced as part of the process of decriminalisation.

7.14.5 The greatest asset of the police in investigation of crimes and maintenance of law and order is the confidence of the people. Today, such public confidence is at the lowest ebb. The police are increasingly losing the benefit of this asset of public confidence. Hard intelligence in investigations comes from public cooperation. If police are seen as violators of law themselves or if they abuse their powers for intimidation and extortion, public develop an attitude of revulsion and the onerous duties and responsibilities that the police shoulder become more onerous and difficult.

In order that citizen's confidence in the police administration is enhanced, the police administration in the districts should periodically review the statistics of all the arrests made by the police in the district and see as to in how many of the cases in which arrests were made culminated in the filing of charge-sheets in the court and how many of the arrests were ultimately turned out to be unnecessary. This review will check the tendency of unnecessary arrests. Some statistics indicate that in some districts in the country, nearly 80% of the arrests were made in respect of bailable offences.

7.14.6 The legal services authorities in the States should set up committees with the participation of civil society for bringing the accused and the victims together to work out compounding of offences.

206 LJ&CA/2002—16A

7.14.7 **Statements of witnesses during investigation of serious cases be recorded before a magistrate under section 164 of the Code of Criminal Procedure, 1973.**

Victim Orientation and Victomology

7.15.1 The assumption that by punishing the offender the victim receives "Justice" is of doubtful value today because of the decreasing number of successful investigations and convictions. Given the inconvenience, delays, corruption and harassment, many victims tend to keep away from reporting crimes and sometimes there is a tendency to take law into one's own hands.

7.15.2 Among the many reforms canvassed for improving criminal justice is one that advocates a victim-orientation to criminal justice administration. 'Victim orientation' includes greater respect and consideration towards victims and their rights in the investigative and prosecution processes, provision for greater choices to victims in trial and disposition of the accused, and a scheme of reparation/ compensation particularly for victims of violent crimes.

7.15.3 The case for a viable, social justice-oriented and effective scheme for compensation victims is now widely felt. **The Government at the Union level and in the states are well advised under the directive principles as well as under International Human Rights obligations to legislate on the subject of an effective scheme of compensation for victims of crime without further delay.**

7.15.4 **The tremendous support which the criminal justice might derive from the people once the compensation scheme is introduced even in a modest scale, and the possibilities of advancing the crying need for social justice in a very real sense, are attractive enough for the State to find money to float the scheme immediately.**

1206 LJ&CA/2002—16B

All India Judicial Service

7.16 The Commission had circulated a Consultation Paper[8] on 'All India Judicial Service' for eliciting public opinion. After examining the responses received and after detailed deliberations, the Commission decided that the formation of All India Judicial Service would not be a better alternative to the present system. The Commission did not therefore, favour deletion of clause (3) of article 312.

Digital legal information system

7.17.1 The Commission notes that the law libraries available in the country are limited. Further, the cost of maintaining modern law libraries in various parts of the country would be enormous. With a view to providing a satisfactory justice delivery system, access to law books, law journals and other legal literature by all concerned needs no special emphasis.

7.17.2 **The Commission, therefore, recommends that the National Informatics Centre in collaboration with or with the assistance of the Indian Law Institute and the Government Law Departments should set up a Digital Legal Information System in the country so that all courts, legal departments, law schools would be able to access and retrieve information from the data bank of the important law libraries in the country."**

Subordinate Judiciary

7.18 The jurisdiction and nomenclature of subordinate courts in the various States of the country are different. At present, there are three or more tiers of civil and criminal courts below the High Court. Cases at the trial stages are decided by and assume finality at the level of the subordinate courts. The trial system is the cutting edge of the judicial machine. It would, therefore, be necessary that the

[8] *See* Volume II (Book 2) of the Report.

presiding officers of these courts are impartial and competent. It will also enhance the quality and quantity of their output. The administration of justice at this grass root level needs standardization.

The Commission **recommends that progressively the hierarchy of the subordinate courts should be brought down to a two tier of subordinate judiciary under the High Court. Further, strict selection criteria and adequate training facilities for the presiding officers of such courts should be provided.** The Commission also recommends that **to cope up with the workload of cases at the lower level and also to curtail arrears and delay, the States should appoint honorary judicial magistrates selected from experienced lawyers on the criminal side to try and dispose less serious and petty cases on part-time basis on the pattern of Recorders and Assistant Recorders in UK. They could set for, say, 100 days in a year and hold court later in the evenings after regular court hours. This would relieve the load on the regular magistracy.**

Habeas Corpus and the Human Rights Courts

7.19.1 Section 491 of the Code of Criminal Procedure, 1898 (since repealed and re-enacted as the Code of Criminal Procedure, 1973) vested the power to issue directions of the nature of *habeas corpus* in all the High Courts. The power was available since the Code was enacted in 1898 when the constitutional provisions of judicial review of the nature provided in article 226 in relation to the High Courts and article 32 for the enforcement of fundamental rights in relation to the Supreme Court of India were not available. The power under section 491 of the Code continued to be available simultaneously with the power of the High Courts and the Supreme Court to issue writs of the nature of a habeas corpus vested in them under article 226 and article 32 of the Constitution respectively even after coming into force of the provisions of the Constitution. However, when the new Code was enacted in 1973, it was thought that, in face of the constitutional provisions under article 226 and article 32, the power of the nature of section 491 of the Code of

Criminal Procedure, 1898 is redundant and was thus not provided for in the new legislation.

7.19.2 Since the enactment of the Code of Criminal Procedure, 1973, issues relating to the human rights have found a prominent place throughout the world. In India, the Protection of Human Rights Act, 1993 was enacted with a view to providing for establishment of the National Human Rights Commission and the various State Human Rights Commissions. Section 30 of the said Act provides that the State Governments may, with the concurrence of the Chief Justice of the High Court, by notification, specify for each district a court of session to be a Human Rights Court to try the offences relating to human rights.

7.19.3 Since the issues relating to human rights, more particularly relating to unlawful detention, have now occupied a center-stage, both nationally and internationally, **it shall be desirable that the Protection of Human Rights Act, 1993 may be suitably amended to provide that, in addition to the powers generally vested in that Court, such courts shall have the power to issue directions of the nature of a *habeas corpus* as was available to the High Courts under section 491 of the Code of Criminal Procedure, 1898. Vesting of such power will go a long way in providing help to the indigent and vulnerable sections of the society in view of the proximity and easy accessibility of the Court of Session."**

CHAPTER 8

UNION – STATE RELATIONS

CONTENTS

8.1 Background

A. Legislation

8.2. ➢ Legislative Relations
8.2.14 ➢ Suggestion for a new entry in the Concurrent List – Management of Disasters and Emergencies, Natural or Man-made

B. Finance

8.3 ➢ Financial Relations
8.3.5 ➢ Enlargement of the Scope of the Finance Commission
8.4 ➢ Share of States in taxes, cesses and surcharges.
8.5 ➢ Tax on Services
8.6 ➢ Status of Central Bank

C. Trade, Commerce and Intercourse

8.7 ➢ Barriers to Inter-State Trade and Commerce
8.8 ➢ Trade and Commerce Commission

D. Resolution of Disputes

8.9 ➢ Inter-State Disputes
8.10 ➢ Inter-State Water Disputes
8.11 ➢ Inter-State Water Disputes Act
8.12 ➢ Inter-State Council
8.13 ➢ Treaty Making

E. Executive

8.14 ➢ Office of Governor
8.14.4 ➢ Assent of the President and Governors
8.15 ➢ Failure of Constitutional Machinery
8.16 ➢ Use-misuse of article 356
8.17 ➢ Sarkaria Commission
8.18. ➢ Should Article 356 be Deleted?
8.19 ➢ Need for Conventions
8.20 ➢ Situation of Political breakdown
8.21 ➢ Constitutional Amendments
8.22 ➢ Dissolution of Assembly
8.23 ➢ Miscellaneous Matters

CHAPTER 8

UNION-STATE RELATIONS[1]

Background

8.1.1 The Constitution in its very first article describes India as a Union of States. When the British power was established in India it was highly centralized and unitary. To hold India under its imperial authority, the British had to control it from the Centre and ensure that power remained centralized in their hands. A strong central authority was for the British both an imperial and an administrative necessity. The country continued to be ruled under the 1919 Act by a central authority until 1947. And, since under the 1919 Act, there was a central government, a central legislature, a system of central laws etc., the use of these terms continued under the colonial hangover.

8.1.2 In the Constituent Assembly, the Drafting Committee decided in favour of describing India as a Union, although its Constitution might be federal in structure. Moving the Draft Constitution for the consideration of the Constituent Assembly on 4 November 1948, Ambedkar explained the significance of the use of the expression "Union" instead of the expression "Federation". He said "...what is important is that the use of the word 'Union' is deliberate... Though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people a single people living under a single imperium derived from a single source." Finally, when the Constitution was adopted on 26 November 1949, it provided for India being a Union of States and its States and territories being as specified in the First Schedule. The Schedule specified four types of units - Parts 'A', 'B' and 'C' States and Part 'D' territories.

[1] See also the Consultation Papers released by the Commission on "Constitutional Mechanisms for Settlement of Inter-state Disputes", "Treaty Making Power under our Constitution", "Institution of Governor under the Constitution" and "Article 356 of the Constitution" in Volume II (Book 2) of the report and the Background Papers on "Concurrent Powers of Legislation under List III of the Seventh Schedule", "Barriers to Inter-State Trade and Commerce" and "Article 262 and Inter-State Disputes Relating to Water" in Volume II (Book 3)

8.1.3 During the last half-a-century, many structural changes have been made and the map of the Union of States reshaped. Categorisation of States has disappeared, names of several territorial units called States have vanished, many new States have been formed on linguistic and other criteria, boundaries, areas, names etc. of some States have been altered and many relationships have been transformed. As at present, the Union consists of 28 States and seven Union Territories. Some unique solutions of regional councils, development boards, etc., have been attempted with varying degrees of success. The three newest States are Uttaranchal, Jharkhand and Chhatisgarh.

8.1.4 It is a tribute to the farsightedness of the makers of the Constitution that all these changes could be brought about largely peacefully and entirely within the four-walls of the Constitution. The predominant concern of the founding fathers as also of the various Commissions and Committees appointed since Independence to consider reorganisation of States or Union-State Relations - the JVP Committee, the Dar Commission, the States Reorganisation Commission (SRC), the Rajamannar Committee, the Sarkaria Commission, etc. - has been that of the unity and integrity of India. We are still engaged in the stupendous task of national integration which is also an admission of the hard reality of our nation and Union being still in the making. The SRC report concluded:

> It is the Union of India which is the basis of our nationality...States are but limbs of the Union, and while we recognize that the limbs must be healthy and strong...it is the strength and stability of the Union and its capacity to develop and evolve that should be governing consideration of all changes in the country.

8.1.5 The Commission feels that there is no dichotomy between a strong Union and strong States. Both are needed. The relationship between the Union and the States is a relationship between the whole body and its parts. For the body being healthy it is necessary that its parts are strong. It is felt that the real source

of many of our problems is the tendency of centralisation of powers and misuse of authority.

A - Legislation

Legislative Relations

8.2.1 The Constitution, based on the principle of federalism with a strong and indestructible Union, has a scheme of distribution of legislative powers designed to blend the imperatives of diversity with the drive of a common national endeavour. In this respect our constitutional theory as well as practice have kept pace with contemporary developments. The current trends emphasise cooperation and coordination, rather than demarcation of powers, between different levels of government. The basic theme is inter-dependence in orchestrating the balance between autonomy of the States and the inner logic of the Union.

8.2.2 The Constitution adopts a three-fold distribution of legislative powers by placing them in any one of the three lists, namely I (Union List), II (State List) and III (Concurrent List). Articles 245 and 246 demarcate the legislative domain, subject to the controlling principle of the supremacy of the Union which is the basis of the entire system.

8.2.3 The Concurrent List gives power to two legislatures, Union as well as State, to legislate on the same subject. In case of conflict or inconsistency, the rule of repugnancy, as contained in article 254, comes into play to uphold the principle of Union power.

8.2.4 The Concurrent List expresses and illustrates vividly the underlying process of nation building in the setting of our heterogeneity and diversity. The framers of the Constitution recognised that there was a category of subjects of common interest which could not be allocated exclusively either to the States or the Union. Nonetheless, a broad uniformity of approach in legislative policy was essential to combine specific requirements of different States with the articulation

of a common national policy objective. Conceived thus, harmonious operation of the Concurrent List could well be considered to be creative federalism at its best.

8.2.5 The problems that have attracted attention in the field of Union-State relations have less to do with the structure or the rationale of the Concurrent List than with the manner in which the Union has exercised its powers. In a fundamental political sense, the passing of one party dominance that characterised the first four decades of the Republic has also ended the drive towards overcentralisation. Even the powers that unquestionably belong to the Union, for example the power to temporarily assume the functions of a State Government under article 356, are heavily circumscribed by the political reality of a multi-party system where the States have acquired significant bargaining power vis-à-vis the Government of India.

8.2.6 The evolving political system has thus imparted considerable vitality to the federal impulses of the Constitution. However, what has been gained in the actual practice of legislative relations between the Union and the States, in terms of restoring the balance inherent in the constitutional scheme, has not entered the realm of institutional validation. To this extent, the unilateralism of the Union in regard to the exercise of legislative powers under the Concurrent List remains a potential problem area. The principal critique of concurrency is not that it is not required, but that it is used without consultation, that it is not exercised to deepen inter-dependence and co-operation but to stress dominance of the Union point of view.

8.2.7 It has to be conceded that institutional arrangements for facilitating exchange of views between the States and the Union on matters falling within the field of concurrent legislation leave something to be desired. This has happened in spite of the existence of the Inter-State Council under article 263. The Council has yet to develop into a mechanism to be relied on for an ongoing process of dialogue on vital socio-economic and political issues between the Union and the States and among the States. It is not as if such consultation is absent. There are

Chief Ministers' Conferences on specific issues. There are State Ministers' Conferences on a variety of subjects on which common policy positions have to be formulated, such as Value Added Tax.

8.2.8 There is, however, no formal institutional structure that requires mandatory consultation between the Union and the States in the area of legislation under the Concurrent List which covers several items of crucial importance to national economy and security. Even the National Development Council, whose ambit may occasionally be widened beyond the Five Year and the Annual Plans, is seldom convened to test ideas and evaluate experience in policy formulation and implementation in areas where both the Union and the States are interested for the sake of social and economic development.

8.2.9 The Concurrent List provides a fine balance between the need for uniformity in the national laws and creating a simultaneous jurisdiction for the States to accommodate the diversities and peculiarities of different regions. This also provides a distinguishing feature in the federal scheme envisaged by the framers of the Constitution. This is further reinforced by placing a mode of altering the provisions in lists I,II and III in the 7th schedule among other matters of provisions substantive in nature and basic to the structure of the Constitution that fall within the purview of the proviso to clause (2) of Article 368. A bill for amending the list in the 7th schedule has to be passed by Parliament by a majority of the total membership of that House and by a majority of not less than 2/3rd of the members of the House present and voting – and followed by ratification of legislatures of not less than ½ of the States. This mechanism provides a statutory tilt in favour of consultation and cooperation with the States in matters pertaining to the Legislative sphere and inherent balance between flexibility and rigidity.

8.2.10 Globalization as a phenomenon has created a great deal of mobility of goods, services, capital, technology; integrating the world trade far more than ever before. There are also related concerns arising out of a need for a better

and sustained use of resources of the earth as a planet that call for a much greater coordination in identification and formulation of responses among the nations. This process of cohesive and concurrent action needs to generate, first-of-all within the national context. The geographical climate, environmental, technological diversities amongst States have to be harmonized in order that these may link with global processes for viable sustained, development and growth. A major field of undertaking new initiatives in these spheres would lie in the legislative domain where a certain concurrences and coherence between the States and their different needs have to be harmonized to evolve national policies. This is also reflected in issues that pertain to technology, trade, financial services etc. in the global context.

8.2.11 The Commission examined the constitutional provisions regarding concurrent powers of legislation, analysing the constitutional amendments that had been enacted from time to time and the judicial pronouncements on major issues arising from concurrency. The view that emerged was that there was no ground for change in the existing constitutional provisions.

8.2.12 The Commission believes that on the whole the framework of legislative relations between the Union and the States, contained in articles 245 to 254, has stood the test of time. In particular, the Concurrent List, List III in the Seventh Schedule under article 246 (2), has to be regarded as a valuable instrument for consolidating and furthering the principle of cooperative and creative federalism that has made a major contribution to nation building. The Commission is convinced that it is essential to institutionalise the process of consultation between the Union and the States on legislation under the Concurrent List.

8.2.13 **The Commission recommends that individual and collective consultation with the States should be undertaken through the Inter-State Council established under article 263 of the Constitution. Further, the Inter-State Council Order, 1990, issued by the President may clearly specify in**

4(b) of the order the subjects that should form part of consultation in the Inter-State Council.

Suggestion for a new entry in the Concurrent List – Management of Disasters and Emergencies, Natural or Man-made

8.2.14 **The Commission has examined a suggestion made by the Union Ministry of Agriculture that "Management of Disasters and Emergencies, Natural or Man-Made" be included in List III of the Seventh Schedule, and agrees to the suggested inclusion.**

B - Finance

Financial Relations

8.3.1 Division of financial powers and functions among different levels of the federal polity are asymmetrical, with a pronounced bias for revenue taxing powers at the Union level while the States carry the responsibility for subjects that affect the day to day life of the people entailing larger expenditure than can be met from their own resources. On an average, the revenue of States from their own resources suffices only for about 50 to 60 percent of States' current expenditure. Since the insufficiency of the States' fiscal resources had been foreseen at the time of framing the Constitution, a mechanism in the shape of Finance Commission was provided under article 280 for financial transfers from the Union. Its function is to ensure orderly and judicious devolution that is deemed necessary from the point of view of avoiding vertical or horizontal imbalances.

8.3.2 The Finance Commission is only one stream of transfer of resources from the Union to the States. The Planning Commission advises the Union Government regarding the desirable transfer of resources to the States over and above those recommended by the Finance Commission. Bulk of the transfer of revenue and capital resources from the Union to the States is determined largely on the advice of these two Commissions. By and large, such transfers are

formula-based. Then there are some discretionary transfers as well to meet the exigencies of specific situations in individual States.

8.3.3 These institutional arrangements served the country well in the first three decades after independence. Testifying to the strength of these institutions neither the Union nor the States suffered from any large imbalance in their budgets, although the size of the public sector in terms of proportion of government expenditure to Gross Domestic Product had nearly doubled during this period.

8.3.4 Imbalances have become endemic during the last two decades and have assumed alarming proportions recently. For this state of affairs, the constitutional provisions can hardly be blamed. Broadly, the causes have to be sought in the working of the political institutions. There are shortcomings in the transfer system. For example, the 'gap-filling' approach adopted by the Finance Commission and the soft budget constraints have provided perverse incentives. The point, however, is that these deficiencies are capable of being corrected without any change in the Constitution.

Enlargement of the Scope of the Finance Commission

8.3.5 The institution of the Finance Commission has been one of the major success stories of the Constitution. The broad terms of reference as laid down in article 280(3) are unexceptionable. However, other matters in the interest of sound finance can also be referred to the Finance Commission. These would constitute additional terms of reference. It has been suggested that it would be desirable to associate the States more actively in deciding the additional terms of reference, preferably by having the National Development Council (comprising the Prime Minister and the Chief Ministers of States) to endorse the additional terms of reference. The Commission is not in favour of an amendment of article 280(3)(d) to enable such enlargement of the scope of the Finance Commission. However, it is recommended that terms of reference of the Finance Commission

should be broader and comprise of matters which would take care, in a comprehensive way, aspects of the financial relations between the Union and the States. The broadening of such terms of reference could also be discussed earlier by the National Development Council.

8.3.6 Under article 281, the recommendations of the Finance Commission are laid before the Houses of Parliament along with an explanatory memorandum as to the action taken on them. The recommendations are not theoretically binding, although there has been no case so far when the Government of India has deviated from recommendations of successive Finance Commissions. It has been suggested that the Constitution itself should describe the recommendations as an award binding on both the Union and the States. This has been urged in the context of the mechanism of the State Finance Commissions which are set up under articles 243-I and 243-Y which too make only recommendations and not awards. The State Finance Commissions are a comparatively new constitutional mechanism. They would take some time to strike roots in the constitutional soil. Politicians at the Sate level have also to find their bearings in the new landscape where the old landmarks of patronage at the State level have yielded place to a non-discriminatory passage of resources from the State exchequer to the local government institutions. Keeping in view the factors pointed out above the Commission does not consider it necessary to recommend the amendment of the Constitution to provide for the recommendations of either the Finance Commission constituted under article 280 or of the State Finance Commissions constituted under articles 243-I and 243-Y being treated as awards.

Share of States in taxes, cesses and surcharges

8.4. The Constitution was amended to provide a prescribed percentage of the revenue receipts to be transferred to States (article 270(2)). However, surcharges and cesses do not form part of the divisible pool. Cesses are intended for specific purposes and the States can have no complaint if the

1206 LJ&CA/2002—17A

money is spent on predetermined purposes. Surcharges can be regarded as a not so thinly veiled device to deny the States their share in receipts from such surcharges. Keeping in view the complexity of the present national and international situation which has placed additional burden on the Union; the Commission would not recommend any constitutional amendment to make surcharges shareable but would expect public policy to move decisively in the direction of doing away with the surcharges as part of the Union's fiscal armoury.

Tax on services

8.5 In recent years, services have emerged as the dominant component in the gross domestic product (GDP). Yet there is no mention in the Constitution in any of the three lists (Union List, State List, Concurrent List) enabling any level of government to tax services. The Union has used the residuary power in the last entry of the Union List (entry 97) to levy taxes on selected services. The efforts have not succeeded in tapping the full potential of the service sector of a vast range of services which are primarily local in nature. It is necessary to enhance the revenue potential of the States in view of their major responsibilities for social and physical infrastructure. It might be worthwhile to provide explicitly for taxing power for the States in respect of certain specified services. For the Union also an explicit entry would be helpful, rather than leaving it to the residuary power of entry 97. However, it may be better to first let a consensus list of services to be taxed by the States come into force to be treated as the exclusive domain of the States, even if the formal taxing power is exercised by the Union. In other words, the golden rule here would be to hasten slowly. A *de facto* enumeration of services that can be taxed exclusively by the States should get priority from policy makers with a view to augmenting the resource pool of the States. **The Commission recommends specific enumeration of services that may become amenable to taxation by the States. This is necessary with a view to augmenting the resource pool of the States. The Commission recommends an appropriate amendment to the Constitution in this behalf to include certain taxes, now levied and collected by the Union, to be**

enabled to be levied and collected by the States. Illustratively a list of such subjects in respect of which service tax is levied under the relevant section of the Finance Act, 1994 (Act 32 of 1994) as amended from time to time is given below:

(1) Section 65(48)(e): "To a client, by an advertising agency in relation to advertisements in any manner". Corresponding Entry in List-II of the Constitution – Entry 55 – "Taxes on advertisements published in the newspapers [and advertisements broadcast by radio or television]"

(2) Section 65(48)(f) – "to a customer, by a courier agency in relation to door-to-door transportation of time-sensitive documents, goods or articles". Corresponding Entry in List-II of the Constitution – Entry 56 – "Taxes on goods and passengers carried by road or on inland waterways".

(3) Section 65(48)(m) – "to a client, by a mandap keeper in relation to the use of a mandap in any manner including the facilities provided to the client in relation to such use and also services, if any, rendered as a caterer". Corresponding Entry in List-II of the Constitution – Entry 49 – "Taxes on lands and buildings"

(4) Section 65(48)(o) – "to any person, by a rent-a-cab scheme operator in relation to the renting of a cab" Corresponding Entry in List-II of the Constitution – Entry 57 – "Taxes on vehicles, whether mechanically propelled or not; suitable for use of roads, including tram-cars subject to the provisions of Entry 35 of List III.

(5) Section 65(48)(za) – "to any person, by a mechanized slaughter house in relation to the slaughtering of bovine animals."

Status of Central Bank

8.6 A question has been raised whether any constitutional or legislative safeguards are needed to uphold the autonomy of the Reserve Bank of India (Entry 38, List I) in conducting monetary policy. An advisory group set up by the Reserve Bank of India (RBI) has recommended that legislative changes should be made to facilitate the emergence of an independent and effective monetary policy. However, the Commission sees no need for a change in the Constitution to specifically provide for independent conduct of monetary policy. The existing legislation has broadly succeeded in maintaining a suitable environment of security and continuity for the key personnel and of the autonomy of decision making by the top management. The Commission agrees that appropriate legislative changes would suffice for the proper and timely development of money, securities and exchange markets.

C - Trade, Commerce and Intercourse

Barriers to Inter-State Trade and Commerce

8.7.1 Free flow of trade without geographical barriers is *sine-qua-non* for economic prosperity nationally as well as internationally. Therefore, progressive removal of such barriers has been a general phenomenon in social evolution in the modern world. Today we are vigorously pursuing the goal of free flow of trade among the nations of the world under the banner of globalisation through, for example, the WTO among the nations of the world. Regionally, member states of the European Community, for example, have already achieved that goal almost fully.

8.7.2 As economy is the most important source of power and identity in the world of today, the nations or regions that constitute the federation do not want to lose their hold on economic power. Nor do the economically strong States want the economically weak States to become parasites on them. Therefore, an arrangement must be devised which will ensure free flow of trade, encourage fair

competition and simultaneously remain capable of discouraging and regulating unfair trade practices.

8.7.3 One common arrangement found in all federations in this regard, is the division between the interstate and intrastate trade and commerce. While the regulation of the former is assigned to the federal authority, the States retain the regulation of the latter. Some federations have gone further and made interstate trade free from regulation both by the federal authority as well as the authority of the States. Australia is the foremost example of that. India goes one step further than Australia in so far as it makes flow of interstate as well as intrastate trade free from regulation by the Union as well as the States. However, unlike Australia, after making such a general declaration, the Constitution of India gives adequate powers to the Union and the States, particularly to the former, to regulate trade and commerce.

Trade and Commerce Commission

8.8.1 In order that the country's competitiveness in trade, commerce and industry is enabled to respond to the increasing pressures of globalisation, it is necessary that barriers to Interstate trade and commerce, particularly, the free movement of goods on the inter-state routes should be progressively reduced with a view to their final elimination. A statutory authority contemplated under article 307 of the Constitution requires to be set-up. As the effects of such an authority could as well go beyond the purposes of article-307, the legislation could be comprehensive drawing on Entry 42 of List -I and, if necessary, Entry 97 of List-I of the Seventh Schedule. The composition of the authority may provide for representation of the FICCI, CII, Railway Board, FSIME (Federation of Small Industries and Micro Enterprises), Indian Society of Automobile Manufacturers, National Highway Authority of India, NCAER, National Institute of Public Finance and Policy, Inter-State Council, School of International Studies (Jawaharlal Nehru University), Planning Commission and Ministry of Surface Transport.

8.8.2 **For carrying out the objectives of articles 301, 302, 303 and 304, and other purposes relating to the needs and requirements of inter-state trade and commerce and for purposes of eliminating barriers to inter-state trade and commerce Parliament should by law establish an authority called the "Interstate Trade and Commerce Commission" under the Ministry of Industry and Commerce under article 307 read with Entry 42 of List-I.**

D - Resolution of Disputes

Inter-State Disputes

8.9.1 In a constitutional set-up where powers are distributed between the Union and the States, it is natural to expect disputes as to on which side of the boundary a particular matter falls. Where such differences do arise, it is desirable that there should be a well thought out systemic mechanism for the resolution of such inter- State disputes.

8.9.2 Article 131 relates to the original jurisdiction of the Supreme Court and provides the judicial mechanism for dealing with inter-Governmental disputes involving any questions of law or fact on which existence or extent of a legal right depends between the Government of India and one or more States or between the Government of India and any State or States on the one side and one or more other States on the other or between two or more States. However, a few matters are excluded either by express provisions or by necessary implication.

8.9.3 The Commission considered as to whether the Supreme Court should be given exclusive jurisdiction in controversies concerning the distribution of legislative powers. Incidentally, it may be mentioned here that article 131A was inserted in the Constitution *vide* the Constitution (Forty-second Amendment) Act, 1976 so as to provide exclusive jurisdiction to the Supreme Court in regard to the questions as to constitutional validity of Union laws. However, the said provision was repealed by the Constitution (Forty-third Amendment) Act, 1977. After carefully considering the issues, the Commission is of the view that no exclusive

jurisdiction need be conferred on the Supreme Court in matters of controversies concerning distribution of legislative power between the Union and the States. It would deprive non-governmental parties of the facilities and the advantages of seeking remedy in the High Courts. However, there may be situations, which may require that such questions should not undergo a long drawn-process of litigation and the Supreme Court should be enabled to dispose off such questions finally and quickly without its being made a court of exclusive jurisdiction. The Commission is of the view that the Supreme Court should be empowered to transfer such cases to itself and decide the same. For this purpose it is not necessary to amend article 131. It can be provided for by amending article 139A. This will also ensure that the Supreme Court would be able to apply its mind and *prima facie* see as to whether (a) the case really involves some substantial question of law and is not raising untenable or frivolous contentions; and (b) whether the case is such that it should be transferred to it and disposed of expeditiously.

8.9.4 **The Commission recommends that article 139A, which confers power on the Supreme Court to withdraw cases involving the same or substantially the same question of law, which are pending in Supreme Court and one or more High Courts, should be amended so as to provide that it can withdraw to itself cases even if they are pending in one court where such questions as to the legislative competence of the Parliament or State Legislature are involved.**

Inter-State Water Disputes

8.10.1 Water is a prime resource for sustaining life on earth. The domestic, agricultural and industrial uses of water are multiplying day by day and this phenomenal increase in demand for water in diverse fields has resulted in its scarcity. Moreover, availability of water is highly uneven in both space and time as it is dependent upon varying seasons of rainfall and capacity of storage. India is served by two great river systems, i.e. the Great Himalayan Drainage system and the peninsular river network. It has 14 major rivers that are inter-State rivers

and 44 medium rivers of which 9 are inter-State rivers. Eighty five per cent of the Indian land mass lies within its major and medium inter-State rivers. The Commission considered the importance of inter-State water sharing as an area of great concern in maintaining the federal spirit and better Union-State and inter-State relations. The Commission accordingly studied the mechanisms available for efficient, productive and sustainable resource management of the country's river systems and allocation of inter-State water resources.

8.10.2 The Constitution does not itself lay down any specific machinery for adjudication of water disputes. Article 262(1) lays down that Parliament may by law provide for the adjudication of any disputes or complaints with respect to use, distribution or control of the waters of, or in, any inter-State river or river valley. The subject "Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power, subject to the provisions of Entry 56 of List I" is a matter enumerated in entry 17 of the State List (List II) of the Seventh Schedule.

8.10.3 The expression "regulation and development of inter-State rivers and river valleys" in Entry 56 of the Union List in the Seventh Schedule of the Constitution would include the use, distribution and allocation of the waters of the inter-State rivers and river valleys between different riparian States. Otherwise the provision for the Union to take over the regulation and development under its control makes no sense and serves no purpose. The River Boards Act, 1956 which is admittedly enacted under Entry 56 of the Union List for the regulation and development of inter-State rivers and river valleys does cover the field of the use, distribution and allocation of the waters of the inter-State rivers and river valleys. The very basis of a federal Constitution like ours mandates such interpretation and would not bear an interpretation to the contrary which will destroy the constitutional scheme. Although, therefore, it is possible technically to separate the "regulation and development" of the inter-State rivers and river valleys from the "use, distribution and allocation" of water, yet it is neither warranted nor necessary to do so.

Inter-State Water Disputes Act

8.11.1 Pursuant to the powers conferred by article262 of the Constitution, Parliament enacted the Inter-State Water Disputes Act, 1956 (Act 33 of 1956) to provide for adjudication of disputes relating to waters of inter-State river and river valleys. The Union Government has constituted several Tribunals under the aforesaid Act. Section 4(1) of the Inter-States Water Disputes Act, 1956 empowers the Central Government to constitute a Water Disputes Tribunal for adjudication of a water dispute when a request from any State Government in respect of such water dispute is received by it and it is of opinion that the water dispute cannot be negotiated. The process under the Act from the stage of constitution of the Tribunal to the giving of the award by it normally takes 7 to 10 years. The inordinate delay caused in constituting the Tribunals, delay in passing awards, framing of schemes or plans for giving effect to the decisions, and judicial review by the Supreme Court at times have been contributing factors in developing bitterness and friction between the States involved in the disputes. All these delays were also causing underutilization of water resources and hindering the timely development of the nation.

8.11.2 Having regard to the various infirmities and difficulties in speedy and timely resolution of disputes, the Commission on Centre-State Relations (commonly known as Sarkaria Commission) in Chapter XVII of its report (Volume I) gave several recommendations for implementation. Keeping in view the recommendations of the Sarkaria Commission, the Union Government introduced the Inter-State Water Disputes (Amendment) Bill, 2001 in Lok Sabha to ensure the setting up of inter–State Tribunals and submission of reports by the Tribunals in a time bound manner. (*See* the Background paper on the subject for details). It was passed by Lok Sabha on 03.08.2001 and is still pending in the Rajya Sabha Though the Bill has dealt with some important aspects, particularly the speedier settlement of Inter-State Water Disputes, the momentum of change in technologies requires quicker and larger mobilization of water resources to sufficiently meet the different needs including that of food security.

8.11.3 The Commission observed that in case of every water dispute there have been several occasions when one or the other party approached the Supreme Court by way of seeking judicial review both against the interim orders of the tribunal as also against the final decision. Further in the implementation of the decision of the tribunal the oustees or persons on behalf of the oustees resort to enforcing their fundamental rights under article 21 by a remedy under article 32, consequent on the submergence of their lands due to construction of reservoirs. This leads to adjudication by two forums one as to the use and distribution of water and the other relating to the enforcement of fundamental rights in the process of implementation of the decision of the Tribunal.

8.11.4 The Commission is of the view that it is not necessary to exclude Inter-State Water Disputes from the original jurisdiction of the Supreme Court under article 131 of the Constitution and that such disputes should also be made to fall within the exclusive jurisdiction of the Supreme Court. It has been noticed that Inter-State Water Disputes Act, 1956 has vested the Tribunal with a very unique jurisdiction under section 3. When a water dispute has arisen or is likely to arise by reason of the fact that the interest of the State or of the inhabitants thereof, in the waters of an inter-State river or river valley have been or are likely to be affected prejudicially by any executive action or legislation taken or passed or proposed to be taken or passed by another State, the aggrieved State Government may request the Union Government to refer the water dispute to a Tribunal for adjudication. Consequently, even a proposed legislation can be the subject matter of a dispute and interdicted by the Tribunal by a *quia timet* action. Courts do not exercise such powers of interdiction of legislative measures. Appropriate provision should be made for conferring such a unique power on the Supreme Court. It is recommended that the Inter-State Water Disputes Act, 1956 be repealed and in its place a more comprehensive parliamentary legislation should be enacted. However, it is necessary to make express provisions that the suit shall be instituted in the Supreme Court, which shall have exclusive jurisdiction.

8.11.5 It is not necessary to repeal article 262 of the Constitution for shifting the jurisdiction from the Tribunal to the Supreme Court. Article 262 is a very important provision and the said provision being a part of the Constitution as originally enacted and having come up before the courts several times, it is unlikely to successfully challenge the same. Once it is omitted or repealed, difficulties would arise if after experimenting on the changed form of adjudication, it is later felt or desired to have a Tribunal with a modified or changed jurisdiction or even if it is felt that the system of adjudication by a Tribunal as in the Act of 1956 would be better.

8.11.6 Article 131 is subject to the provisions of the Constitution. It may be noticed that article 262(2) is only an enabling provision and Parliament is not bound to enact a legislation constituting a Tribunal. A parliamentary legislation is sufficient to substitute the forum of the Supreme Court to the Tribunal. No amendment to the provisions of the Constitution may be required. This will enable Parliament to change the law, from time to time, as it may deem fit and proper by resorting to its power under article 262.

8.11.7 **The Commission feels that as river water disputes being important disputes between two or more States and/or the Union, they should be heard and disposed by a bench of not less than three Judges and if necessary, a bench of five Judges of the Supreme Court for the final disposal of the suit.**

8.11.8 **Appropriate provisions may be made as envisaged by article 145(1) in consultation with the Supreme Court or if the Supreme Court so opts to provide for the same by the Supreme Court Rules to appoint Commissioners or Masters and to have the evidence recorded not by the Supreme Court itself but by the Commissioners or Masters so that the precious time of the Supreme Court is saved.**

8.11.9 While a more radical suggestion has been made to place all the inter-State rivers under the jurisdiction of an authority appointed to administer them in national interest by law enacted by Union Parliament, it is a fact that in relation to regulation and development of inter-State waters, the River Boards Act, 1956 has remained a dead letter. Further, as and when occasions arose, different River Boards have been constituted under different Acts of Parliament to meet the needs in a particular river system according to the exigencies, facts and the circumstances. **The Commission, therefore, recommends that appropriate Parliamentary legislation should be made for repealing the River Boards Act, 1956 and replacing it by another comprehensive enactment under Entry 56 of List I. The new enactment should clearly define the constitution of the River Boards and their jurisdiction so as to regulate, develop and control all inter-State rivers keeping intact the adjudicated and the recognized rights of the States through which the inter-State river passes and their inhabitants.** While enacting the legislation, national interest should be the paramount consideration as inter-State rivers are 'material resources' of the community and are national assets. Such enactment should be passed by Parliament after having effective and meaningful consultation with all the State Governments.

Inter-State Council

8.12.1 Article 263 provides a mechanism for resolving problems by collective thinking, persuasion and discussion through a high level coordinating forum, namely the inter-State Council. In view of frequent friction between the Union and the States and between the States, the article has become more relevant. Article 263 empowers the President to establish an Inter-State Council at any time if it appears to him that the establishment of such a Council would serve the public interest. The Council could be charged with the duty of - (a) inquiring into and advising upon disputes which may have arisen between States;(b) investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States, have a common interest; or (c) making recommendations

upon any such subject and, in particular, recommendations for the better coordination of policy and action with respect to that subject.

8.12.2 An Inter-State Council was established in 1990 but it met for the first time in 1996. Under the States Reorganization Act, 1956 five zonal Councils were set up. Besides this, North-Eastern Council has been setup under the North-Eastern Council Act, 1971.

8.12.3 The Commission observes that article 263 has vast potential and the same has not yet been fully utilized for resolving various problems concerning more than one State. Of late, it has been observed that where a treaty is entered into by the Union Government concerning a matter in the State List vitally affecting the interests of the States no prior consultation is made with them. The forum of inter-State Council could be very well utilized for discussion of policy matters involving more than one State and arriving at a decision expeditiously. The Commission issued a consultation paper on "constitutional mechanism for the settlement of inter-State disputes" and elicited opinion of the general public. The responses were most helpful.

8.12.4 **The Commission, while endorsing the recommendations of the Commission on Centre-State Relations (Sarkaria Commission), recommends that in resolving problems and coordinating policy and action, the Union as well as the States should more effectively utilize the forum of inter-State Council. This will be in tune with the spirit of cooperative federalism requiring proper understanding and mutual confidence and resolution of problems of common interest expeditiously.**

Treaty Making

8.13.1 Entering into treaties and agreements with foreign powers is one of the attributes of State sovereignty. No State can insulate itself from the rest of the world whether it be in the matter of foreign relations, trade, commerce, economy, communications, environment or ecology. The advent of globalization and the

enormous advances made in communication and information technology have rendered independent States more inter-dependent.

8.13.2 Article 246 (1) read with Entry 14 of List I- Union List of the Seventh Schedule empowers Parliament to make laws with respect to "entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries". As per the provisions contained in article 253, Parliament has, notwithstanding anything contained in article 245 to 252, power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. This article (article 253), therefore, overrides the distribution of legislative powers provided for by article 246 read with Lists in the Seventh Schedule to the Constitution.

8.13.3 **The Commission recommends that for reducing tension or friction between States and the Union and for expeditious decision-making on important issues involving States, the desirability of prior consultation by the Union Government with the inter-State Council may be considered before signing any treaty vitally affecting the interests of the States regarding matters in the State List.**

E - Executive

Office of Governor

8.14.1 The Commission had issued a consultation paper with a questionnaire on the office of the Governor for eliciting public opinion. The issues raised and the suggestions made in the consultation paper related to amending articles 155, 156, 200 and 201 with a view to entrusting the selection of Governors to a Committee, making the five-year term a fixed tenure, providing for removal only by impeachment and limiting his powers in the matter of giving assent to Bills and reserving them for the consideration of the President.

8.14.2 After carefully considering the public responses and after full deliberations, the Commission does not agree to dilute the powers of the President in the matter of selection and appointment of Governors. **However, the Commission feels that the Governor of a State should be appointed by the President, after consultation with the Chief Minister of that State. Normally the five year term should be adhered to and removal or transfer of the Governor should be by following a similar procedure as for appointment i.e. after consultation with the Chief Minister of the concerned State.**

8.14.3 **The Commission recommends that in the matter of selection of a Governor, the following matters mentioned in para 4.16.01 of Volume I of the Sarkaria Commission Report should be kept in mind:**

- **He should be eminent in some walk of life.**
- **He should be a person from outside the State.**
- **He should be a detached figure and not too intimately connected with the local politics of the State.**
- **He should be a person who has not taken too great a part in politics generally, and particularly in the recent past.**

In selecting a Governor in accordance with the above criteria, the persons belonging to the minority groups should continue to be given a chance as hitherto.

Assent of the President and Governors

8.14.4 **There should be a time-limit - say a period of six months – within which the Governor should take a decision whether to grant assent or to reserve a Bill for consideration of the President. If the Bill is reserved for consideration of the President, there should be a time-limit, say of three months, within which the President should take a decision whether to accord his assent or to direct the Governor to return it to the State**

Legislature or to seek the opinion of the Supreme Court regarding the constitutionality of the Act under article 143.

8.14.5 In *Jamalpur Gram Panchayat* - Vs. *Malwinder Singh* - AIR 1985 SC 1394, the Supreme Court held that if the assent of the President were sought to the law for a specific purpose, the efficacy of the assent would be limited to that purpose and cannot be extended beyond it. The court held that if the assent is sought and given, in general terms so as to be effective for all purposes, different considerations might arise. In the case before the Supreme Court case the assent was given by the President for giving protection to the legislation under article 31 (as it then stood) and article 31A and the court held that such assent would not operate for the purposes of article 254(2) of the Constitution. However, the court upheld the law passed by the State Legislature on the ground that it fell under entry 18 of the State List and not entry 41 of the Concurrent List.

8.14.6 **It is felt desirable that a suitable amendment should be made in the Constitution so that the assent given by the President should avail for all purposes of relevant articles of the Constitution.** It would be inappropriate to drag the assent of President into such arguments. From the time the Bill is introduced till the assent of President is given, the whole procedure and proceedings are legislative in character. It is a collective action of the President, the House of the People, and the Council of States. It is not permissible to enquire as to how the mind of each member of the House and the President worked during the entire proceedings beginning with the introduction of the Bill and concluding with the according of assent by the President. The procedures are "certainly internal matters which are beyond the jurisdiction of the court to inquire into." The court is entitled to go into the questions as to whether the enactment is either ultra virus or unconstitutional. The assent of the President is not justiciable. See AIR 1983 SC 1019 at 1048 para 88 - M/s Hoechst Pharmaceuticals Ltd. Vs. State of Bihar and others. Even if noting sent to the President by the concerned Ministry does not reflect all the articles in the Constitution, which referred to the effect of the assent of the President i.e.

articles 31A, 31C, 254 annot be presumed that the President was not aware of or did not bear in , the relevant articles dealing with the effect of the assent of the President. **However, it is desirable that when a Bill is sent for the President's assent, it would be appropriate to draw the attention of the President to all the articles of the Constitution, which refer to the need for the assent of the President to avoid any doubts in court proceedings.**

8.14.7 **A suitable article should be inserted in the Constitution to the effect that an assent given by the President to an Act shall not be permitted to be argued as to whether it was given for one purpose or another. When the President gives his assent to the Bill, it shall be deemed to have been given for all purposes of the Constitution.**

8.14.8 **It is recommended that the following proviso may be added as second proviso to article 111 of the Constitution:**

> **"Provided further that when the President declares that he assents to the Bill, the assent shall be deemed to be a general assent for all purposes of the Constitution."**

Suitable amendment may also be made in article 200.

Failure of Constitutional Machinery

8.15.1 The Constitution of a country – or, for that matter, any enactment containing important and far-reaching provisions – is expected to provide for situations where circumstances arise, in which those provisions cannot be worked in strict conformity with the constitutional or statutory text, as applicable in normal circumstances. In India, the specific topic of failure of constitutional machinery in the States is dealt with, in three articles of the Constitution – articles 355 to 357 and 365 – of which, article 356 is the one most talked about and subject of controversy allegedly on grounds of having been frequently misused and abused.

1206 LJ&CA/2002—16A

8.15.2 It is important that article 356 is read with the other relevant articles *viz.* articles 256, 257, 355 and 365. Insofar as article 355 also *inter alia* speaks of the duty of the Union to protect the State against external aggression and internal disturbance and to ensure that the government of the State is carried on in accordance with the Constitution, it is obvious that article 356 is not the only one to take care of a situation of failure of constitutional machinery. The Union can also act under article 355 *i.e.* without imposing President's rule. Article 355 can stand on its own. Also, Union Government can issue certain directions under articles 256 and 257. While article 356 authorises the President to issue a proclamation imposing President's rule over a State if he is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, article 365 says that where a State fails to comply with Union directions (under articles 256, 257 and others) "it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution". The scheme of the Constitution seems to clearly suggest that before rushing to issue a proclamation under article 356, all other possible avenues should be explored and as Dr. Ambedkar said, article 356 should be used only as a matter of last resort. It should first be ensured that the Union had done all that it could in discharge of its duty under article 355, that it had issued the necessary directions under articles 256-257 and that the State had failed to comply with or give effect to the directions.

Use-misuse of Article 356

8.16 Since the coming into force of the Constitution on 26 January 1950, article 356 and analogous provisions have been invoked 111 times. According to a Lok Sabha Secretariat study, on 13 occasions the analogous provision namely section 51 of the Government of Union Territories Act, 1963 was applied to Union Territories of which only Pondicherry had a legislative assembly until the occasion when it was last applied. In the remaining 98 instances the article was applied 10 times technically due to the mechanics of the Constitution in

circumstances like reorganisation of the States, delay in completion of the process of elections, for revision of proclamation and there being no party with clear majority at the end of an election. In the remaining 88 instances a close scrutiny of records would show that in as many as 54 cases there were apparent circumstances to warrant invocation of article 356. These were instances of large scale defections leading to reduction of the ruling party into minority, withdrawal of support of coalition partners, voluntary resignation by the government in view of widespread agitations, large scale militancy, judicial disqualification of some members of the ruling party causing loss of majority in the House and there being no alternate party capable of forming a Government. About 13 cases of possible misuse are such in which defections and dissensions could have been alleged to be result of political manoeuvre or cases in which floor tests could have finally proved loss of support but were not resorted to. In 18 cases common perception is that of clear misuse. These involved the dismissal of 9 State Governments in April 1977 and an equal number in February 1980. This analysis shows that number of cases of imposition of President's Rule out of 111, which could be considered as a misuse for dealing with political problems or considerations irrelevant for the purposes in that article such as mal-administration in the State are a little over 20. Clearly in many cases including those arising out of States Reorganisation it would appear that the President's Rule was inevitable. However, in view of the fact that article 356 represents a giant instrument of constitutional control of one tier of the constitutional structure over the other raises strong misapprehensions.

Sarkaria Commission

8.17 Chapter 6 of the Sarkaria Commission Report deals with emergency provisions, namely, articles 352 – 360. The Sarkaria Commission has made 12 recommendations; 11 of which are related to article 356 while 1 is related to article 355 of the Constitution. Sarkaria Commission also made specific recommendations for amendment of the Constitution with a view to protecting the States from what could be perceived as a politically-driven interference in self-

governance of States. The underlined theme of the recommendations is to promote a constitutional structure and culture that promotes co-operative and sustained growth of federal institutions set down by the Constitution.

Should Article 356 be Deleted?

8.18 The Commission had issued a consultation paper along with a questionnaire with a view to elicit the views and responses of the public. Large majority of the responses were against deletion of article 356 but favoured its being suitably amended to prevent misuse. There are three patent reasons which require the retention of the article:

(i) Article 356 and related provisions were regarded as a bulwark of the Constitution, an ultimate assurance of maintaining or restoring representative government in States responsible to the people.

(ii) In a fairly large number of cases the invocation of article 356 has been found to have been not only warranted but inevitable.

(iii) If this article is deleted, article 365 would lose relevance and use of article 355 in the absence of 356 might bring a drastic change in Union-State relations which may be worse from the point of view of both the States and the Union.

The Commission is, therefore, not in favour of deletion of article 356.

Need for Conventions

8.19.1 In considering the issues raised regarding article 356 the Commission found that a great part of the remedy to prevent its misuse lies in the domain of creating safeguards and constitutional conventions governing its use. The ultimate protection against the misuse of article 356 lies in the character of the

political process itself. The Commission is, therefore, for generating a constitutional culture that relies on conventions and treats them with same respect as a constitutional provision.

8.19.2 Article 356 has been lodged in the Constitution as a bulwark, a giant protection and a remedy of the last resort. The invocation of article 356 is a constitutional device, the operation of which is vested in the executive domain. In invocation, it is therefore essential to preserve its stature in the constitutional scheme. If the exercise of this power is perceived to yield to political expediency, it will greatly damage the majesty of the executive power and the federal balance. **The Commission, therefore, recommends, in the spirit of the framers of the Constitution, that article 356 must be used sparingly and only as a remedy of the last resort and after exhausting action under other articles like 256, 257 and 355.**

8.19.3 It has been widely represented that the process of invocation of article 356 must follow the principles of natural justice and fair consideration. This aspect also weighed heavily during discussions in the Constituent Assembly and the Chairman of the Drafting Committee had hoped that warning would be given to the errant States and they would be given an opportunity to explain their position. One other issue regarding the issue of such a warning is whether it should be made public or given wide publicity. The Commission have considered this aspect very carefully and have come to the conclusion that taking this matter to the public domain at this stage may apparently allow for transparency but is likely to generate a great deal of heat in the political domain providing the anti-social forces a free play for social disharmony and violence. It may also encourage from the very outset a process of litigation that may apply continuous brakes in exercise of the executive responsibility.

8.19.4 The Commission feels that in a large number of cases where article 356 has been used, the situation could be handled under article 355 i.e. without

imposing President's rule under article 356. It is most unfortunate that article 355 has hardly been used.

8.19.5 In case of political breakdown, the Commission recommends that before issuing a proclamation under article 356 the concerned State should be given an opportunity to explain its position and redress the situation, unless the situation is such, that following the above course would not be in the interest of security of State, or defence of the country, or for other reasons necessitating urgent action.

Situation of Political breakdown

8.20.1 One of the principal criticisms against the imposition of the President's rule has been the unseemly hurry of Governors to recommend it - particularly in a politically conflicting context – without exploring all possibilities of having an alternative Government enjoying confidence of the House. Even while making such an exploration the Governors placed excessive reliance on their subjective satisfaction to ascertain majority support for one or the other political party by resorting to headcounts of supporters presented before them by the political parties.

8.20.2 The issue of determining the majority support of a political party in the House has been dealt with in the Rajamannar Committee Report, Sarkaria Commission and the Bommai judgement. The Commission notes that the political events in a divisive context in several States have repeatedly shown tremendous speed and mobility of shifting political loyalties. In such a situation the task that a Governor may impose upon himself to determine the majority support of one or the other party is indeed an onerous one. The assessment of the Governor, no matter how carefully and objectively determined, can loose validity in no time in the climate of quick shifting sands of political loyalty. It is, therefore, not a matter of subjective determination of the Governor or the President. The constitutional requirement is that a Government should enjoy the

confidence of the House and its open and objective determination is possible only on the floor of the House. There may conceivably be exceptional circumstances and situations which are not conducive to hold the floor test. The Commission is not, therefore, in favour of a static binding rule but would rely on a political and constitutional process in a constitutional forum for a valid determination of majority support for a particular party in the House. The procedure suggested forms a part of the Bommai judgement and thus holds ground judicially.

8.20.3 The Commission recommends that the question whether the Ministry in a State has lost the confidence of the Legislative Assembly or not, should be decided only on the floor of the Assembly and nowhere else. If necessary, the Union Government should take the required steps, to enable the Legislative Assembly to meet and freely transact its business. The Governor should not be allowed to dismiss the Ministry, so long as it enjoys the confidence of the House. It is only where a Chief Minister refuses to resign, after his Ministry is defeated on a motion of no-confidence, that the Governor can dismiss the State Government. In a situation of political breakdown, the Governor should explore all possibilities of having a Government enjoying majority support in the Assembly. If it is not possible for such a Government to be installed and if fresh elections can be held without avoidable delay, he should ask the outgoing Ministry, (if there is one), to continue as a caretaker government, provided the Ministry was defeated solely on a issue, unconnected with any allegations of maladministration or corruption and is agreeable to continue. The Governor should then dissolve the Legislative Assembly, leaving the resolution of the constitutional crisis to the electorate.

8.20.4 The problem would stand largely resolved if the recommendations made in para 4.20.7 in Chapter 4 in regard to the election of the leader of the House (Chief Minister) and the removal of the Government only by a constructive vote of no-confidence are accepted and implemented.

8.20.5 Clause (1) of article 356 contains the expression 'or otherwise'. Clearly, the satisfaction of the President, as regards the existence of the situation contemplated under article 356, flows from two streams. It is immaterial that in most cases where article 356 had been invoked in the past it was on the basis of the report of the Governor. Given the circumstances of global nexus in activities of terrorism, insurgency, lawlessness, the material flowing from the source "otherwise" than the report of the Governor is equally germane to the scheme of invoking this provision. If, to meet with the desirable objective of transparency, as suggested by the Sarkaria Commission, the Governor's Report is projected in the public domain by making it a speaking document and given wide publicity, it would raise serious problems in the discharge of the executive responsibility. For purposes of publicity it would be difficult to differentiate between the Report of the Governor and the materials received "otherwise". **The Commission recommends that normally President's Rule in a State should be proclaimed on the basis of Governor's Report under article 356(1). The Governor's report should be a "speaking document", containing a precise and clear statement of all material facts and grounds, on the basis of which the President may satisfy himself, as to the existence or otherwise of the situation contemplated in article 356.**

Constitutional Amendments

8.21.1 Article 356 has been amended 10 times principally by way of amendment of clause 356(4) and by substitution/omission of proviso to Article 356(5). These were basically procedural changes. Article 356, as amended by Constitution (44th Amendment) provides that a resolution with respect to the continuance in force of a proclamation for any period beyond one year from the date of issue of such proclamation shall not be passed by either House of Parliament unless two conditions are satisfied, *viz:-*

(i) that a proclamation of Emergency is in operation in the whole of India or as the case may be, in the whole or any part of the State; and

(ii) that the Election Commission certifies that the continuance in force of the proclamation during the extended period is necessary on account of difficulties in holding general elections to the Legislative Assembly of the State concerned.

8.21.2 The fulfillment of these two conditions together are a requirement precedent to the continuation of the proclamation. It could give rise to occasions for amendment of the Constitution from time to time merely for the purpose of this clause as happened in case of Punjab. Circumstances may arise where even without the proclamation of Emergency under article 352, it may be difficult to hold general elections to the State Assembly. In such a situation continuation of President's rule may become necessary. It may, therefore, be more practicable to delink the two conditions allowing for operation of each condition in its own specific circumstances for continuation of the President's rule. This would allow for flexibility and save the Constitution from the need to amend it from time to time.

8.21.3 **The Commission recommends that in clause (5) of article 356 of the Constitution, in sub-clause (a) the word "and" occurring at the end should be substituted by "or" so that even without the State being under a proclamation of Emergency, President's rule may be continued if elections cannot be held.**

8.21.4 Whenever a proclamation under article 356 has been issued and approved by the Parliament it may become necessary to review the continuance in force of the proclamation and to restore the democratic processes earlier than the expiry of the stipulated period. The Commission are of the view that this could be secured by incorporating safeguards corresponding, in principal, to

clauses (7) and (8) of article 352. **The Commission, therefore, recommends that clauses (6) & (7) under article 356 may be added on the following lines:**

> **"(6) Notwithstanding anything contained in the foregoing clauses, the President shall revoke a proclamation issued under clause (1) or a proclamation varying such proclamation if the House of the People passes a resolution disapproving, or, as the case may be, disapproving the continuance in force of, such proclamation.**
>
> **(7) Where a notice in writing signed by not less than one-tenth of the total number of members of the House of the People has been given, of their intention to move a resolution for disapproving, or, as the case may be, for disapproving the continuance in force of, a proclamation issued under clause (1) or a proclamation varying such proclamation:**
>
> **(a) to the Speaker, if the House is in session; or**
>
> **(b) to the President, if the House is not in session,**
>
> **a special sitting of the House shall be held within fourteen days from the date on which such notice is received by the Speaker, or, as the case may be, by the President, for the purpose of considering such resolution."**

Dissolution of Assembly

8.22.1 When it is decided to issue a proclamation under article 356(1), a matter for consideration that arises is whether the Legislative Assembly should also be dissolved or not. Article 356 does not explicitly provide for dissolution of the Assembly. One opinion is that if till expiry of two months from the Presidential

proclamation and on the approval received from both Houses of Parliament the Legislative Assembly is not dissolved, it would give rise to operational disharmony. Since the executive power of the Union or State is co-extensive with their legislative powers respectively, bicameral operations of the legislative and executive powers, both of the State Legislature and Parliament in List II of VII Schedule, is an anathema to the democratic principle and the constitutional scheme. However, the majority opinion in the Bommai judgement holds that the rationale of clause (3) that every proclamation issued under article 356 shall be laid before both Houses of Parliament and shall cease to operate at the expiry of two months unless before the expiration of that period it has been approved by resolutions passed by both Houses of Parliament, is to provide a salutary check on the executive power entrenching parliamentary supremacy over the executive.

8.22.2 The Commission having considered these two opinions in the background of repeated criticism of arbitrary use of article 356 by the executive, is of the view that the check provided under clause 3 of article 356 would be ineffective by an irreversible decision before Parliament has had an opportunity to consider it. The power of dissolution has been inferred by reading sub clause (a) of clause 1 of article 356 along with article 174 which empowers the Governor to dissolve Legislative Assembly. Having regard to the overall constitutional scheme it would be necessary to secure the exercise of consideration of the proclamation by the Parliament before the Assembly is dissolved.

8.22.3 **The Commission, therefore, recommends that article 356 should be amended to ensure that the State Legislative Assembly should not be dissolved either by the Governor or the President before the proclamation issued under article 356(1) has been laid before Parliament and it has had an opportunity to consider it.**

Coorg Organisations

8.23.1 The Commission considered memoranda submitted by Coorgi organizations. While one wanted a separate State or Union Territory status for Coorg, the other opposed it. The Commission appreciates the contribution made by the Coorgis to the national cause and **recommends that the Government may consider having a Sainik School and setting up a Development Board for them and also the demand for a University in Coorg.** The Commission did not favour the demand for a separate State or granting of Union Territory status for the area.

Sindhi Organisations

8.23.2 The Commission considered the representations made by various Sindhi organizations. It was agreed that some of the grievances of the community were genuine and required action and it was not possible for the Commission to consider granting any separate constitutional status to the Sindhi community as such or to consider any request for carving out a separate territory as a Sindhi state or a Sindhi region. **However, the Commission recommends that steps may be taken for better protection of Sindhi language and culture by setting up a Centre of Sindhi Language and Culture with the State providing necessary facilities for the same. The Commission recommends further that the difficulties faced by the Sindhi migrants may be examined and corrective measures taken to facilitate grant of citizenship as per the existing law.**

CHAPTER 9

DECENTRALISATION AND DEVOLUTION

CONTENTS

A. Panchayats

9.1 ➢ Background

9.2 ➢ Vision of the Founding Fathers

9.3 ➢ Record of Implementation

9.4 ➢ Constitutional Provisions

9.5 ➢ The Problems

9.6 ➢ Elections

9.7 ➢ Functional Domain

9.8 ➢ Financial Domain

9.9 ➢ Personnel System

9.10 ➢ Dissolution of Panchayats

9.11 ➢ Coordination Machinery

9.12 ➢ Audit of Accounts

B. Municipalities

9.13 ➢ Dissolution of Municipalities

9.14 ➢ Qualifications and Disqualifications for Membership

9.15 ➢ Election Expenses and Code of Conduct

9.16 ➢ Ensuring Regular Elections

9.17 ➢ Electoral Rolls and Delimitation

9.18 ➢ Reservations

9.19 ➢ State Election Commissions

9.20 ➢ Functional Domain

9.21 ➢ Financial Domain

C. Cantonments

9.22 ➢ Administration of Cantonments

D. Institutions In North East India

9.22 ➢ Background and Objective

9.23 ➢ General Recommendations

9.24 ➢ Specific State-wise Recommendations

9.25 ➢ Nagaland

9.26 ➢ Assam

9.29 ➢ Meghalaya

9.30 ➢ Tripura

9.31 ➢ Mizoram

9.32 ➢ Manipur

9.33 ➢ Arunachal Pradesh

CHAPTER 9

DECENTRALISATION AND DEVOLUTION[1]

A. Panchayats

Background

9.1 The search for ways to rebuild India free from the yokes of deprivation, disparities, discrimination proceeded along with the struggle against foreign rule. It was recognized that political, economic, social and cultural spheres of life were interdependent. Gandhiji had advocated the concept of village republics and village self-government. His vision was that of each village being a republic, self sufficient for its own vital needs, and yet inter-dependent. In this model, the village was the centre of a super-structure of concentric circles of governance with a bottom up approach.

Vision of the Founding Fathers

9.2 The Draft Constitution came under sharp criticism in the Constituent Assembly as the popularly elected Panchayats of Gandhiji's dreams did not find a place therein. The only concession made to the Gandhian sentiment, however, was addition of article 40 (as added to draft Constitution by way of amendment) among the Directive Principles of State Policy. The article provides that the State shall take steps to organize village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. Entry 5 of List II (State List) of the Seventh Schedule empowers the State Legislatures to make laws with respect to local self-government or village administration. K. Santhanam put on record the intent of the Constituent Assembly in unambiguous terms:

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[1] *See* also the Consultation Papers on "Review of the Working of the Constitutional Provision for Decentralisation (Panchayats)", Decentralisation and Municipalities" "Empowering and Strengthening of Local Self-Government in Cantonments" and "Empowerment and Strengthening of Panchayati Raj Institutions/ Autonomous District Councils/Traditional Tribal Governing Institutions in the North East India" issued by the Commission, in Volume II (Book 2).

"What is attempted to do here is to give a definite and unequivocal direction that the State shall take steps to organize Panchayats and shall endow them with necessary powers and authority to enable them to function as units of self-government. That the entire structure of self-government, of independence in this country should be based on organized village community life is the common factor of all the amendments tabled and that factor has been made the principal basis of this amendment. I hope it will meet with unanimous acceptance."[2]

Record of Implementation

9.3 The sad fact is that only some sporadic initiatives were taken during 1950-1980. The most serious attempt was in the late 1950s following the review of the working of the community development programme by the Balwant Rai Mehta Committee. The Committee held that in the absence of democratic decentralization, no meaningful and sustained development could be expected. Following the Mehta Committee Report, States like Andhra Pradesh, Rajasthan, Maharashtra and Gujarat took some legislative and administrative initiatives to set up Panchayat Raj Institutions. But it was only in the late 1980s that the first ever effective initiative was taken.

Constitutional Provisions

9.4.1 The Constitution (73rd Amendment) Act, 1992 relating to Panchayats containing articles 243 to 243-O and the Constitution (74th Amendment) Act, 1992 relating to Municipalities (articles 243P to 243ZG) imparted some basic features of certainty, continuity and strength to Panchayat Raj institutions all over the country.

9.4.2 The main features of the 73rd Amendment are - (i) a three-tier system of Panchayat Raj for all States having a population of over twenty lakhs; (ii) Panchayat elections to be held regularly every five years; (iii) reservation of seats for the Scheduled Castes and Scheduled Tribes and for women (not

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[2] See Debates dated 22nd November, 1948 in 'Constituent Assembly Debates' Volume 7 (Book No. 2), Lok Sabha Secretariat Reprint (1999 Edition) p. 520.

less than one-third of seats), (iv) constitution of State Finance Commissions; (v) constitution of District Planning Committees to prepare development plans for the district as a whole; (vi) establishment of State Election Commissions; and (vii) establishment of Gram Sabhas.

The Problems

9.5.1 With a view to generating a debate and eliciting public opinion before examining the problems and suggesting remedial measures, the Commission released Consultation Papers on (i) Panchayats, (ii) Municipalities, (iii) Cantonments and (iv) Panchayat institutions/Autonomous District Councils/ traditional tribal institutions in the North-eastern India. The Commission heard the views of a delegation of representatives of Panchayat Raj Institutions [PRIs] and representatives of traditional tribal institutions in the North-East region. It also considered the responses to the Questionnaires and the general memoranda received by it.

9.5.2 In the process of implementation of the 73rd and 74th Amendments, considerable gaps have been noticed. The Union Government and the State Governments continue to exercise powers in planning and the Panchayats and Municipalities do not enjoy autonomy – financial or administrative – as institutions of local self-government. While today Panchayats elect some three million members of whom one-third are women, the objectives envisaged in the Amendments have not been fully achieved even after more than eight years.

Elections

9.6.1 The State Governments often delay Panchayat elections on purely political considerations. They can do so, because they retain some powers relating to the conduct of elections under the State Acts/Rules. The State Election Commission (SEC) has to depend upon the State Government for

1206 LJ&CA/2002—19A

logistic support that includes staff and finances. Besides, certain important powers like issuance of election notification, delimitation of constituencies, earmarking of reserved seats, etc. are retained by the State Governments in many States. Considering all these, the Commission feels that there is strong case for further strengthening the hands of the SEC by making specific provisions in the Constitution itself.

9.6.2 Sometimes, the SECs have to fight long battles against the State Governments in order to fulfil their constitutional duty to hold elections as per the provisions of law. In order to ensure the accountability of the States in timely conduct of Panchayat and Municipal elections, it is felt that the SECs should function independent from the State Governments and draw expertise and guidance from the Election Commission of India.

The Commission, therefore, recommends that article 243K and 243ZA should be amended on the following lines:

1. Amendment of article 243K.-

In article 243K of the Constitution,-

(a) for clause (1), the following clauses shall be substituted, namely:-

"(1) Subject to the provisions of clause (1A), the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.

(1A) The Election Commission shall have the power to issue any directions or instructions to the State Election Commission for the discharge of its functions under clause (1).".

1206 LJ&CA/2002—19B

(b) after clause (4), the following clause shall be inserted, namely:-

"(5) The State Election Commission shall submit its annual report to the Election Commission and to the Governor, every year and it may, at any time, submit special reports on any matter which in its opinion is of such urgency or importance that it should not be deferred till the submission of its annual report.".

2. Amendment of article 243ZA.-

In article 243ZA of the Constitution, for clause (1), the following clauses shall be substituted, namely:-

"(1) Subject to the provisions of clause (1A), the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Municipalities shall be vested in the State Election Commission referred to in article 243K.

(1A) The Election Commission shall have the power to issue any directions or instructions to the State Election Commission for the discharge of its functions under clause (1).".

Functional Domain

9.7.1 Article 243G along with the Eleventh Schedule indicates the kind of functions to be discharged by the Panchayats. It does not guarantee assignment of a set of exclusive functions to the Panchayats. Hence the kind of role they would be expected to play in governance depends on the regime that controls the government of a State.

The Commission recommends that Panchayats should be

categorically declared to be 'institutions of self-government' and exclusive functions be assigned to them.

Even in the States which have shown political will to decentralise, devolution has not gone beyond entrusting to them responsibility for implementation of the schemes/projects conceived by the State or Union government. As a result, Panchayats have not blossomed into institutions of self-government. Instead they have been reduced to an implementing arm of the State Government.

9.7.2 Article 243G alongwith the Eleventh Schedule indicates the kind of functions to be discharged by the Panchayats. It does not guarantee assignments of a set of exclusive functions to the Panchayats. Hence the kind of role they would be expected to play in governance depends on the regime that controls the government of a State.

The Commission, therefore, recommends that Panchayats should be categorically declared to be "institutions of self-government" and exclusive functions should be assigned to them. For this purpose, article 243G should be amended to read as follows:

Substitution of article 243G.- For article 243G, the following article shall be substituted, namely:-

"Powers, authority and responsibility of Panchayats

243G. Subject to the provisions of this Constitution, the Legislature of a State shall, by law, vest the Panchayats with such powers and authority as are necessary to enable them to function as institutions of self-government and such law shall contain provisions for the devolution of powers and responsibilities upon Panchayats at the appropriate level, subject to such conditions as shall be specified therein, with respect to-

(a) preparation of plans for economic development and social

justice;

(b) the implementation of schemes for economic development and social justice as shall be entrusted to them including those in relation to the matters listed in the Eleventh Schedule."

Similar amendments should be made in article 243W relating to the powers, authority and responsibilities of Municipalities, etc.

Financial Domain

9.8.1 As an institution of self-government, the Panchayats should have adequate fiscal capability. To be an institution of self-government, a Gram Panchayat should, as far as possible, be a viable unit. It should be capable of generating internal resources by using its own fiscal powers that include taxing power commensurate with the functions assigned to it. The PRIs at present are principally grant-fed and their dependence upon the State Government even for carrying out their routine functions is heavy. Among the three-tiers of Panchayats, the Gram Panchayats (GPs) are comparatively in a better position. This is so because the GPs have some taxing power of their own, while the other two tiers are dependent only on tolls, fees and non-tax revenue for generating internal resources. The Commission feels that major fiscal restructuring and financial resources are necessary to enable the Panchayats to function as viable local self-government institutions. Some of the measures necessary for such reforms may be taken even within the framework of existing constitutional provisions.

9.8.2 Articles 243H and 243X are enabling provisions that give authority to the State Legislature to authorise the Panchayats and Municipalities in respect of levy, collection and appropriation of taxes, duties, fees and tolls aw well as for the creation of a fund within the Panchayat and Municipal institutions to regularise and control inflow and outflow of financial resources. The said

articles do not serve their purpose since some State Governments appeal to be reluctant to share their fiscal powers with the local self-government institutions. The Commission, therefore, feels that the only way out is to introduce the concept of a separate tax domain for the local bodies. The Commission considered the suggestion to provide a Local List in the Seventh Schedule for giving fiscal autonomy to the local-self government institutions. However, the Commission feels that it would be too early to consider such a proposal.

The Commission, therefore, recommends that the Eleventh and the Twelfth Schedules should be restructured in a manner that creates a separate fiscal domain for Panchayats and Municipalities. Accordingly articles 243H and 243X should be amended making it mandatory for the Legislature of the States to make laws devolving powers to the Panchayats and Municipalities.

9.8.3 Sub-clauses (bb) and (c) of clause (3) of article 280 require the Finance Commission to make its recommendations in respect of the Panchayats and Municipalities "on the basis of the recommendations made by the Finance Commission of the State". The Eleventh Finance Commission found it difficult to work within this framework because of various problems. It found that in some States, the State Finance Commissions (SFCs) were either not constituted or did not submit their reports. Again, in view of the 'heterogeneity of approach' of different SFCs and differences in contents and periods covered by them, the Eleventh Finance Commission found it difficult to form its opinion only on the basis of their recommendations. For avoiding such a situation in future and **in order to enable the Finance Commission to take a macro-level view, it is recommended that the provisions of article 280(3)(bb) and (c) should be suitably amended. The words "on the basis of the recommendation" in these clauses may be replaced by the words "after taking into consideration the recommendations."**

9.8.4 In order to enable the Finance Commission to give due weight to the reports of SFCs for assessing the situation in each State, it is necessary to synchronize the periods covered by the reports of both of them. **In the part of clause (1) of article 243-I which calls for constitution of SFC at the expiration of every fifth year, in line with article 280(1), the words "or at such earlier time as the Governor considers necessary" may be added after the words 'fifth year'. While it is for the State Legislature to ensure that the Government implements fully its assurances, there should be constitutional obligations for placing the Action Taken Report (ATR) before the legislature within 'six months' after the submission of the report. Clause (4) of article 243-I may need to be amended accordingly.**

9.8.5 Taxes on professions, trades, callings and employment under article 276 have been a traditional source of revenue for the local bodies. (Of late, there is, however, a tendency for the State Governments to take over such powers from the local bodies). One of the impediments in generating substantial revenue from the levy and collection of this tax is that the upper ceiling (presently, Rs. 2500 per annum) has been constitutionally fixed [*see* article 276(2)]. While there is a need for fixing the upper ceiling of the tax centrally in order to avoid the charge of double taxation on 'income', constitutional provision introduces unnecessary rigidity. **It would be better to vest in Parliament the necessary legislative power of fixing upper limit of taxes on professions, trades, callings and employment under article 276.**

9.8.6 Now-a-days, the local governments are being encouraged to take recourse to borrowing for financing asset-building and/or remunerative projects. Some Municipal Corporations have been given power even to go to the capital market. The Panchayats of West Bengal are permitted to borrow from the financial institutions, subject to Government approval. With the role

we are envisaging for PRIs in the governance structure, there is no reason as to why the borrowing power should not be constitutionally given to the Panchayats, especially, the Zilla Parishads. **All local authorities may be allowed to borrow from the State Government and financial institutions.**

Personnel System

9.9.1 An institution of self-government must have the power to recruit and control the officers and other employees required for managing its functions. The Constitution is totally silent about this vital aspect of institutional autonomy. The Commission feels that failure to address the human resource issue has definitely affected the growth of Panchayats as self-governing institutions. **It is necessary that an enabling provision is made in Part IX of the Constitution permitting the State Legislature to make, by law, provisions that would empower the State Government to confer on the Panchayats full power of administrative and functional control over such staff as are transferred following devolution of functions, notwithstanding any right they may have acquired from State Act/Rules. They should also have the power to recruit certain categories of staff required for service in their jurisdiction.**

Dissolution of Panchayats

9.10 Clause (1) of article 243E provides that every Panchayat, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer. However, the corresponding provision, namely, clause (1) of article 243U relating to Municipalities, makes a specific proviso to the effect that a municipality shall be given a reasonable opportunity of being heard before its dissolution. It has been noticed that there is no corresponding proviso in article 243E relating to Panchayats.

The Commission recommends that a proviso to clause (1) of article 243E may be inserted to the effect that a reasonable opportunity of being heard shall be given to a Panchayat before it is dissolved.

Coordination Machinery

9.11 There is need for coordination among the Panchayats. They also need continued support from the State Government. Gujarat, Orissa and Karnataka Acts provide for a coordination body.

The Commission recommends that a provision for constitution of a State Panchayat Council under the chairmanship of the Chief Minister [on the pattern of Gujarat State Council for Panchayats as provided in the Gujarat Panchayats Act, 1993] may be made in the Constitution on the analogy of the provision in article 263 of the Constitution relating to the Inter-State Council. The leader of the opposition may be made *ex-officio* vice-chairman of the Council to provide a consensual approach to the development of Panchayats as fully democratic, efficient and responsible institutions.

Audit of Accounts

9.12 The Commission noted with concern that there is considerable lack of accountability of Panchayats because of inadequate provisions in law relating to audit of accounts of public bodies. There is no time frame to conduct the audit of accounts of a given year, submit the audit report or comply with the objections raised in the report. Delay in audit provides opportunity for misuse of funds, tardy implementation of projects and over-all weakening of the system.

The Commission recommends that necessary provisions may be made for audit of Panchayat accounts to ensure that all works related to

audit (conduct of audit, submission of audit report and compliance with audit objections if any) are completed within a year of the close of a financial year. To ensure uniformity in the practice relating to audits of accounts, the Comptroller and Auditor-General of India be empowered to conduct the audit or lay down accounting standards for Panchayats.

B. Municipalities

Dissolution of Municipalities

9.13 **The Commission recommends that whenever a Municipality is superseded, a report stating the grounds for such dissolution should be placed before the State Legislature.** This will be a deterrent to treating supersession casually and resorting to it because of political expediency.

Qualifications and Disqualifications for Membership

9.14 Articles 243F and 243V contain identical provisions so far as disqualifications for membership in a Panchayat or a Municipality are concerned. The main principle followed is that the grounds of disqualification should be the same as applied for elections to the State Legislatures. But since the State laws may make additional provisions, these are spread over several State laws. Some disqualifications, as in Himachal Pradesh or Haryana barring all licensed architects, town planners, surveyors, etc., from contesting local elections merely because they are licensed by the Municipality may be carrying the notion of conflict of interest too far. It may be expected that the State laws will be modified in the context of experience. **The Commission recommends that all provisions regarding qualifications and disqualifications for elections to local authorities should be consolidated in a single law and until that is done, each State should prepare a manual of existing provisions for public information.**

Election expenses and code of conduct

9.15 Having regard to the population, topography, etc., election expenses may vary from State to State.

The Commission recommends that the State Election Commission (SEC) should have the authority to prescribe ceiling of expenses and code of conduct in elections. Further, the State laws should clearly specify the powers of the SEC to disqualify candidates in the event of violation of these laws.

Ensuring regular elections

9.16.1 Articles 243E and 243U of the Constitution contain identical provisions. Clause (1) of article 243E states that every Panchayat, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer". Similarly, clause (1) of article 243U states that every Municipality, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting. The provisions are clear and unambiguous and hence, there is no scope for any other interpretation. Clause (3) of article 243E and that of 243U further state that elections to constitute a Panchayat and a Municipality respectively shall be "completed before the expiry of its duration specified in Clause (1)". Both the articles 243E and 243U, in sub-clause (1) thereof contains a provision for dissolution of panchayat or municipality respectively. Here again sub-clause (b) of clause (3) in both the articles stipulate that elections have to be completed "before the expiration of a period of six months from the date of its dissolution."

9.16.2 **The Commission recommends that it should be the duty of a State and the Union (in case of Panchayats and Municipalities located in Union territories) to ensure the completion of elections within the**

stipulated limits. It should also be duty of the State Election Commissioner to ensure this and in the event of possible delay make a report to the Governor of the State drawing his attention to the problems and suggesting remedial action to fulfill the requirements of the Constitution. Article 243K(I) and article 243 ZA(I) state that the "superintendence, direction and control of the preparation of electoral rolls and the conduct of all elections to the Panchayats/Municipalities shall be vested in a State Election Commission." This is a composite set of responsibilities. The preparation of electoral rolls and the conduct of elections involve several processes and actions which are closely inter-related. The words, "superintendence, direction and control" are comprehensive and unambiguous and do not permit any artificial division. Clause (4) of 243K and Clause (2) of 243 ZA do provide for a State Legislature to make provisions with respect to all matters relating to or in connection with these elections. However, this has to be subject to the provisions of the Constitution and can relate only to processes to be followed and guidelines for this purpose so that such processes serve public interest and ensure free and fair elections. They do not permit splitting up of the composite responsibilities as stated in article 243K and 243ZA. However, experience indicates that certain important parts of these responsibilities such as delimitation of territorial constituencies or reservation of seats or rotation of such reservation among constituencies have been assumed by some State Governments. The effect of this has been to enable these State Governments to intervene in the composite and integrated process of conducting elections and thereby hold up the same if they so chose to do.

The Commission, therefore, recommends that article 243K and 243ZA should be suitably amended to specify that the responsibility for the conduct of elections shall include all preparatory steps for the same including preparation of electoral rolls. The Commission further

recommends that the functions and responsibilities of delimitation, reservation and rotation of seats and matter connected therewith should be vested in a delimitation commission constituted by law made by the appropriate Legislature and not in the SEC.

Electoral Rolls and Delimitation

9.17.1 (a) Under articles 243K and 243ZA, the preparation of electoral rolls is the responsibility of the State Election Commission (SEC). The general practice has been for the SECs to adopt the electoral rolls available for the Assembly and Lok Sabha elections. In some cases however the electoral rolls for the local elections are prepared afresh and the two rolls may differ. As recommended by the Commission earlier, the Constitution should specifically stipulate a common electoral roll both for local elections to Panchayats and Municipalities and to the Parliament and State Legislative Assemblies. In other words, the electoral roll for the Panchayat/Municipal elections should be the same electoral roll prepared by the Election Commission of India under article 327 of the Constitution read with the Representation of the People Act, 1950 and as updated by the SECs. The processes for preparing the roll as also its periodical revision should be uniform throughout the country.

9.17.2 The Election Commission has been evolving over a period of time a system whereby each polling station in an Assembly constituency has a unique identity which is linked to the roll of electors using that polling station. It is possible that panchayat and municipal elections may require more polling stations. If so, these additional polling stations should be extensions or sub-units of the main polling station. This will ensure a 'building block' approach for elections in the country whereby the smallest unit will be a polling station on a sub unit theory. A certain number of these will form a 'panchayat ward' or a 'municipal ward' which in turn will be grouped into Panchayats and Municipalities or Assembly segments and Lok Sabha constituencies. The

voter is the same. **The R.P. Act and State laws should specify that common polling stations should be used for elections to local bodies, State Legislatures and Parliament.**

9.17.3 While delimitation of the constituencies for Panchayat and Municipal elections should be under the control and direction of the SEC, the Constitution should stipulate that such delimitation should be adjusted after every census and not for every election. **The State laws should provide guidelines for the delimitation work such as parity, as far as possible, in the ratio between the population of a territorial constituency and the number of seats within the same class of Panchayats or Municipalities.** The extent of permissible variations should also be mentioned. Parity as a requirement is stipulated in the proviso to article 243C so far as panchayats are concerned but is missing in article 243R relating to municipalities.

9.17.4 **State laws should specify that changes in the administrative boundaries of districts, sub-divisions, taluks, police stations, etc., should not be made within six months prior to a panchayat or a municipal election.**

Reservations

9.18.1 Reservation and rotation of reserved constituencies and division of responsibilities in this regard is another cause for delay in holding elections in time. If rotation takes place during every election, a person elected on the reserved seat does not get an opportunity of occupying the same seat for a second term. This proves to be a disincentive for members to work hard for their constituency. It is particularly disadvantageous to women and fresh entrants to build up their capacity and experience as elected representatives.

9.18.2 Articles 243D and 243T contain identical provisions so far as

reservation of seats in Panchayats and Municipalities for SCs/STs and women are concerned. However there are some ambiguities about the rotation of such reserved seats. The words used in both the articles are "may be allotted by rotation". However in the third proviso to clause (4) of article 243D regarding reservation of the offices of chairpersons the words used are "shall be allotted by rotation". The constitutional provisions also do not specify the frequency of rotation. Moreover, in clause (4) of article 243T there is no stipulation for rotation. **To remove ambiguities, articles 243D and 243T should be suitably amended to provide for rotation and changes only at the time of delimitation and not in between. State laws should provide the guidelines for the process of reservation which should ensure transparency and adequate opportunities for eliciting voter response.**

9.18.3 Clause (6) of article 243D and clause (6) of article 243T enable a State Legislature to provide for reservation of seats as also offices of chairpersons in Panchayats and Municipalities in favour of backward class of citizens. Neither of the articles stipulate any ceiling for the total number of reserved seats and reserved offices. Since not less than one-third of total seats has been specified as the minimum for women; the reservation additionally made for backward classes can take a large proportion. **To clarify the precise position, the overall total of reserved seats and reserved offices in Panchayats and Municipalities should be specified.**

State Election Commissions

9.19.1 It is essential that the machinery for organizing the local elections is adequately strengthened. For this purpose, **the Commission recommends that the State Election Commissioner should have a fixed term of 5 years. He/she should be equal to a Judge of the High Court. The broad qualifications for a State Election Commissioner may be specified under the State law.** Since the conduct of elections is a major logistical exercise,

administrative experience should be stressed.

9.19.2 Notification for all elections to Panchayats and Municipalities should be issued by the SEC.

Functional Domain

9.20 In the period after independence, there has been a steady diversion and diminution of responsibilities in the sphere of municipal functions. There has been a growth of development activities of Municipalities and they have become afflicted with maladies such as corruption, unresponsiveness, financial mismanagement, lack of accountability, political interference, etc. It was expected that the Constitution 74th Amendment would reverse this trend and once again entrust the responsibilities for the upkeep and development of towns and cities to Municipalities and corporations. Article 243G and 243W of the Constitution provide for the State laws to endow the Panchayats and Municipalities respectively with such powers and authority as may be necessary to enable them to function as institutions of self-government. The Eleventh and Twelfth Schedules to the Constitution Lists 29 and 18 items respectively for Panchayats and Municipalities. It is important to note that neither these Schedules are exhaustive nor they signify a variety of functions. In essence, these Schedules are illustrative only. The Commission reiterates its recommendations made in para 9.8.2 above.

Financial Domain

9.21 The functions, functionaries and finances have to go together for any process of devolution to be meaningful. It has been observed that the mismatch between functions and finances and near bankruptcy in many situations have been recurring features of municipal body finances in the country. The Constitution, even after the 74th Amendment does not provide

for an autonomous domain of tax or revenue raising powers to Municipalities. These continue to be determined and regulated by the State Governments. The State Governments specify the taxes that the Municipalities can levy and collect which are taken from the State List in the 7th Schedule. Historically these taxes have included taxes on lands and buildings, taxes on entry of goods into a local area for consumption, taxes on animals and boats, taxes on entertainment, taxes on professions, trades, etc. There are significant variations between the States. Since there is no distinct tax domain of the Municipalities as such, the control of the State Governments in determining the tax, tax rates or even tax exemptions is significant.

The Commission recommends that the concept of a distinct and separate tax domain for municipalities should be recognised. This concept should be reflected in a list of taxes in the relevant schedule. Carving out items from the existing State lists such as item 49 (taxes on land and buildings) and item 52 (taxes on entry of goods into a local area for consumption) should not be difficult. The Commission also reiterates its recommendations in para 9.8 above.

C. Cantonments

Administration of Cantonments

9.22 After considering the suggestions in regard to cantonments, the Commission decided that it was not necessary to make any recommendations in that regard.

D. Institutions in North East India

Background and Objective

9.22.1 The North Eastern region of India is one of its richest regions in terms

1206 LJ&CA/2002—20A

of natural resources. It is also one of the most beautiful parts of India. However, a sense of alienation, misgovernance, corruption and under development are pervasive features of the region. To tackle the problems of this unique area and to preserve the democratic traditions and cultural diversity of its people, the framers of the Constitution conceived of the instrument of tribal self-rule. This stands embodied in the Sixth Schedule to the Constitution. The drafting of this Schedule was done by a Sub-Committee on North East Frontier (Assam Tribal and excluded areas) of the Constituent Assembly headed by Shri Gopinath Bardoloi, the then Premier of Assam. The effort was to accommodate the collective aspirations of tribal communities within the broader framework of a democratic political system.

9.22.2 The provisions of the Sixth Schedule are applicable to the administration of the tribal areas in the States of Assam, Meghalaya, Tripura and Mizoram. Arunachal Pradesh (earlier known as North Eastern Frontier Agency) was also part of the Sixth Schedule and was administered by the Governor of Assam. Assam (barring two districts covered by the Sixth Schedule), Arunachal Pradesh, Manipur and Sikkim have passed legislation bringing the local bodies under the provisions of the 73rd and 74th Amendments to the Constitution.

9.22.3 **The North Eastern part of India with its large number of tribal communities and emerging educated elites has self-governing village councils and organized tribal chiefdoms. Efforts are to be made to give all the States in this region the opportunities provided under the 73rd and 74th Constitution Amendments. However, this should be done with due regard to the unique traditions of the region and the genius of the people without tampering with their essential rights and giving to each State the chance to use its own nomenclature for systems of governance which will have local acceptance.**

1206 LJ&CA/2002—20B

9.22.4 The Commission feels that our efforts must be to develop those instruments of political government to bring self-governance to the region and to calm the passions of divisive trends. The future of the North Eastern States hinges on choosing self-governance. During the last few decades, the system of local-governance promoted under the provisions of the Sixth Schedule has been seeking to guarantee political dominance for backward groups, better local governance at the community level, better economic development and ethnic security for those who feel threatened by large scale influx of illegal migrants and even settlers from other parts of India.

9.22.5 The other regions of the country where there are large population of tribals are covered by the provisions of the Fifth Schedule. This is totally different from the Sixth Schedule States where the emphasis is on self-rule because many of the communities inhabiting these areas had ruled themselves until the British subjugated them in the 19th century. The issues of emotional, physical and political distance and alienation still remain.

General Recommendations

9.23 After carefully studying the existing position of local self- governance in the various North-eastern States, the Commission makes the following general recommendations:-

(i) Careful steps should be taken to devolve political powers through the intermediate and local-level traditional political organisations, provided their traditional practices carried out in a modern world do not deny legitimate democratic rights to any section in their contemporary society. The details of state-wise steps to devolve such powers will have to be carefully considered in a proper representative

meeting of traditional leaders of each community, opinion builders of the respective communities and leaders of state and national stature from these very groups. A hasty decision could have serious repercussions, unforeseen and unfortunate, which could further complicate and worsen the situation. To begin with, the subjects given under the Sixth Schedule and those mentioned in the Eleventh Schedule could be entrusted to the Autonomous District Councils (ADCs). The system of in-built safeguards in the Sixth Schedule, should be maintained and strengthened for the minority and micro-minority groups while empowering them with greater responsibilities and opportunities, for example, through the process of Central funding for Plan expenditure instead of routing all funds through the State Governments. The North Eastern Council can play a central role here by developing a process of public education on the proposed changes, which would assure communities about protection of their traditions and also bring in gender representation and give voice to other ethnic groups.

(ii) Traditional forms of governance must be associated with self-governance because of the present dissatisfaction. However, positive democratic elements like gender justice and adult franchise should be built into these institutions to make them broader based and capable of dealing with a changing world.

(iii) The implementation of centrally funded projects from various departments of the Union Government should be entrusted to the ADCs and to revived village councils with strict audit by the Comptroller and Auditor-General of India.

(iv) The process of protection of identity and the process of

development and change are extremely sensitive. These twin processes need to be understood in the framework of a changing world and the role of all communities, small and large, in that world. Therefore, the North Eastern Council should be mandated to conduct an intensive programme of public awareness, sensitization and education through non-government organizations, State Governments, and its own structure to help bring about such an understanding of the proposals given below.

(v) The provisions of the Anti-Defection Law in the proposed revised form as now recommended by the Commission, vide paragraph 4.18.2 shall be made applicable to all the Sixth Schedule areas.

(vi) Given the demographic imbalance which is taking place in the North-East as a result of illegal migration from across the borders, urgent legal steps are necessary for preventing such groups from entering electoral rolls and citizenship rolls of the country. The recommendations of this Commission for issuance of multi-purpose identity cards to all Indian citizens be made mandatory for all Indian residents in the North East on a *high-priority basis* and the Citizenship Act should be reviewed to plug the loopholes which enable illegal settlers to become 'virtual' citizens in a short span of time, using a network of touts, politicians and officials.

(vii) A National Immigration Council be set up under law to examine and report on a range of issues including Work Permits for legal migrants, Identity Cards for all residents and the enactment of a National Migration Law and a National Refugee Law, review of the Citizenship Act, the

Illegal Migrants Determination by Tribunal Act and the Foreigners Act.

(viii) Local communities be involved in the monitoring of our borders, in association with the local police and the Border Security Force.

Specific State-wise Recommendations

9.24 In addition to the above, some specific reforms are recommended by the Commission in regard to individual States in the North Eastern region of India.

9.25 ***Nagaland***: The case of Nagaland is quite different from the position of other North Eastern States in view of the provisions of article 371A of the Constitution inserted by the Constitution (Thirteenth Amendment) Act, 1962 and the Nagaland Tribe, Area, Range and Village Council Act, 1966. Article 371A specifically provides that no Act of Parliament in respect of (i) religious or social practices of the Nagas, (ii) Naga customary law and procedure, (iii) administration of civil and criminal justice involving decisions according to Naga customary law; and (iv) ownership and transfer of land and its resources shall apply to the State unless the Legislative Assembly by a resolution so decides. In addition, the Governor of Nagaland has special powers to act with regard to internal disturbances; powers which are virtually unchallengeable. The Nagaland Tribe, Area, Range and Village Council Act, 1966 provides for the creation of a tribal council for each tribe, an Area Council for Kohima and Dimapur, a Range Council where there is a recognized range in the Mokukchung and Kohima Districts and Village Councils for one or more villages in Kohima and Mokukchung, wherever they may be deemed necessary by the Deputy Commissioner. The Village Development Board scheme was started in 1970s to enable village councils to function effectively and with autonomy. The Village Development Boards are now receiving central funds and about 1000 village development boards are functioning with assets totalling about twenty crores of rupees. The Commission elicited views

of the State Government and the general public as to how a long term settlement of the political issues of the Naga leadership could be arrived at and as to how much autonomy could be given to the local communities to promote self-governance and a sense of ownership. The Commission notices the efforts being made by the Government to arrive at a political solution. It is to be hoped that this process would contribute to peace and stability.

The Commission recommends that in Nagaland -

(1) **Naga Councils be replaced by elected representatives of various Naga society groups with an intermediary tier at the district level.**

(2) **Village Development Boards be less dependent on State and receive more Centrally-sponsored funds.**

9.26 ***Assam***: The division of the composite State of Assam led to the drawing of new boundaries. The North Cachar hills sub-division of the United Mikir and Cachar Hills District was upgraded to a district in 1970. The Mikir Hills District section was renamed as Karbi Anglong in 1976. Both the districts have Autonomous Councils. For each autonomous district, the Sixth Schedule provides for a District Council consisting of not more than 30 members for a term of five years. The Governor nominates not more than four members to the Council while the others are elected on the basis of adult suffrage. The Chief Executive Member (CEM), the chairman and the deputy chairman (equivalent to Speaker and the deputy Speaker) are elected from among the Members and the CEM selects the other executive members.

9.27 There are different internal rules for different Autonomous District Councils. In some Councils like Mara in Mizoram, the electorate are eligible adults and in certain others like Karbi Anglong right to access to traditional lands and length of stay in the region are regarded as qualifying criteria for being included in the voters' list for the ADCs.

9.28 **As regards Assam, the Commission recommends that (1) the Sixth Schedule should be extended to the Bodoland Autonomous Council with protection for non-tribal, non-Bodo groups, (2) other Autonomous Councils be upgraded to Autonomous Development Councils with more Central funds for infrastructure development; within the purview of the 73rd Amendment but also using traditional governing systems at the village level.**

9.29 ***Meghalaya***: In Meghalaya, the District Councils are dominated by the tribal communities. The major tribes of the State are Khasi, Jaintia and Garo. Besides District Councils, there are traditional ruling systems, namely, the Syiems (rajas) of the Khasi Hills. The Dolois of the Jaintia and the Nokmas of the Garos. Of these three, the Khasi traditional polity was regulated under a three tier system with the Durbar Shnong *i.e.,* Village Council presided by the Rangbah Shnong (headman) at the base, the Durbar Hima *i.e.,* State Assembly presided by the Syiem or the equivalent of a king at the apex. The Dolois of the Jaintia Hills and the Nokmas or traditional headmen of the Garos are not as well organized as the Syiemships. There are at present competing systems of authority each of which is seeking to serve or represent the same constituency and the system therefore requires streamlining as per the aspirations of the people. Trends towards militancy in the State can be discouraged through measures leading to self-governance. For this to happen, the traditional systems of governance will have to be included and given specific roles and opportunities instead of being marginalized.

As regards Meghalaya, the Commission makes the following recommendations:-

(1) **A tier of village governance to be created for a village or a group of villages in the Autonomous District Councils, comprising of elected persons from the traditional systems plus from existing village councils with not more than 15**

persons at each village unit.

(2) **At present, each of the Autonomous District Councils in Meghalaya consists of 30 seats. It is recommended that this number may be increased by 10 seats, *i.e.*, to a total number of 40 seats. Of the 10 additional seats, having regard to the non-representation of women and non-tribals, the Governor may nominate up to five members from these categories to each of the ADCs. The other five may be elected as follows:-**

- **By Syiems and Myntris, from among themselves to the Khasi Autonomous Council.**
- **By Dolois from among themselves to the Jaintia Autonomous District Council; and**
- **By Nokmas from among themselves to the Garo Autonomous District Council.**

9.30 ***Tripura*:** In Tripura, the Tripura Tribal Areas Autonomous District Councils were formed in 1985 and every such Council has 28 elected members and two members nominated on the basis of the Chief Executive Member's recommendation by the Governor from among the Tribals.

As regards Tripura, the Commission makes the following recommendations:-

(1) **The recommendations made by the Commission for other Autonomous Councils should also apply in respect of the Autonomous District Council(s) in Tripura.**

(2) **The number of elected members in the Council should be increased from 28 to 32.**

(3) **The number of nominated members should be increased to six from the current two. The existing non-tribal seats (currently,**

they have three elected seats) be converted to tribal seats. Three non-tribals may be nominated by the Governor and three tribal women may be nominated by the Chief Executive Member.

9.31 ***Mizoram*:** In Mizoram, there are three Autonomous District Councils (ADCs), namely, the Lai, Mara and Chakma. The Chakma ADC has 13 elected members and 3 nominated members. The Lai ADC has 23 elected and 4 nominated members. The Mara ADC has 19 elected and 4 nominated members.

As regards Mizoram, the Commission makes the following recommendations:-

(1) **An intermediary elected 30-member tier be developed at the district level in areas not covered by the Sixth Schedule, *i.e.*, excluding the Chakma, Lai and Mara District Autonomous Councils. There would thus be two tiers below the State Legislature: the District and the Village.**

(2) **Village Councils in non-Scheduled areas be given more administrative and judicial powers; two or more villages be combined to form one village council, given the small population in the State.**

(3) **Consideration be given to groups seeking Sixth Schedule status, depending on viability of the demand, including size of population, territorial and ethnic contiguity.**

(4) **Central funding as outlined in general recommendations be provided to the ADCs.**

(5) **Nominated seats for women, non-tribals and Sixth Schedule tribes in non-scheduled area (not to exceed six over and above the size of the Councils, making a total of 36 members);**

current size of ADCs be increased to 30 with a similar provision for women and non-scheduled tribes.

9.32 ***Manipur:*** Manipur has been seeking Sixth Schedule status for its hill areas and this request needs serious consideration. The 73rd and 74th Amendments are applicable to only those areas of Manipur which are in plains and these provisions are yet to be fully implemented.

As regards Manipur, the Commission recommends that the provisions of the Sixth Schedule be extended to hill districts of the State. Also, the 73rd Amendment be implemented vigorously in the areas of the plains where, despite elections, the system is virtually non-existent.

9.33 ***Arunachal Pradesh*:** Since the Government of Arunachal Pradesh has already implemented the provisions of the Constitution 73rd Amendment *in toto*, the Commission does not propose to make any recommendation in this regard.

CHAPTER 10

PACE OF SOCIO-ECONOMIC CHANGE AND DEVELOPMENT

CONTENTS

10.1	➢ Constitutional Aspirations	10.10	➢ Strengthening of constitutional provisions in favour of SCs and STs
10.2	➢ Progress towards social justice	10.11	➢ Minorities
10.3	➢ Issues of governance	10.12	➢ Denotified Tribes/ Communities and Nomadic and Semi-nomadic Tribes/ Communities
10.4	➢ Education – Establishment of Residential Talent Schools and Protection of Educational Interest of Weaker Sections	10.13	➢ Unorganised labour
10.5	➢ Liberation and Rehabilitation of Safai Karmacharis (Scavengers)	10.14	➢ Bonded and Child Labour
10.6	➢ Socio-economic Development and Empowerment of SCs, STs and Revitalisation of Special Component Plan for SCs and Tribal sub-plan	10.15	➢ Development of Backward Classes
10.7	➢ Land Reforms	10.16	➢ Empowerment of Women
10.8	➢ Legal protection for security of life and human dignity	10.17	➢ Immoral traffic in women and girls children- rescue and rehabilitation
10.9	➢ Science and Technology		

CHAPTER 10

PACE OF SOCIO-ECONOMIC CHANGE AND DEVELOPMENT[1]

Constitutional Aspirations

10.1.1 The Constitution aimed at a social revolution that would transform the Indian society. There were many dimensions to this historic endeavour. There was, first, the task of catching up with the agricultural and industrial revolutions that had characterised the developed world. This among other reforms involved vast technological changes for increasing productivity of both capital and labour. It was not easy to introduce new techniques of production based on modern science and technology. New structures and institutions had to be created to suit these, a difficult and disruptive exercise in the best of circumstances.

10.1.2 In the Indian context there were other serious obstacles to be overcome, obstacles that had not been confronted by the presently developed nations. Hierarchy and attendant inequality presented an entirely new aspect in India in the shape of the caste system which stifled the creative energies of vast numbers condemned to labour in conditions of degrading exploitation. The exploiter and the exploited were both stripped of human dignity and worth. Patriarchy added yet another element of subjection of women and children to this enormously tragic blockage of initiative and innovation. Religious differences of a plural tradition were turned into a pernicious divide by the deliberate policy of the master minds of the Raj which continues to cast its vicious shadows on Indian polity.

10.1.3 The colonial version of modernity not only carefully preserved inherited inequalities and oppressions, but also overlaid them with more

[1] See also the Consultation Paper released by the Commission on "Pace of Socio-Economic Change Under the Constitution" in Volume-II (Book 1) and the Background Paper on "Pace of Socio-Economic Change and Development" in Volume-II (Book 3).

powerful subtexts of new inequalities of a parasitic feudalism and dominations deriving from arrested development.

10.1.4 Faced with the daunting task of modernising India against this setting, the constitution makers set to work with unflinching faith and unbounded hope - faith in the revolutionising principles of liberty, equality and fraternity and in the genius of the Indian people to build a better future for themselves, and hope that the promised transformation would be accomplished without violence and within the framework of democracy.

Progress towards social justice

10.2.1 The Preamble to the Constitution accords primacy to Justice, social, economic, and political, in the making of state policy and in state action. Accordingly, an impressive array of legislative enactments and executive orders have provided a firm legal framework for government action to abolish the most outrageous aspects of the caste system, viz., untouchability; to anchor in law the scheme of reservations for the Scheduled Castes and Scheduled Tribes in political institutions of governance, and to provide for reservation in government services and educational institutions; to reform land relations in order to enable the weaker sections, predominantly belonging to the scheduled castes and scheduled tribes, to access productive assets so that they may work with freedom and dignity; to protect the incomes of landless labour and marginal land holders through minimum wage legislation; to provide financial and organisational resources for the scheduled caste children to receive elementary, secondary and higher education; to prevent and penalise atrocities; to allocate plan resources under specially designed schemes for economic, educational and social development of the scheduled castes and scheduled tribes and to provide the plan mechanism of Special Component Plan for SCs and Tribal Sub-plan to channelise more developmental resources to them and to integrate the scheduled castes and scheduled tribes with the mainstream of social and economic life in the country. There is a misconception that the problems of Scheduled Castes, Scheduled Tribes and Backward Classes are sectional and marginal. In reality these are part of the central and core problems of the country. These

three categories of people constitute about 3/4th of the population of the country and almost the entire physical labour force of the country is drawn from them. It is the failure to tackle their problems so as to remove their disabilities and secure their full potential for national development that lies at the root of the many weaknesses faced by post-Independence India to this day. Therefore, these issues and the remedial measures should be approached as central and core concerns of India.

10.2.2 It is true that there is some progress in breaking the mould of social inequality and caste oppression and in the economic and educational spheres but there is a long way to go before social equality, educational equality, freedom from caste oppression, freedom from economic dependence are achieved. The traditional sanction for inequality has been decisively questioned and to some extent undermined. What is most important is the cultural and intellectual upsurge in the *dalit* communities across the country evidenced in their literary and intellectual productions. This is a development which fills us with hope for the future.

10.2.3 Yet, one still waits for a cultural revolution that would uproot inherited attitudes, values, institutions, practices, and postures, replacing them with values and attitudes relevant to a modern, egalitarian society. Education has still to perform the role of dissolving the encrusted debris of birth sanctioned superiority and birth-based discrimination, deprivation and exploitation. Vast numbers of landless and marginal farmers still hope for a change in institutional arrangements that would end their abject dependency on the existing power structures in the rural areas.

10.2.4 However, even when faced with the reality of the gap between aspiration and achievement, we cannot but pay our humble tribute to the foresight and wisdom of the Constitution makers in frontally tackling an issue of immense significance to nation building. It remains for us to carry forward the task of bringing about social, economic and educational equality fortified by the mandates of our Constitution. Reservation, no doubt, helped the deprived sections to secure a share, though not to an adequate extent, in governance. Reservation was intended to be part of a comprehensive

package of an entire gamut of economic, educational and social measures. This comprehensive package has not been provided in its fullness. Consequently, reservation alone by itself has not been able to bring about the total social transformation envisaged in the Constitution.

10.2.5 The outcome of the failure to provide the comprehensive package envisaged by the Constitution gives material for a sobering thought. More than half century after the Constitution, the bulk of the SC families remain agricultural wage labourers as in the past many centuries. The bulk of STs continue to remain in remote areas and are being progressively deprived of their lands converting many of them into agricultural labourers. The bulk of the backward classes pertaining to economic categories like traditional artisans, fisher-folks and the like are being deprived of their traditional occupations while being denied access to relevant technology and modern occupations, thereby pushing them into the unorganised labour force. All the three categories continue to be the victims, in varying forms and degrees, of all-round deprivations, discriminations and disabilities, in all spheres – economic, educational, social – in the case of SCs extending to the extreme of untouchability and in the case of STs to the extreme of isolation.

Issues of governance

10.3.1 In line with our earlier analysis of the Executive and Public Administration (Chapter 6), we emphasise the paramount need for a radical redefinition of governance to change the mind-set of the political executive and the permanent civil service. The movement must be from governance to self-governance. It should be recognised that constitutional rights of the citizenry, human dignity, Human Rights, human security are not rewards of development but are critical to development itself. Self-governance must necessarily include developmental autonomy for SCs and STs through empowered special institutions on their behalf and empowerment of SCs, STs, BCs and other deprived categories to shape relevant and appropriate policies and programmes for their development and empowerment and the implementation of those policies. Since civil society is an important element figuring conceptually in model of self-governance, it has to be emphasised

1206 LJ&CA/2002—21B

that civil society must include Scheduled Caste, Scheduled Tribes, Backward Classes and other deprived categories outside Government and governmental institutions and they should be enabled to have a hand in the continuing process of development and programmes.

10.3.2. **The Commission recommends that Citizens' Charters be prepared by every service providing department/agency to enumerate the entitlements of the citizens. In case a citizen fails to receive the public goods and the services in the manner and to the extent set out in such charters, he/she should have recourse to an easy and effective system of grievance redressal through chartered Ombudsman. These citizen's charters should include specifically the entitlements of citizens belonging to SCs, STs and other deprived classes. In the case of these deprived classes the charters can with advantage provide for National and State Commission for SC, ST, BC, Minorities, women, safai karamcharis to function effectively as ombudsman-bodies. Concomitantly, the Commission recommends that the charter of these National and State Commissions and the way they are constituted should be such as to facilitate the role, *inter alia*, as ombudsman-bodies for different deprived classes.**

10.3.3. Personnel policy should consciously aim at sensitizing public servants, especially officers in the Indian Administrative Service and the Indian Police Service to the special needs of women, the scheduled castes, the scheduled tribes, minorities, and other weaker sections. **The Commission recommends that the Civil Services Boards, recommended to be set up under Chapter 6 for considering promotions and placements, should be directed to specifically consider the performance of officers in promoting the welfare of scheduled castes, scheduled tribes and other deprived categories. When officers are being considered for promotion and placement economic agencies/ministries, weightage should be given to officers who have worked conscientiously and efficiently to implement constitutional values and norms under the law and rules and regulations for the welfare,**

development and empowerment of the above disadvantaged categories and those who have failed in this and those who have not worked at least for five years in the areas and sectors pertaining to these categories should be excluded from placements in economic ministries/agencies. For this purpose, the Commission recommends that provision be made for Social Justice Clearance before an officer of class I or class II is promoted along the lines detailed in para 3.2 at pages 1390-1391 of Book-3, Vol.II.

10.3.4 The Commission recommends that:

(i) reservation for SCs and STs should be brought under the purview of a statute covering all aspects of reservation, as detailed in para 8.10 at pages 1406-1408 of Book-3, Vol.II, including setting up *Arakshan Nyaya Adalats* or Tribunal to adjudicate upon all cases and disputes pertaining to reservation in posts and vacancies in Government, Public Sector, Banks and other financial institutions, Universities and all other institutions and organisations to which reservations are and become applicable. These Tribunals should have the status of High Courts, appeals lying only to the Supreme Court. These Tribunals should have their main Bench at Delhi and other Benches in the States. The Chairperson, Vice-Chairperson and other Members of the Tribunal and its benches should be selected on the basis of their record in the implementation of Reservation in their earlier positions. The statute should, *inter alia*, have a penal provision including imprisonment for those convicted of wilfully or negligently failing to implement reservation; and

(ii) the proposed statute and related provisions should be brought under the Ninth Schedule to the Constitution.

10.3.5 The Commission further recommends that the three constitution amendment enacted in the last two years to undo the harm done in 1997 to the long pre-existing rights of SCs and STs in reservations should be put into effect forthwith. The Central and State

1206 LJ&CA/2002—21A

Governments should amend the executive orders issued in 1997 regarding the roster and restore the pre-1996 roster. This should also be brought into the purview of the statute mentioned above.

10.3.6 **The Commission recommends that Reservation for backward classes should also be brought under a statute which, while containing the specificities of reservation for BCs should also contain provisions for *Arakshan Nyaya Adalats* or Tribunal for providing Justice in Reservation, penal provisions etc. as recommended in the case of the statute in respect of SCs and STs.**

10.3.7 **The Commission recommends that it should be mandatorily stipulated in the Memoranda of Understanding (M.O.Us.) of privatisation or dis-investment of public sector undertakings that the policy of reservation in favour of SCs, STs and BCs shall be continued even after privatisation or dis-investment in the same form as it exists in the Government and this should also be incorporated in the respective statutes of reservation. As a measure of social integration there should be a half per cent reservation for children of parents one of whom is SC/ST and the other parent is non-SC/non-ST and this reservation should be termed as reservation for the Casteless.**

10.3.8 In higher judiciary, the representation of judges from Scheduled Castes, Scheduled Tribes and other backward classes is inadequate. Out of 610 judges in the High Courts, there are hardly about 20 judges belonging to the Scheduled Castes and the Scheduled Tribes. In S.P. Gupta's[2] case and Supreme Court Advocates on Record[3] case, popularly known as the First Judges' Case and Second Judges' Case respectively, the Supreme Court upheld the constitutionality of the circular letter addressed by the Union Law Minister requesting the State Governments and the High Courts to recommend the names of competent candidates belonging to the Scheduled Castes, the Scheduled Tribes, women and Other Backward Classes.

[2] AIR 1982 SC 149
[3] AIR 1994 SC 268

10.3.9 **In view of the above and also taking into account the weighty opinion against the formal introduction of reservation in the higher judiciary, and the fact that over fifty years, the progress of education, however tardy, has certainly produced adequate number of persons of the SC, ST and BC in every State who possess the required qualifications, having necessary integrity, character and acumen required for Judges of Supreme Court and High Courts for appointment as Judge of the superior judiciary, a way could and should, therefore, be found to bring a reasonable number of SCs, STs and BCs on to the Benches of the Supreme Court and High Courts in the same way in which, in practice, it is found is followed in respect of advocates from different social segments/regions of the country/States or different religious communities so that on the one hand the overwhelming opinion against formal reservation in the Supreme Court and High Courts is respected and on the other hand, the feeling of alienation of the vast majority of Indians comprising SCs, STs and BCs that, in spite of having persons of requisite calibre and character among them, they are being ignored in the appointment of Judges, is resolved.**

10.3.10 **The Commission recommends that there should be reservation for SCs, STs and BCs (including BC minorities and especially More and Most Backward classes), with a due proportion of women from each of these categories in the matter of allotment of shops under the public distribution system, and other allotments like petrol stations, gas agencies, etc. for distribution of commodities by public authority. There is need for support mechanism to help entrepreneurs among these deprived sections to help them to come up in these business ventures. These measures should be taken along detailed lines as spelt out in para 4.6 at page 1393 of Book-3 Vol.II.**

10.3.11 In the context of PDS, taking note of people who do not have purchasing power even to pay for subsidised food-grains available through PDS, **the Commission recommends that massive programmes of employment be undertaken and expanded to cover all such people and**

provide them employment at statutory minimum wage fixed for agricultural labourers at least for 80 days in the year over and above the unsteady employment they normally have. The nature of the work to be undertaken, the mode of payment of wages etc. should be as detailed in para 4.5 at pages 1392 to 1393 of Book-3 of Volume-II. Inclusion of Right to Work as a fundamental right has been recommended in para 3.13.2 of this Report and this will provide the necessary constitutional base and support for this programme.

Education - Establishment of Residential Talent Schools and Protection of Educational Interest of Weaker Sections

10.4.1 Education was envisaged as one of the most powerful engines for the social and economic liberation of the SCs, STs, BCs and for bringing about social equality and empowerment of these categories. The mandate of Article 46 of the Constitution is very clear on these aspects. Yet the best education has not been brought within the reach of these sections. In the context of realities, it is imperative to set up residential schools of high quality for SC, ST and BC, each of which is not a single community but hundreds of communities, recognised and categorised together on the basis of criteria like untouchability, and social backwardness. Unless such schools are set up for them, the goal of educational equalisation and quality education will continue to elude them and the constitutional mandate envisaged by Article 46 will continue to be flouted. **This Commission, therefore, recommends the establishment of residential schools for SCs and STs in every district in the country – one each for SC boys and SC girls, and ST boys and ST girls, as one item of an important package of comprehensive measures required for the development and empowerment of SCs and STs. Similarly, the Commission recommends that residential schools should be set up for the BCs in every district, one each for BC boys and BC girls, including minorities who belong to BCs and with special attention to More Backward and Most Backward classes among BCs. The proportion of the students of the specific category of weaker sections (say 75 per cent) and of other social categories (say 25 per cent), the principles of location, methodology of covering the Minority B.C.,**

phasing and funding, mode of selection of the candidates, management etc. should be as detailed in paras 5.4 and 6.2 at pages 1395 to 1398 of Book 3 of Volume II. This system has got the support of the precedent and experience for the last two decades in Andhra Pradesh state, providing ground for hope in this important and indispensable measure. In addition, the Commission recommends that it is also necessary to see that the SCs, STs and BCs especially the More and Most Backward classes of BCs from poor and middle-class families get due benefit of good and prestigious private educational institutions in the country as well as in foreign educational institutions at all levels and in all disciplines, at state cost. Funding for this can be found by measures outlined in sub para (V) of para 5.4 at page 1396 of Book 3 of Volume II. The measures detailed in sub para (ii) and (iv) of para 5.4 at pages 1395 and 1396 of Book 3 of Volume II should be followed in the matter.

10.4.2 The Commission feels that the time has come to build up the educational coverage of SC and ST in technical, vocational, scientific and professional disciplines, with appropriate incentive and support and with special budgetary outlays so that a reservoir of highly educated professional, scientific and technological manpower is built up among the SCs and STs and also the More and Most Backward Classes of BCs, commensurate with their population proportion. **Incentives should be offered to students to prepare for such courses of study. Only a massive transfer of resources to the educational programmes for the scheduled castes and scheduled tribes will enable us to achieve the kind of quantitative expansion needed to bring these communities on par with others in terms of skills and knowledge base to engage with the modern world. It is only then that they would be in a position to compete on the basis of their own strength and rise to the leadership role in different spheres of public life. The Commission recommends that this aspect of measures for building up a reservoir of highly educated professional, scientific and technological manpowers among these categories in population equivalent proportion should be borne in mind along with its earlier recommendations regarding residential schools of high quality and**

elementary education, and provisions and outlays should be made accordingly.

10.4.3 Social policy should aim at enabling the SC, ST and BC (including BC minorities and especially the More and Most Backward Classes among BCs) and with particular attention to the girls in each of these categories to compete on equal terms with the general category. This was always necessary but this becomes more important and increasingly urgent in the context of a knowledge society that is emerging. Reservation has helped the above deprived categories to enter state educational institutions from which they had been debarred and / or otherwise excluded in the past. Reservation continues to be necessary since these adverse factors have not ceased to exist. But with the growth of high quality educational institutions built up by the wealthier sections, almost entirely drawn from non-SC, non-ST, non-BC categories, as a high quality stream distinct and separate from the state educational system, it becomes important to ensure that other measures in addition to reservations are introduced. That is why the Commission has recommended establishment of high quality residential schools for boys and girls of these categories in every district, and ensuring a share for boys and girls of these categories from poor and middle-class families, at state cost, in private institutions of excellence created for themselves by the wealthier sections and also a share for these disadvantaged categories in foreign educational institutions again at state cost. Without these measures, along with the Commissions recommendations on elementary education, the gap between the SC, ST and BC on the one hand and the rest of society will inexorably continue and even be widened.

Liberation and Rehabilitation of Safai Karamcharis (Scavengers)

10.5 Manual scavenging is a degrading practice. The Commission recommends that the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993, be strictly enforced to bring to an early end to this degrading practice so offensive to human

dignity without abridgement of the employment and income of existing Safai Karamcharis. Automatic applicability of the Act to all states should be brought about by the amendment suggested in para 7.2 at page 1399 of Book 3 of Volume II. Further, the specifics and details of the abolition of the manual scavenging system and the liberation and rehabilitation of safai karamcharis and protection of safai karamcharis during the transition period should be as detailed in para 7.3 of pages 1399 to 1401 of book 3 of Volume II, including its incorporation in the System of Social Justice Clearance of officers at the time of their consideration for promotion. Limitations placed on the National Commission of Safai Karamcharis should be removed and it should be given the same powers and functional autonomy as is being enjoyed by the National Human Rights Commission; it should be adequately equipped to achieve its objective of total liberation and full rehabilitation of safai karamcharis. This should form an integral part of a National Sanitation Policy-cum-National Social Justice Policy.

Socio-economic Development and Empowerment of SCs, STs and Revitalisation of Special Component Plan for SCs and Tribal sub-Plan

10.6.1. For comprehensive development and empowerment of Scheduled Castes and Scheduled Tribes, the Government have followed, over the last 25 years, a policy of earmarking a proportion of total plan outlay, not less than the proportion of the population of SCs/STs in India as a whole (for the central plan) and in each State (for State Plans). It has also been formally decided many years back that population equivalent proportion of the total plan outlay of the Centre and of each State should be for the Special Component Plan for Scheduled Castes (SCP), and Tribal Sub-Plan (TSP). Further the concept has been that programmes and schemes in accordance with the developmental needs and priorities of the SCs and STs should be formulated under the SCP and TSP. This commendable policy has no doubt helped but has not been able to bring about the required qualitative change in the conditions of the SCs and STs. Adequate Plan outlays and corresponding budgetary allocations as required for SCP and TSP are never made for want of seriousness of purpose in line with Article 46 of the Constitution, in the

process of plan formulation and implementation. In recent years even the aggregate allocations for the development of SCs and STs have declined as a proportion of the total plan outlay. Another serious problem is that the allocated amounts are not fully utilised due to lack of coordination between various Departments and want of seriousness and sincerity. Further funds earmarked for SCP and TSP allocated for the development of SCs and STs often have been diverted in spite of specific policy decisions and guidelines from the Centre as well as States against such diversions.

10.6.2 **The Commission strongly feels that this bleak situation will continue to bedevil the SCs and STs and the nation unless appropriate new institutions are created to take charge of the full quantum of outlay of SCP and TSP (i.e. outlay not less than the population equivalent proportion of the total plan outlay of the Centre/each State) and manned by competent experts of SCs and STs and others genuinely working for them, to formulate Plans in accordance with the developmental needs and priorities of the SCs and STs and ensure that these plans are implemented effectively.** This will help to take planning and implementation of development of SCs and STs out of the hands of those who have no interest in them. **This new institutional system should consist of an integrated network of National Development Council for SCs and STs, and National SCs and STs Development Authority, State SCs and STs Development Authorities and District SCs and STs Development Authorities. Out of the total plan outlay of the Centre and of each State, before sectoral allocations are made, an outlay equivalent to the population proportion of SCs and STs should be placed at the disposal of the National and respective State Authorities, as the corpus of SCP and TsP for formulation of plans in accordance with the needs and priorities of SC & ST. For this, the system as detailed in para 9.2 at pages 1409 to 1411 of Book-3, Volume-II should be established. The schemes as illustrated in sub-para (9) of para 9.2 at page 1410 to 1411 of Book-3, Volume-II should also be taken up on a massive scale. This will at one stroke remove the various limitations and difficulties faced by the SCP and TSP and create a powerful, integrated instrument of social**

transformation based on the vision of economic liberation, educational equality and social dignity of the SCs and STs.

Land Reforms

10.7.1 One of the basic issues continues to be access to and control over land. It is significant that land reform as a political and economic issue of major importance has ceased to occupy the central place it occupied in political discourse not too long ago. The statistical data compiled for the background paper clearly shows that the vast majority of the SC population remain landless agricultural labourers and marginal peasants and the STs have been steadily losing their land and adding to the landless agricultural labour force. Without access to productive assets and firm legal protection for their title, ownership, possession and peaceful enjoyment, it is difficult to see how there can be a real and significant change in the position of the scheduled castes and scheduled tribes in the village society. In addition, we need to inject new vitality in the operation of minimum wage legislations to benefit agricultural labour. **The Commission recommends that land reforms involving distribution and allotment of lands from different sources (i.e. Government lands not required for genuine public use, Bhoodan lands, ceiling surplus lands, etc.) to the SCs and STs along with supportive mechanism in the shape of supply of subsidised capital and credit and extension be made, and development of these lands through irrigation and other means be undertaken. In this context, the measures recommended at (b) of sub-para (9) of para 9.2 at pages 1410 to 1411 of Book-3, Volume-II and in para 14(i) to (vi) at pages 1416 to 1417 of Book-3, Volume-II should be implemented. Similarly, with regard to enforcement of the Minimum Wages Act for agricultural labour, the methodology recommended at (c) of sub-para (9) of para 9.2 at page 1410 of Book-3, Volume-II should be followed. Strong legal action is needed to prevent alienation of lands belonging to the tribal communities and effective prior rehabilitation of tribals before displacement due to developmental projects. For this purpose the measures listed in para 13.2 at page 1414 to 1416 of Book-3, Volume-II**

should be undertaken. Additionally the tribal communities have to be associated with the management of forest resources, for not only their livelihoods, but also for protecting their way of life and cultural identity which are indissolubly linked to forests. For this purpose, action as recommended in sub-para (10) and (11) of para 13.2 at pages 1415 to 1416 of Book-3, Volume-II should be taken.

10.7.2 **In the matter of harmonising the preservation of the land ownership of STs, industrial and other development, the Commission recommends that action be taken as outlined in sub-para (6),(8) and (9) of para 13.2 of pages 1415 to 1416 of Book-3, Volume-II.**

10.7.3 The tribal communities are repositories of myriad cultural traditions –tribal lore, the arts and crafts, music, dance, and design, textiles, metallurgy and eco-friendly technology. There is a tremendous range of attainment in all these different aspects of their heritage. Knowledge of flora and fauna, herbal medicine and therapies, time-reckoning, animal husbandry, veterinary practices etc. represent additional areas of specialized knowledge in tribal societies in different parts of the country. It is of crucial importance that these variegated elements of tribal cultural heritage are protected from being overrun or expropriated. **The Commission recommends that special safeguards should be provided to protect the wholesome traditions of the cultural heritage and of the intellectual property rights of the tribal people. This is no less important for the tribal identity than the effort to prevent alienation of land and land-related institutional rights of tribal people.**

10.7.4 As a means of improving the administration of the areas inhabited by the Scheduled Tribes and promoting local autonomy, **the Commission recommends that all areas governed by the Fifth Schedule of the Constitution should be forthwith transferred to the Sixth Schedule extending the applicability of the Sixth Schedule to tribal areas other than the North Eastern States to which alone the Sixth Schedule now applies, and all tribal areas which are neither in the Fifth Schedule nor in the Sixth Schedule should also be brought forthwith under the Sixth**

Schedule. Special programmes of training and orientation for the elected representatives of the Sixth Schedule bodies and related officials should be undertaken and conducted regularly in order to secure the full potential of local developmental and administrative autonomy envisaged under the Sixth Schedule.

10.7.5 The Commission took into account the changing parameters of State action in the context of the tectonic shift toward globalization and liberalization. At present SC and ST employees in the private sector are numerically insignificant except at the shop floor level. This is also true of More and Most Backward Classes to a considerable extent including BC Minorities and women, particularly women from these sections. It is obvious that in the context of the severe bias against the SCs and STs and also in varying degrees against BCs, women and minorities shared by the captains of the private sector with the rest of the advanced sections of the society, they will not, left to themselves, be able to provide adequate space for the SCs and STs and also to BCs, women and Minorities and meet their just aspirations. **It is necessary for the Government to step in firmly and clearly, if the gap is to be bridged between private prejudices, camouflaged in the name "efficiency" on the one hand and the just aspirations of the SC, ST, BC including BC minorities, and women. For this purpose the Commission recommends that the Government should take the initiative along the lines suggested in para 11.3 at pages 1412 to 1413 of Book-3, Volume-II.**

10.7.6 **Further the Government should examine other economic and activity sectors at every level of each such sector and see whether the SCs and STs are adequately represented in each of them. If they are not, remedial measures either through reservation or through other means should be undertaken to see that they are adequately represented at every level in every such sector. Similar action should also be taken with regard to backward classes including BC minorities, especially More and Most Backward Classes and women of all**

categories. This is possible, if non-economic prejudices are excluded, without watering down the genuine requirements of efficiency.

10.7.7 **Agriculturists and other traditional producing classes face certain adverse effects of sudden and unprepared exposure to the regimes of WTO, IPR, etc. In order to protect them from these adverse effects while at the same time to secure the benefits of those regimes, a national convention should be convened involving Ministers in charge of Ministries connected with globalisation and Ministers in charge of Agriculture and other sectors of traditional produce and authentic representatives of the peasant organizations as well as organisations of other traditional producing classes, to identify remedial Steps arrive at a consensus about them and these should be implemented quickly. There should be a continuing mechanism involving all these to continuously monitor implementation and corrections and modifications required from time to time.**

10.7.8 **Further agriculturists and many other traditional producing classes suffer from the adverse effects of natural calamities like drought, cyclone, floods, etc. A similar national convention should identify the measures required to protect them from such adverse effects of natural calamities including crop insurance, preparedness etc., arrive at a consensus about these measures and institute a continuing machinery of continuous monitoring and corrections and modifications.**

Legal protection for security of life and human dignity

10.8.1 The Commission recognises that on the one hand there should be an effective legal structure to protect the SCs and STs against atrocities and discriminatory practices based on untouchability and along with such structure and its efficient functioning, there should also be attitudinal change of a profound nature in the general society.

10.8.2 With regard to legal structure, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 needs to be strengthened and its effective enforcement ensured. This include the establishment of special courts exclusively to try offences under this Act, inclusion of certain crimes in the list of atrocities, certain penal provisions where they do not exist, appropriate plugging of certain loopholes and comprehensive rehabilitation of victims and so on. For this purpose, the Commission recommends the measures suggested in para 8.2.1, 8.2.2, 8.2.3, 8.3 and 8.4 (a) to (p) of Book-3, Vol.II at pages 1401 to 1404.

10.8.3 Regarding untouchability which continues to be widely prevalent in old classic forms as well as in new forms in line with modern developments, multi-pronged measures covering human rights education, moral education, building up of a strong democratic movement against untouchability and effective punitive action under the Protection of Civil Right Acts, 1955 (PCR Act) are required. In view of this, the Commission recommends the adoption of the entire gamut of measures suggested in paras 8.6 to 8.8 at pages 1404 to 1405, Book-3, Vol.II.

Science and Technology

10.9 The National Science and Technology Commission referred to in Chapter 6 should also promote measures for extending the umbrella of modern science and technology and higher scientific and technological research to cover SCs, STs and BCs, women and other poor sections of the society, devise means by which they can also be introduced into this field and potential talent among them identified and nurtured so that they also are enabled to contribute to the advancement of higher scientific and technological research in the country and so that there is no feeling that they are shut out from this important area on account of non-scientific prejudices.

Strengthening of constitutional provisions in favour of SCs and STs

10.10 **The Constitution of India** was shaped by the guiding hand and genius of Dr.Babasaheb Ambedkar with the goodwill of Pt. Nehru, Sardar Patel and Dr.Rajendra Prasad and other stalwarts of the Constituent Assembly under the inspiration of Mahatma Gandhi and **contains distinct provisions for the protection and promotion of the interests of Scheduled Castes and Scheduled Tribes, Backward classes, women, minorities and other weaker sections, so that an egalitarian society could be built up. If these provisions had been implemented in the right spirit, the problems bedevilling the masses of the people and country as a whole should have disappeared by now. Taking the realities of the recent decades and the failure to implement these constitutional provisions, the Commission considers it necessary to strengthen these provisions by amendments, transfer of certain articles to Part III Fundamental Rights, and certain other similar steps. Accordingly, the Commission recommends amendments to the Constitution listed in para 15 at pages 1417 and 1418 of Book-3, Vol.II, covering articles 46, 335, 16, 15 and List III of the Seventh Schedule.**

Minorities

10.11.1 The general argument for creating a better cultural, economic and educational environment for protection of rights and of development of disadvantaged sections applies mutatis mutandis to the religious and linguistic minorities. Constitutional safeguards already exist. What is needed is a major break through in educational and economic spheres. In this context, it is also to be noted that the bulk of the religious minorities consist of castes/communities which are included in the list of socially and educationally backward classes. They are mainly counterparts of Hindu Backward Classes and to some extent of Hindu Scheduled Castes.

1206 LJ&CA/2002—22A

10.11.2 The Commission recommends that-

(a) Steps should be taken for improvement of educational standards amongst the minority communities. Special programmes should be drawn up after the widest consultation with the leaders of minority communities including leaders of BCs, SCs and STs among Minorities from academic, professional, business, and socio-political spheres and from low-occupational spheres. Such programmes should be generously funded. Only educational and cultural advancement will help the cause of national integration as well as raise the capabilities of the communities. This is the high road to national cohesion.

(b) At present the political representation of minority communities in legislatures, especially Muslims, has fallen well below their proportion of population. The proportion of BCs among them is next to nil. This can lead to a sense of alienation. It is recommended that in situations of this kind, it is incumbent for political parties to build up leadership potential in the minority communities, including BCs, SCs and STs among them, for participation in political life. The role of the state for strengthening the pluralism of Indian polity has to be emphasised.

(c) Backward classes belonging to religious minorities who have been identified and included in the list of backward classes and who, in fact, constitute the bulk of the population of religious minorities should be taken up with special care along with their Hindu counterparts in the developmental efforts for the backward classes. This should be on the pattern of the approach to the development of Backward Classes formulated by the Working Group for the Development and Empowerment of Backward Classes in the Tenth Plan referred to separately under Backward Classes. This will, on the one hand, help the development of the masses of religious minorities and on the other hand help bring about national cohesion.

(d) An effort needs to be made to carry out special recruitment of persons belonging to the underrepresented minority communities in the

1206 LJ&CA/2002—22B

police forces of States, para military forces and armed forces. This will instil confidence among minority populations as well as help them to develop responsible attitudes toward security issues confronting the nation.

10.11.3 There exist in every State minority people speaking languages other than the Stage langueage in other words linguistic minorities, who suffer from the dis-advantage of education being available only in the language of the State concerned. Keeping in view the psychology of learning, the Commission recommends that in every State the linguistic minorities should be provided the facility of having instruction for their children at elementary stage in their mother tongue. Numerous recommendations in this behalf and other matters have been made by the Commissioner for Linguistic Minorities in his successive Annual Reports regarding the various problems faced by the linguistic minorities. **The Commission recommends that the Ministry of Social Justice and Empowerment and the Ministry of HRD should collate all these recommendations and see that substantive action is taken on each of them.**

10.11.4 The Secretary, Ministry of Social Justice & Empowerment requested the Commission to examine the relevance of the Office of the Commissioner for Linguistic Minorities under article 350B. After considering the matter, the Commission felt that no change in article 350B was desirable.

Denotified Tribes/Communities and Nomadic and Semi-nomadic Tribes/ Communities

10.12.1 The denotified tribes/communities have been wrongly stigmatized as crime prone and subjected to high handed treatment as well as exploitation by the representatives of law and order as well as by the general society. Some of them are included in the list of Scheduled Tribes and others are in the list of Scheduled Castes and list of backward classes. The special approach to their development has been delineated and emphasized in the Reports of the Working Groups for the Development of Scheduled Tribes, Scheduled Castes and Backward Classes in successive Plans and also in the

Annual Reports of the Commissioners for Scheduled Castes and Scheduled Tribes, National Commission for Scheduled Castes and Scheduled Tribes and the National Commission for Backward Classes. There are also special reports available on de-notified tribes. Their recommendations have not received attention. **The Commission recommends that the Ministry of Social Justice and Empowerment and the Ministry of Tribal Welfare should collate all these materials and recommendations contained in the reports of the working groups and the reports of the National Commissions and other reports referred to and strengthen the programmes for the economic development, educational development, generation of employment opportunities, social liberation and full rehabilitation of denotified tribes. Whatever has been said about vimuktajatis also holds good for nomadic and semi-nomadic tribes/communities. The Commission recommends similar action in respect of nomadic and semi-nomadic tribes/communities as done in the case of de-notified tribes or vimuktajatis.** The continued plight of these groups of communities distributed in the list of Scheduled Castes, Scheduled Tribes and backward classes is an eloquent illustration of the failure of the machinery for planning, financial resources allocation and budgeting and administration in the country to seriously follow the mandate of the Constitution including Article 46. **The Commission also points out that the setting up of an integrated net work of National Scheduled Castes and Scheduled Tribes Development Authority, etc. recommended in para 10.5.2 to 10.5.3 above will provide a structural mechanism to deal in a practical way with the vimuktajatis as well as nomadic and semi-nomadic tribes/communities within the frame work of the SCP and TsP. Similarly the approach to the development of backward classes referred to at para 10.14 below contains the approach to deal in a practical way with the Vimuktajatis and nomadic and semi-nomadic tribes/communities who are in Backward Class list.**

10.12.2 **The Commission also considered the representations made on behalf of the De-notified and Nomadic Tribal Rights Action Group and decided to forward them to the Ministry of Social Justice &**

Empowerment with the suggestion that they may examine the same preferably through a Commission.

Unorganized labour

10.13.1 In 1991, out of a total work force of 286 million, an overwhelming proportion was in the unorganized sector. Nothing illustrates better, the dualistic structure of our economy. Whereas legal protection for the rights of workers in the organized sector has a long history and the trade union movement has made a major contribution to organized workers' welfare, unorganized labour is in an extremely vulnerable situation. Bereft of trade union support, ill supported by the enforcement agencies of State Governments in regard to the implementation of minimum wages legislations and let down by political formations of nearly all descriptions, unorganized workers have looked to the State in vain to come to their help.

10.13.2 **The Commission recommends that the Union legislation for agricultural workers, drafted as far back as 1978-80, should be introduced and passed immediately.** It is regrettable that a legal measure of great importance for the welfare of unorganized workers in the rural sector has not had the political salience it deserved. A realistic scheme of credible implementation of minimum wages Acts with particular attention to agricultural labours, relying to a suitable degree on the district Collectors/Dy. Commissioners and district superintendents of police, should be immediately put into action. **For this purpose the measures suggested in para 17.2 at page 1419 of Book 3 Vol.II should be followed.**

Bonded and Child Labour

10.14 **Despite prohibition of begar and other forms of forced labour by the Constitution, the practice of bonded labour has not ended as it is patronised by the most powerful sections in the rural areas. Child labour too is widespread. In order to deal effectively with this problem in keeping with the mandate of the Constitution, the Commission recommends that a fully empowered National Authorit**

for the Liberation and Rehabilitation of bonded labour, as recommended by the Commission for Rural Labour in 1990-91, should be set up immediately along with similar authorities at the State level. In addition, the Commission recommends simultaneous rehabilitation of released Bonded Labourers and education for released bonded child labourers and other measures referred to in para 19.2 at page 1420 of Book 3,Vol.II.

Development of Backward Classes

10.15 Socially and educationally backward classes other than SC and ST were recognised at the national level and many States as a category needing focussed developmental attention, only in 1990 and this could be put into effect only after the Supreme court's Mandal judgment in November 1992. On account of this unfortunate delay, there has been a serious lacuna in respect of planned development of Backward Classes and there is no national policy and programmes consensus as in the case of SCs and STs. The Working Group on the Empowerment of Backward Classes in the Tenth Plan has given a clear and comprehensive approach to the development of backward classes. The best that can be said is that the Government should immediately implement everyone of the recommendations of the Working Group. As mentioned in para 10.9.1 above, the backward classes include identified castes/communities of religious minorities who together constitute the bulk of the population of religious minorities of the country. **The Commission recommends that the Government should immediately implement every one of the recommendations of the Working Group on Employment of Backward Classes in the Tenth Plan which covers all aspects and fields of their development - Economic, Educational, social, employment, reservation, etc. - taking in with particular care those backward classes who belong to religious minorities along with their Hindu counterparts in a cohesive manner. For example, some of the residential talent schools earmarked for Backward Classes should be located in areas of concentration of Muslim B.Cs. Further there should be residential talent schools for backward classes as separately**

recommended for SCs and STs at the rate of one each for boys and girls in each district, 75% being taken from backward classes and 25% from other categories. The Government should without any delay introduce reservation for backward classes in seats in educational institutions since absence of promotion of their education through reservation and other means when there is reservation of employment is anomalous.

Empowerment of Women

10.16 Disabilities to which women of all categories are subject to and the deprivations are well documented in various books, reports and papers as well as the background paper on the Pace of Socio-Economic Change under our Constitution. In addition, the women of SC, ST and BC and other weaker sections have extra dimensions of disabilities along with their men folk. **In view of this, the Commission recommends to the Government action in accordance with the suggestions made in para 16.2 at page 1418 of Book 3 Vol.II, covering reservation, development, empowerment, health including malnutrition and maternal anaemia and protection against violence.**

Immoral traffic in women and girls children - rescue and rehabilitation

10.17 The problems relating to prostitution, child prostitutes and children of prostitutes have been the subject of a landmark judgment of the Supreme Court in Gaurav Jain's case of 9th July, 1997 and the Report of Committee of Secretaries on Prostitution, Child Prostitutes and children of Prostitutes set up in 1997 as explained in para 20.1 and 20.2 at pages 1414 to 1415 of Book 3 Vol.II. **In respect of this area of problem, the Commission recommends to the Government that action be taken according to the suggestion listed at para 20.3 at page 1415 of Book 3 of Vol.II, covering implementation of the judgement and the Secretaries' report, elimination the Devadasi system, provision of development and education and prevention of HIV / AIDS.**

CHAPTER 11

SUMMARY OF RECOMMENDATIONS

CONTENTS

		Recommendation Nos.
Chapter 3	Fundamental Rights, Directive Principles and Fundamental Duties	(1) to (29)
Chapter 4	Electoral Processes and Political Parties	(30) to (69)
Chapter 5	Parliament and State Legislatures	(70) to (97)
Chapter 6	Executive and Public Administration	(98) to (121)
Chapter 7	The Judiciary	(122) to (149)
Chapter 8	Union-State Relations	(150) to (175)
Chapter 9	Decentralisation and Devolution	(176) to (213)
Chapter 10	Pace of Socio-Economic Change and Development	(214) to (249)

CHAPTER 11

SUMMARY OF RECOMMENDATIONS

[Of the various recommendations, **58** recommendations involve amendments to the Constitution, **86** involve legislative measures and the rest involve executive action. Those recommendations which involve amendments to the Constitution are given in italics]

CHAPTER 3: FUNDAMENTAL RIGHTS, DIRECTIVE PRINCIPLES AND FUNDAMENTAL DUTIES

Fundamental Rights

(1) *In article 12 of the Constitution, the following Explanation should be added:-*

'Explanation – In this article, the expression "other authorities" shall include any person in relation to such of its functions which are of a public nature.'

[Para 3.5]

(2) *In articles 15 and 16, prohibition against discrimination should be extended to "ethnic or social origin; political or other opinion; property or birth".*

[Para 3.6]

(3) *Article 19(1)(a) and (2) should be amended to read as follows:*

"Art. 19(1): All citizens shall have the right -
(a) to freedom of speech and expression which shall include the freedom of the press and other media, the freedom to hold opinions and to seek, receive and impart information and ideas."

19(2): "Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence, or preventing the disclosure of information received in confidence except when required in public interest.".

[Para 3.8.1]

(4) *A Proviso to article 19(2) of the Constitution should be added as under:-*

"Provided that, in matters of contempt, it shall be open to the Court to permit a defence of justification by truth on satisfaction as to the bona fides of the plea and it being in public interest.".

[Paras 3.8.2 and 7.42]

(5) *The existing article 21 may be re-numbered as clause (1) thereof, and a new clause (2) should be inserted thereafter on the following lines:-*

"(2) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.".

[Para 3.9]

(6) *After clause (2) in article 21 as proposed in para 3.9, a new clause, namely, clause (3) should be added on the following lines:-*

"(3) Every person who has been illegally deprived of his right to life or liberty shall have an enforceable right to compensation."

[Para 3.10]

(7) *After article 21, a new article, say article 21-A, should be inserted on the following lines:-*

"21-A. (1) Every person shall have the right to leave the territory of India and every citizen shall have the right to return to India.

(2) Nothing in clause (1) shall prevent the State from making any law imposing reasonable restrictions in the interests of the sovereignty and integrity of India, friendly relations of India with foreign States and interests of the general public."

[Para 3.11]

(8) *A new article, namely, article 21-B, should be inserted on the following lines:*

"21-B. (1) Every person has a right to respect for his private and family life, his home and his correspondence.

(2) Nothing in clause (1) shall prevent the State from making any law imposing reasonable restrictions on the exercise of the right conferred by clause (1), in the interests of security of the State, public safety or for the prevention of disorder or crime, or for the protection of health or morals, or for the protection of the rights and freedoms of others.". [Para 3.12]

(9) *A new article, say article 21-C, may be added to make it obligatory on the State to bring suitable legislation for ensuring the right to rural wage employment for a minimum of eighty days in a year.*

[Para 3.13.2]

(10) *As regards article 22, the following changes should be made:-*

(i) The first and second provisos and Explanation to article 22(4) as contained in section 3 of the Constitution (44th Amendment) Act, 1978 should be substituted by the following proviso and the said section 3 of the 1978 Act as amended by the proposed legislation should be brought into force within a period of not exceeding three months:-

"Provided that an Advisory Board shall consist of a Chairman and not less than two other members, and the Chairman and the other members of the Board shall be serving judges of any High Court:

Provided further that nothing in this clause shall authorize the detention of any person beyond a maximum period of six months as may be prescribed by any law made by Parliament under sub-clause (a) of clause (7).".

(ii) In clause (7) of article 22 of the Constitution, in sub-clause (b), for the words "the maximum period", the words "the maximum period not exceeding six months" shall be substituted. [Para 3.14.2]

(11) *After article 30, the following article should be added as article 30A:*

"30-A: Access to Courts and Tribunals and speedy justice

(1) Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before an independent court or, where appropriate, another independent and impartial tribunal or forum.

(2) The right to access to courts shall be deemed to include the right to reasonably speedy and effective justice in all matters before the courts, tribunals or other fora and the State shall take all reasonable steps to achieve the said object.". [Para 3.15.1]

(12) *Article 39A in Part IV should be shifted to Part III as a new article 30-B to read as under:-*

"30-B. Equal justice and free legal aid. The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.". [Para 3.15.2]

(13) *Article 300-A should be recast as follows:-*

"300-A. (1) Deprivation or acquisition of property shall be by authority of law and only for a public purpose.

(2) There shall be no arbitrary deprivation or acquisition of property:

Provided that no deprivation or acquisition of agricultural, forest and non-urban homestead land belonging to or customarily used by the Scheduled Castes and the Scheduled Tribes shall take place except by authority of law which provides for suitable rehabilitation scheme before taking possession of such land."

[Para 3.16.2]

(14) *In article 31-B, the following proviso should be added at the end, namely:-*

"Provided that the protection afforded by this article to Acts and Regulations which may be hereafter specified in the Ninth Schedule or any of the provisions thereof, shall not apply unless such Acts or Regulations relate –

(a) in pith and substance to agrarian reforms or land reforms;
(b) to reasonable quantum of reservation under articles 15 and 16;
(c) to provisions for giving effect to the policy of the State towards securing all or any of the principles specified in clause (b) or clause (c) of article 39."

[Para 3.17]

(15) *Clauses (1) and (1A) of article 359 should be amended by substituting for "(except articles 20 and 21)", the following:-*

"(except articles 17,20,21,23,24,25 and 32)"

[Para 3.18.2]

(16) *The relevant provision in the Constitution (93rd Amendment) Bill, 2001 making the right to education of children from 6 years till the completion of 14 years as a Fundamental Right should be amended and enlarged to read as under:-*

"30-C. Every child shall have the right to free education until he completes the age of fourteen years; and in the case of girls and members of the Scheduled Castes and the Schedule Tribes until they complete the age of eighteen years."

[Para 3.20.2]

(17) *After article 24, the following article should be added:-*

"Article 24A. Every child shall have the right to care and assistance in basic needs and protection from all forms of neglect, harm and exploitation.".

[Para 3.21.2]

(18) *After the proposed article 30-C, the following article may be added as article 30-D:-*

"30-D. Right to safe drinking water, prevention of pollution, conservation of ecology and sustainable development.-

Every person shall have the right-

(a) to safe drinking water;

(b) to an environment that is not harmful to one's health or well-being; and

(c) to have the environment protected, for the benefit of present and future generations so as to-

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.".

[Para 3.22.3]

(19) *Explanation II to article 25 should be omitted and sub-clause (b) of clause (2) of that article should be reworded to read as follows:-*

"(b) providing for social welfare and reform or the throwing open of Hindu, Sikh, Jaina or Buddhist religious institutions of a public character to all classes and sections of these religions.".

[Para 3.23.2]

(20) *It shall be desirable that some optimum level of population with a view to take necessary action under this constitutional provision is prescribed. In article 347 of the Constitution, for the words "a substantial proportion of the population", the words "not less than ten per cent of the population" should be substituted.*

[Para 3.24]

Directive Principles

(21) *The Commission recommends that the heading of Part IV of the Constitution should be amended to read as* "DIRECTIVE PRINCIPLES OF STATE POLICY AND ACTION".

[Para 3.26.3]

(22) A strategic Plan of Action should be initiated to create a large number of employment opportunities in five years to realize and exploit the enormous potential in creating such employment opportunities. The components of this plan may include:

(1) Improvement of productivity in agriculture that will activate a chain of activities towards increased income and employment opportunities.

(2) Integrated horticulture that will include production of fruits, vegetables and flowers, cut-flowers for export and medicinal plants as well as establishment of bio-processing industries aimed primarily at value-addition of agricultural products.

(3) Intensification of animal husbandry programs and production of quality dairy products.

(4) Integrated Program of Intensive Aquaculture including use of common property resources like village ponds and lakes.

(5) Afforestation and Wasteland Development t[illegible] an additional 12 million hectares under forest plantation, a[illegible]ribute to rural asset building activity.

(6) Soil and Water Conservation to support affo[illegible]n and Natural Resource Conservation towards eco-friendly [illegible]ure.

(7) Water Conservation and Tank Rehabilitation

(8) Production and use of organic manures thro[illegible]miculture and other improved techniques and production o[illegible]c health foods from them.

[Para 3.27.3]

(23) The Commission recommends that an [illegible]lent National Education Commission should be set up every [illegible]rs to report to Parliament on the progress of the constitutio[illegible]ective regarding compulsory education and on other aspects rel[illegible]t to the knowledge society of the new century. The model of the Finance Commission may be usefully looked into.

[Para 3.31.3]

(24) *After article 47, the following article should be added, namely:-*

47A. "Control of population.- The State shall endeavour to secure control of population by means of education and implementation of small family norms."

[Para 3.32]

(25) An inter-faith mechanism to promote such civil society initiatives should be set up. This may be done under the auspices of the National Human Rights Commission set up under section 3 of the Protection of Human Rights Act, 1993 which, inter alia, provides for the participation of "the Chairpersons of the National Commission for Minorities, the National Commission for Scheduled Castes and Scheduled Tribes and the National Commission for Women" who shall be deemed to be the Members of the Commission for the discharge of functions specified in clauses (b) to (j) of the section 12 of the said Act. This body could, in addition to its other statutory functions, also function in collaboration with the National Foundation for Communal Harmony as a mechanism for promotion of inter-religious harmony for *inter alia* overseeing the installation and working of "Mohalla Committees" and other civil society initiatives in sensitive areas. With an appropriate statutory enablement by way of enlargement of section 12 of the said Act, the purpose could be achieved without additional expenditure for setting up a separate mechanism. Section 12 of the said Act with consequential amendments to section 3(3) could be amended by the addition of clause (k), which shall read as under:

"(k) promoting through civil society initiatives, inter-faith and inter-religious harmony and social solidarity.".

The Chairpersons of the National Commission for the Backward Classes and the National Commission for Safai Karamcharis should be co-opted to this body.

[Para 3.34.2]

(26) There must be a body of high status which first reviews the state of the level of implementation of the Directive Principles and Economic, Social and Cultural Rights and in particular (i) the right to work, (ii) the right to health, (iii) the right to food, clothing and shelter, (iv) Right to Education up to and beyond the 14th year, and (v) the Right to Culture. The said body must estimate the extent of resources required in each State under each of these heads and make recommendations for allocation of adequate resources, from time to time. For ensuring that the Directive Principles of State Policy are realized more effectively, the following procedure should be followed:-

(i) The Planning Commission should ensure that there is special mention/emphasis in all the plans and schemes formulated by it, on the effectuation/realization of the Directive Principles of State Policy.

(ii) Every Ministry/Department of the Government of India should make a special annual report indicating the extent of effectuation/realization of the Directive Principles of State Policy, the shortfall in the targets, the reasons for the shortfall, if any, and the remedial measures taken to ensure their full realization, during the year under report.

(iii) The report under item (ii) should be considered and discussed by the Department Related Parliamentary Standing Committee, which shall submit its report on the working of the Department indicating the achievements/failures of the Ministry/Department along with its recommendations thereto.

(iv) Both the Reports mentioned at items (ii) and (iii) above should be discussed by the Planning Commission in an interactive seminar with the representatives of various NGOs, Civil Society Groups, etc. in which the representatives of the Ministry/Department and the Departmental Related Parliamentary Standing Committee would also participate. The report of this interaction shall be submitted to the Parliament within a time bound manner.

(v) The Parliament should discuss the report at item (iv) above within a period of three months and pass a resolution about the action required to be taken by the Ministry/Department concerned.

A similar mechanism as mentioned above may be adopted by the States.

[Paras 3.35.2 and 3.35.3]

The Report of the National Statistical Commission (2001) stresses the importance of availability of adequate, credible and timely socio-economic data generated by the statistical system, both for policy formulation and for monitoring progress of the sectors of economy and

1206 LJ&CA/2002—23A

pace of socio-economic change. The Commission endorses the recommendations of the National Statistical Commission and stresses the importance of their implementation.

[Para 3.36]

Fundamental Duties

(28) For effectuating Fundamental Duties, the following steps should be taken:-

(i) The first and foremost step required by the Union and State Governments is to sensitise the people and to create a general awareness of the provisions of fundamental duties amongst the citizens on the lines recommended by the Justice Verma Committee on the subject. Consideration should be given to the ways and means by which Fundamental Duties could be popularized and made effective;

(ii) Right to freedom of religion and other freedoms must be jealously guarded and rights of minorities and fellow citizens respected;

(iii) Reform of the whole process of education is an immediate but immense need, as is the need to free it from governmental or political control; it is only through education that will power to adhere to our Fundamental Duties as citizens can be inculcated;

(iv) *Duty to vote at elections, actively participate in the democratic process of governance and to pay taxes should be included in article 51A;* and

(v) The other recommendations of the Justice Verma Committee on operationalisation of Fundamental Duties of Citizens should be implemented at the earliest.

[Para 3.40.3]

(29) *The following should also be incorporated as fundamental duties in article 51A of the Constitution* -

(i) To foster a spirit of family values and responsible parenthood in the matter of education, physical and moral well-being of children.

(ii) Duty of industrial organizations to provide education to children of their employees.

[Para 3. 40.4]

CHAPTER 4: ELECTORAL PROCESSES AND POLITICAL PARTIES

Electoral Processes

(30) While some far-reaching reforms in the electoral processes are necessary, no major constitutional amendment is required. The necessary correctives could be achieved by ordinary legislation modifying the existing laws, or in many cases, merely by rules and

1206 LJ&CA/2002—23B

executive action. A foolproof method of preparing the electoral roll right at the Panchayat level constituency of a voter and supplementing it by a foolproof voter ID card which may in fact also serve as a multi-purpose citizenship card for all adults. A single exercise should be enough for preparing common electoral rolls and ID cards. The task could be entrusted to a qualified professional agency under the supervision of the Election Commission of India (EC) and in coordination with the SECs. The rolls should be updated constantly and periodically posted on the web site of the Election Commission and CDROMs should be available to all political parties or anyone interested. Prior to elections, these rolls should be printed and publicly displayed at the post offices in each constituency, as well as at the panchayats or relevant constituency headquarters. These should be allowed to be inspected on payment of a nominal fee by anyone. Facilities should also be provided to the members of the public at the post offices for submitting their applications for modification of the electoral rolls.

[Paras 4.7.3 and 4.8.3]

(31) Introduction of Electronic Voting Machines (EVMs) in all constituencies all over the country for all elections as rapidly as possible.

[Para 4.9]

(32) Under section 58A of the Representation of the People Act, 1951, the Election Commission should be authorised to take a decision regarding booth capturing on the report of the returning officers, observers or citizen groups. Also, the EC should be empowered to countermand the election and order a fresh election or to declare the earlier poll to be void and order a re-poll in the entire constituency. Further, the EC should consider the use of tamper-proof video and other electronic surveillance at sensitive polling stations/ constituencies.

[Para 4.10]

(33) Any election campaigning on the basis of caste or religion and any attempt to spread caste and communal hatred during elections should be punishable with mandatory imprisonment. If such acts are done at the instance of the candidate or by his election agents, these would be punishable with disqualification.

[Para 4.11]

(34) The Representation of the People Act should be amended to provide that any person charged with any offence punishable with imprisonment for a maximum term of five years or more, should be disqualified for being chosen as or for being a member of Parliament or Legislature of a State on the expiry of a period of one year from the date the charges were framed against him by the court in that offence and unless cleared during that one year period, he shall continue to remain so disqualified till the conclusion of the trial for that offence. In case a person is convicted of any offence by a court of law and sentenced to imprisonment for six months or more the bar should

apply during the period under which the convicted person is undergoing the sentence and for a further period of six years after the completion of the period of the sentence. If any candidate violates this provision, he should be disqualified. Also, if a party puts up such a candidate with knowledge of his antecedents, it should be derecognised and deregistered.

[Para 4.12.2]

(35) Any person convicted for any heinous crime like murder, rape, smuggling, dacoity, etc. should be permanently debarred from contesting for any political office.

[Para 4.12.3]

(36) Criminal cases against politicians pending before Courts either for trial or in appeal must be disposed off speedily, if necessary, by appointing Special Courts.

[Para 4.12.4]

(37) A potential candidate against whom the police have framed charges may take the matter to the Special Court. This court should be obliged to enquire into and take a decision in a strictly time bound manner. Basically, this court may decide whether there is indeed a prima facie case justifying the framing of charges.

[Para 4.12.5]

(38) The Special Courts should be constituted at the level of High Courts and their decisions should be appealable to the Supreme Court only (in similar way as the decisions of the National Environment Tribunal). The Special Courts should decide the cases within a period of six months. For deciding the cases, these Courts should take evidence through Commissioners.

[Para 4.12.6]

(39) The benefit of sub-section (4) of section 8 of the Representation of the People Act, 1951 should be available only for the continuance in office by a sitting Member of Parliament or a State Legislature. The Commission recommends that the aforesaid provision should be suitably amended providing that this benefit shall not be available for the purpose of his contesting fresh elections.

[Para 4.12.7]

(40) The proposed provision laying down that a person charged with an offence punishable with imprisonment for a maximum period of five years or more should be disqualified from contesting elections after the expiry of a period of one year from the date the charges were framed in a court of law should equally be applicable to sitting members of Parliament and State Legislatures as to any other such person.

[Para 4.12.8]

(41) In matters of disqualification on grounds of corrupt practices, the President should determine the period of disqualification under section

8A of the Representation of the People Act, 1951 on the direct opinion of the EC and avoid the delay currently experienced. This can be done by resorting to the position prevailing before the 1975 amendment to the said Act.

[Para 4.13.1]

(42) The election petitions should also be decided by special courts proposed in para 4.12.6. In the alternative, special election benches may be constituted in the High Courts and earmarked exclusively for the disposal of election petitions and election disputes.

[Para 4.13.2]

(43) The existing ceiling on election expenses for the various legislative bodies be suitably raised to a reasonable level reflecting the increasing costs. However, this ceiling should be fixed by the Election Commission from time to time and should include all the expenses by the candidate as well as by his political party or his friends and his well-wishers and any other expenses incurred in any political activity on behalf of the candidate by an individual or a corporate entity. Such a provision should be the part of a legislation regulating political funding in India. Further, Explanation 1 to section 77(1) of the Representation of the People Act, 1951 should be deleted.

[Para 4.14.2]

(44) The political parties as well as individual candidates should be made subject to a proper statutory audit of the amounts they spend. These accounts should be monitored through a system of checking and cross-checking through the income-tax returns filed by the candidates, parties and their well-wishers. At the end of the election each candidate should submit an audited statement of expenses under specific heads.

[Para 4.14.2]

(45) Every candidate at the time of election must declare his assets and liabilities along with those of his close relatives. Every holder of a political position must declare his assets and liabilities along with those of his close relations annually. Law should define the term 'close relatives'.

[Para 4.14.5]

(46) Any system of State funding of elections bears a close nexus to the regulation of working of political parties by law and to the creation of a foolproof mechanism under law, with a view to implementing the financial limits strictly. Therefore, proposals for State funding should be deferred till these regulatory mechanisms are firmly in position.

[Para 4.14.5]

(47) All candidates should be required under law to declare their assets and liabilities by an affidavit and the details so given by them should be made public. Further, as a follow up action, the particulars of the

assets and liabilities so given should be audited by a special authority created specifically under law for the purpose. Again, the legislators should be required under law for the purpose. Again, the legislators should be required under law to submit their returns about their liabilities every year and a final statement in this regard at the end of their term of office.

[Para 4.14.6]

(48) Campaign period should be reduced considerably.

[Para 4.15.4]

(49) Candidates should not be allowed to contest election simultaneously for the same office from more than one constituency.

[Para 4.15.5]

(50) The election code of conduct, which should come into operation as soon as the elections are announced, should be given the sanctity of law and its violation should attract penal action.

[Para 4.15.6]

(51) The Commission while recognizing the beneficial potential of the system of run off contest electing the representative winning on the basis of 50% plus one vote polled, as against the first-past-the-post system, for a more representative democracy, recommends that the Government and the Election Commission of India should examine this issue of prescribing a minimum of 50% plus one vote for election in all its aspects, consult various political parties, and other interests that might consider themselves affected by this change and evaluate the acceptability and benefits of this system. The Commission recommends a careful and full examination of this issue by the Government and the Election Commission of India.

[Para 4.16.6]

(52) Intra-State delimitation exercise may be undertaken by the Election Commission for Lok Sabha and Assembly constituencies and the Scheduled Castes and Non-Scheduled Area Scheduled Tribe seats should be rotated. The Delimitation Body should, however, reflect the plural composition of society.

[Para 4.17]

(53) *The provisions of the Tenth Schedule of the Constitution should be amended specifically to provide that all persons defecting - whether individually or in groups - from the party or the alliance of parties, on whose ticket they had been elected, must resign from their parliamentary or assembly seats and must contest fresh elections.* In other words, they should lose their membership and the protection under the provision of split, etc. should be scrapped. The defectors should also be debarred to hold any public office of a minister or any other remunerative political post for at least the duration of the remaining term of the existing legislature or until the next fresh

elections whichever is earlier. The vote cast by a defector to topple a government should be treated as invalid. Further, the power to decide questions as to disqualification on ground of defection should vest in the Election Commission instead of in the Chairman or Speaker of the House concerned.

[Para 4.18.2]

(54) The practice of having oversized Council of Ministers should be prohibited by law. A ceiling on the number of Ministers in any State or the Union government be fixed at the maximum of 10% of the total strength of the popular house of the legislature.

[Para 4.19]

(55) The practice of creating a number of political offices with the position, perks and privileges of a minister should be discouraged and at all events, their number should be limited to two per cent of the total strength of the lower house.

[Para 4.19]

(56) Independent candidates should be discouraged and only those who have a track record of having won any local election or who are nominated by at least twenty elected members of Panchayats, Municipalities or other local bodies spread out in majority of electoral districts in their constituency should be allowed to contest for Assembly or Parliament.

[Para 4.20.3]

(57) In order to check the proliferation of the number of independent candidates and the malpractices that enter into the election process because of the influx of the independent candidates, the existing security deposits in respect of independent candidates may be doubled. Further, it should be doubled progressively every year for those independents who fail to win and still keep contesting elections. If any independent candidate has failed to get at least five percent of the total number of votes cast in his constituency, he/she should not be allowed to contest as independent candidate for the same office again at least for 6 years.

[Para 4.20.4]

(58) An independent candidate who loses election three times consecutively for the same office as such candidate should be permanently debarred from contesting election to that office.

[Para 4.20.5]

(59) The minimum number of valid votes polled should be increased to 25% from the current 16.67% as a condition for the deposit not being forfeited. This would further reduce the number of non-serious candidates.

[Para 4.20.6]

(60) It should be possible without any constitutional amendment to provide for the election of the Leader of the House (Lok Sabha/State Assembly) along with the election of the Speaker and in like manner under the Rules of Procedure. The person so elected may be appointed the Prime Minister/Chief Minister.

[Para 4.20.7]

(61) The issue of eligibility of non-Indian born citizens or those whose parents or grandparents were citizens of India to hold high offices in the realm such as President, Vice-President, Prime Minister and Chief Justice of India should be examined in depth through a political process after a national dialogue.

[Para 4.21]

(62) *The Chief Election Commissioner and the other Election Commissioners should be appointed on the recommendation of a body consisting of the Prime Minister, Leader of the Opposition in the Lok Sabha, Leader of the Opposition in the Rajya Sabha, the Speaker of the Lok Sabha and the Deputy Chairman of the Rajya Sabha. Similar procedure should be adopted in the case of appointment of State Election Commissioners.*

[Para 4.22]

(63) All candidates should be required to clear government dues before their candidature are accepted. This pertains to payment of taxes and bills and unauthorised occupation of accommodation and availing of telephones and other government facilities to which they are no longer entitled. The fact that matters regarding Government dues in respect of the candidate are pending before a Court of Law should be no excuse.

[Para 4.23]

(64) In order to obviate the uncertainty in identifying certain offices as offices of profit or not, *suitable amendments should be made in the Constitution* empowering the Election Commission of India to identify and declare the various offices under the Government of India or of a State to be 'offices of profit' for the purposes of being chosen, and for being, a member of the appropriate legislature.

[Para 4.24.3]

Political Parties

(65) A comprehensive law regulating the registration and functioning of political parties or alliances of parties in India [may be named as the Political Parties (Registration and Regulation) Act] should be made. The proposed law should -

(a) provide that political party or alliance should, in its Memoranda of Association, Rules and Regulations provide for its doors being open to all citizens irrespective of any distinctions of caste, community or the like. It should swear allegiance to the

provisions of the Constitution and to the sovereignty and integrity of the nation, regular elections at an interval of three years at its various levels of the party, reservation/ representation of at least 30 per cent, of its organizational positions at various levels and the same percentage of party tickets for parliamentary and State legislature seats to women. Failure to do so should invite the penalty of the party losing recognition.

(b) make it compulsory for the parties to maintain accounts of the receipt of funds and expenditure in a systematic and regular way. The form of accounts of receipt and expenditure and declaration about the sources of funds may be prescribed by an independent body of Accounts & Audit experts, created under the proposed Act. The accounts should also be compulsorily audited by the same independent body, created under the legislation which should also prepare a report on the financial status of the political party which along with the audited accounts should be open and available to public for study and inspection.

(c) make it compulsory for the political parties requiring their candidates to declare their assets and liabilities at the time of filing their nomination before the returning officers for election to any office at any level of government.

(d) provide that no political party should sponsor or provide ticket to a candidate for contesting elections if he was convicted by any court for any criminal offence or if the courts have framed criminal charges against him.

(e) specifically provide that if any party violates the provision mentioned at sub-para (d) above, the candidate involved should be liable to be disqualified and the party deregistered and derecognised forthwith.

[Paras 4.30.1, 4.30.3, 4.30.4, 4.30.5 and 4.34]

(66) The Election Commission should progressively increase the threshold criterion for eligibility for recognition so that the proliferation of smaller political parties is discouraged. Only parties or a pre-poll alliance of political parties registered as national parties or alliances with the Election Commission be allotted a common symbol to contest elections for the Lok Sabha. State parties may be allotted symbols to contest elections for State legislatures and the Council of States (Rajya Sabha).

[Para 4.31.2]

(67) In a situation where no single political party or pre-poll alliance of parties succeeds in securing a clear majority in the Lok Sabha after elections, the Rules of Procedure and Conduct of Business in Lok Sabha may provide for the election of the Leader of the House by the Lok Sabha along with the election of the Speaker and in the like manner. The Leader may then be appointed as the Prime Minister. The same procedure may be followed for the office of the Chief Minister in the State concerned.

[Para 4.33.2]

(68) An amendment in the Rules of Procedure of the Legislatures for adoption of a system of constructive vote of no confidence should be made. For a motion of no-confidence to be brought out against a government at least 20% of the total number of members of the House should give notice. Also, the motion should be accompanied by a proposal of alternative Leader to be voted simultaneously.

[Para 4.33.3]

(69) A comprehensive legislation providing for regulation of contributions to the political parties and towards election expenses should be enacted by consolidating such laws. This new law should =

(a) aim at bringing transparency into political funding;
(b) permit corporate donations within higher prescribed limits and keep them transparent;
(c) make all legal and transparent donations up to a specified limit, tax exempt and treat this tax loss to the state as its contribution to state funding of elections;
(d) contain provisions for making both donors and donees of political funds accountable. The Government should encourage the corporate bodies and agencies to establish an electoral trust which should be able to finance political parties on an equitable basis at the time of elections;
(e) provide that audited political party accounts like the accounts of a public limited company should be published yearly with full disclosures under predetermined account heads; and
(f) provide for immediate de-recognition of the party and enforcement of penalties for filing false or incorrect election returns.

[Paras 4.35.2, 4.35.3, 4.35.4 and 4.36]

CHAPTER 5: PARLIAMENT AND STATE LEGISLATURES

(70) The presiding officers, the minister for parliamentary affairs, and the chief whips of parties should periodically meet to review the work of the departmental parliamentary committees and take remedial action. It should be entirely possible for the Parliament to sanction budgets to secure the services of specialist advisors to assist these committees in conducting their inquiries, holding public hearings, collecting data about legislation and administrative details pertaining to countries which have relevance to the Indian conditions.

[Para 5.6.3]

(71) Immediate steps be taken to set up a Nodal Standing Committee on National Economy with adequate resources in terms of both in house and advisory expertise, data gathering and computing and research facilities for an ongoing analysis of the national economy for assisting the members of the Committee to report on a periodic basis to the full House.

[Para 5.7]

(72) The Parliament should be associated with the initial stage itself in the matter of formulating proposals for constitutional amendment. The actual drafting should be taken up only after the principles underlying the amendment have been thoroughly considered in a parliamentary forum and subjected to *a priori* scrutiny by the constituent power. A Standing Constitution Committee of the two Houses of Parliament for *a priori* scrutiny of amendment proposals should be set up.

[Paras 5.8.2 and 5.8.3]

(73) With the proposed establishment of three new Committees, namely, the Constitution Committee, the Committee on National Economy and the Committee on Legislation, the existing Committees on Estimates, Public Undertakings and Subordinate Legislation may not be continued.

[Para 5.9.1]

(74) The Petitions Committee of Parliament has tremendous potential as a supplement to the proposed Lok Pal institution. It should be made more widely known and used for ventilation, investigation and redressal of people's grievances against the administration.

[Para 5.9.2]

(75) Major reports of all Parliamentary Committees ought to be discussed by the Houses of Parliament especially where there is disagreement between a Parliamentary Committee and the Government.

[Para 5.9.3]

(76) For a more systematic approach to the planning of legislation, the following steps should be taken:-

(a) Adequate time for consideration of Bills in committees and on the floor of the Houses as also to subject the drafts to thorough and rigorous examination by experts and laymen alike should be provided;

(b) All major social and economic legislation should be circulated for public discussion by professional bodies, business organisations, trade unions, academics and other interested persons;

(c) The functions of the Parliamentary and Legal Affairs Committee of the Cabinet should be streamlined;

(d) More focussed use of the Law Commission should be made;

(e) A new Legislation Committee of Parliament to oversee and coordinate legislative planning should be constituted; and

(f) All Bills should be referred to the Departmental Related Parliamentary Standing Committees for consideration and scrutiny after public opinion has been elicited and all comments, suggestions and memoranda are in. The Committees may schedule public hearings, if necessary, and finalise with the help of experts the second reading stage in the relaxed Committee atmosphere. The time of the House will be saved thereby without impinging on any of its rights. The quality of

drafting and the content of legislation will necessarily be improved as a result of following these steps.

[Paras 5.10.1 and 5.10.2]

(77) The Parliament may consider enacting suitable legislation to control and regulate the treaty-power of the Union Government whenever appropriate and necessary after consulting the State Governments and Legislatures under article 253 "for giving effect to international agreements".

[Para 5.10.3]

(78) The Parliamentarians have to be like Caesar's wife, above suspicion. They must voluntarily place themselves open to public scrutiny through a parliamentary ombudsman. Supplemented by a code of ethics which has been under discussion for a long time, it would place Parliament on the high pedestal of people's affection and regard.

[Para 5.11.1]

(79) Mass media should be encouraged to accurately reflect the reality of Parliament's working and the functioning of Parliamentarians in the Houses. Televising all important debates nationwide in addition to the Question Hours, publication of monographs, handouts, radio, TV, press interviews, use of audio-visual techniques, especially to arouse curiosity and interest of the younger generation, and regular briefing of the press will go a long way in making people better acquainted with the important national work that is being done inside the historic parliament building.

[Para 5.11.2]

(80) It is a legitimate public expectation that membership of Legislatures should not be converted into an office of lucrative gain but remain an office of service. The question of salaries, allowances, perks and pensions of lawmakers should be looked into on a rational basis and healthy conventions built.

[Para 5.11.3]

(81) The Parliament and the State Legislatures should assemble and transact business for not less than a minimum number of days. The Houses of State Legislatures with less than 70 members should meet for at least 50 days in a year and other Houses for at least 90 days while the minimum number of days for sittings of Rajya Sabha and Lok Sabha should be fixed at 100 and 120 days respectively.

[Para 5.11.4]

(82) In order to maintain basic federal character of the Rajya Sabha, the domiciliary requirement for eligibility to contest elections to Rajya Sabha from the concerned State is essential. This should be maintained.

[Para 5.11.5]

(83) Better and more institutionalized arrangements are necessary to provide the much-needed professional orientation to newly elected members. The emphasis should be on imparting practical knowledge on how to be an effective member.

[Para 5.12]

(84) The findings and recommendations of the Public Accounts Committees (PACs) should be accorded greater weight. A convention should be developed with the cooperation of all major parties represented in the legislature to treat the PACs as the conscience-keepers of the nation in financial matters.

[Para 5.13]

(85) Union Government should take necessary steps for the early enactment of the Fiscal Responsibility Bill pending before Parliament. The State Assemblies should enact similar legislation as provided for in article 293 to put their respective fiscal houses in order.

[Para 5.14]

(86) The privileges of legislators should be defined and delimited for the free and independent functioning of Parliament and State Legislatures. It should not be necessary to run to the 1950 position in the House of Commons every time a question arises as to what kind of legal protection or immunity a Member has in relation to his or her work in the House.

[Para 5.15.3]

(87) *Article 105(2) may be amended to clarify that the immunity enjoyed by Members of Parliament under parliamentary privileges does not cover corrupt acts committed by them in connection with their duties in the House or otherwise.* Corrupt acts would include accepting money or any other valuable consideration to speak and/or vote in a particular manner. For such acts, they would be liable for action under the ordinary law of the land. It may be further provided that no court will take cognisance of any offence arising out of a Member's action in the House without prior sanction of the Speaker or the Chairman, as the case may be. *Article 194(2) may also be similarly amended in relation to the Members of State Legislatures.*

[Para 5.15.6]

(88) An Audit Board should be constituted for better discharge of the vital function of public audit, but the number of members to be appointed, the manner of their appointment and removal and other related matters should be dealt with by appropriate legislation, keeping in view the need for ensuring independent functioning of the Board.

[Para 5.16.2]

(89) Though no specific change is needed in the existing provisions of the Constitution insofar as appointment of the Comptroller and Audit General of India (C&AG) and other related matters are concerned, yet a healthy convention be developed to consult the Speaker of the Lok

Sabha, before the Government decides on the appointment of the C&AG so that the views of the Public Accounts Committee are also taken into account.

[Para 5.16.3]

(90) The considerations that apply at the Union level in regard to the functioning of the office of C&AG should apply with equal force at the State level. The State Accountants General (AGs) should be given greater authority by the C&AG, while maintaining its general superintendence, direction and control to bring about a broad uniformity of approach in the sphere of financial discipline. The C&AG should evolve accounting policies and standards and norms for all bodies and entities that receive public funds, such as autonomous bodies and the Panchayat Raj institutions.

[Para 5.16.4]

(91) The operations of the office of the C&AG itself should be subject to scrutiny by an independent body. To fulfil the canons of accountability, a system of external audit of C&AG's organization should be adopted for both the Union and the State level organizations.

[Para 5.17]

(92) The MP LAD Scheme, as being inconsistent with the spirit of the Constitution in many ways, should be discontinued immediately.

[Para 5.19.2]

(93) Legislation envisaged in article 98(2) should be undertaken to reorganise the Secretariats as independent and impartial instruments of Parliament, with special emphasis on upgrading professional competence.

[Para 5.20.1]

(94) It would be useful to reform the budgetary procedure for streamlining the work of Parliament.

[Para 5.21.2]

(95) The number of days on which voting is considered essential should be reduced to the barest minimum and the time for such voting in a given session be fixed in advance with appropriate whips requiring full attendance of members.

[Para 5.21.3]

(96) In order to ensure better scrutiny of administration and accountability to Parliament, parliamentary time in the two houses may be suitably divided between the government and the opposition.

[Para 5.21.4]

(97) The best way to deal with issues of procedural reforms in a professional (and not political) manner is to have them studied by a Study Group outside Parliament as was done in U.K. The conclusions and suggestions of the Group can be considered by the Rules

Committees of the houses of Parliament. Accordingly, a Study Group outside Parliament for study of Parliament should be set up.

[Para 5.21.5]

CHAPTER 6: EXECUTIVE AND PUBLIC ADMINISTRATION

(98) While improving the nature and institutional response of administration to the challenges of democracy is imperative, the system can deliver the goods only through devolution, decentralisation and democratisation thereby narrowing the gap between the base of the polity and the super structure.

[Para 6.2.8]

(99) District should be considered as a basic unit of planning for development. Functions, finances, and functionaries relating to the development programmes would have to be placed under the direct supervision and command of elected bodies at the district levels of operation to give content and substance to such programmes of development and public welfare. This would, to a substantial degree, correct the existing distortions and make officials directly answerable to the people to ensure proper implementation of development programmes under the direct scrutiny of people.

[Para 6.4.1]

(100) India should move to a system where the State guarantees the title to land after carrying out extensive land surveys and computerizing the land records. It will take some time but the results would be beneficial for investment in land. This will be a major step forward in revitalizing land administration in the country as it would enable Right to access, Right to use and Right to enforce decisions regarding land. Similar rationalization of records relating to individuals rights in properties other than privately held lands (which are held in common) would improve operational efficiency which left unattended foment unrest. A coherent public policy addressed to the modern methods of management would contribute to better use of assets and raise dynamic forces of individual creativity. Run away expansion in bureaucratic apparatus of the State would also get curtailed by new management system.

[Para 6.4.2]

(101) Energetic efforts should be made to establish a pattern of cooperative relationship between the State and associations, NGOs and other voluntary bodies to launch a concerted effort to regenerate the springs of progressive social change. State and civil society are not to be treated antithical but complementary.

[Para 6.5.4]

(102) The questions of personnel policy including placements, promotions, transfers and fast-track advancements on the basis of forward-looking career management policies and techniques should be managed by

autonomous Personnel Boards for assisting the high level political authorities in making key decisions. Such Civil Service Boards should be constituted under statutory provisions. They should be expected to function like the UPSC. The sanctity of parliamentary legislation under article 309 is needed to counteract the publicly known trends of the play of unhealthy and destabilizing influences in the management of public services in general and higher civil services in particular.

[Para 6.7.1]

(103) Above a certain level--say the Joint Secretary level - all posts should be open for recruitment from a wide variety of sources including the open market. Government should specialize some of the generalists and generalize some of the specialists through proper career management which has to be freed from day to day political manipulation and influence peddling.

[Para 6.7.2]

(104) Social audit of official working should be done for developing accountability and answerability. Officials, before starting their career, in addition to the taking of an oath of loyalty to the Constitution, should swear to abide by the basic principles of good governance. This would give renewed sense of commitment by the executives to the basic tenets of the Constitution.

[Para 6.7.3]

(105) The services have remained largely immune from imposition of penalties due to the complicated procedures that have grown out of the constitutional guarantee against arbitrary and vindictive action (article 311). The constitutional safeguards have in practice acted to shield the guilty against swift and certain punishment for abuse of public office for private gain. A major corollary has been erosion of accountability. It has accordingly become necessary to re-visit the issue of constitutional safeguards under article 311 to ensure that the honest and efficient officials are given the requisite protection but the dishonest are not allowed to prosper in office. A comprehensive examination of the entire corpus of administrative jurisprudence has to be undertaken to rationalize and simplify the procedure of administrative and legal action and to bring the theory and practice of security of tenure in line with the experience of the last more than 50 years.

[Para 6.7.4]

(106) The civil service regulations need to be changed radically in the light of contemporary administrative theory to introduce modern evaluation methodology.

[Para 6.7.5]

(107) The administrative structure and systems have to be consciously redesigned to give appropriate recognition to the professional and technical services so that they may play their due role in modernizing our economy and society. The specialist should not be required to play second fiddle to the generalist at the top. Conceptually we need

to develop a collegiate style of administrative management where the leader is an energizer and a facilitator, and not an oracle delivering verdicts from a high pedestal.

[Para 6.7.6]

(108) A parliamentary legislation under article 312(1) should be enacted. It should be debated in professional circles as well as by the general public.

[Para 6.7.7]

(109) Right to information should be guaranteed and needs to be given real substance. In this regard, government must assume a major responsibility and mobilize skills to ensure flow of information to citizens. The traditional insistence on secrecy should be discarded. In fact, we should have an oath of transparency in place of an oath of secrecy. Administration should become transparent and participatory. Right to information can usher in many benefits, such as speedy disposal of cases, minimizing manipulative and dilatory tactics of the babudom, and, last but most importantly, putting a considerable check on graft and corruption.

[Para 6.10]

(110) The Union Government should take steps to move the Parliament for early enactment of the Freedom of Information Legislation. It will be a major step forward in strengthening the values of a free and democratic society.

[Para 6.11]

(111) To remain actively involved in new development programmes the people would also need the support of well organized, well prepared, knowledge-oriented personnel and well thought out policies. Think tanks and organized intellectual groups would have to be promoted through state funding, etc. without abridging their autonomy.

[Para 6.12]

(112) The structural problems of foreign policy would be to constantly aim at making the best possible use of the international order and use it to our advantage. In the country's governance, the duality of foreign and domestic policy should end. The two should not be antithetical. A serious effort is required to combine the two to recast relations and launch a creative initiative to achieve strategic partnerships the world over on the principles of inter-dependence without domestic interests being relegated to the background. This calls for a thorough change in the form, working and structuring of Foreign Affairs mechanisms including the External Affairs Ministry. Foreign policy implementation calls for cutting through the mind-set of a generation.

[Para 6.14]

(113) One of the measures adopted in several western countries to fight corruption and mal-administration is enactment of Public Interest

Disclosure Acts which are popularly called the Whistle-blower Acts. Similar law may be enacted in India also. The Act must ensure that the informants are protected against retribution and any form of discrimination for reporting what they perceived to be wrong-doing, i.e., for *bona fide* disclosures which may ultimately turn out to be not entirely or substantially true.

[Para 6.16.3]

(114) The Government should examine the proposal for enacting a comprehensive law to provide that where public servants cause loss to the State by their *mala fide* actions or omissions, they would be made liable to make good the loss caused and, in addition, would be liable for damages.

[Para 6.17]

(115) The Union Government should frame rules, without further loss of time, under Section 8 of the Benami Transactions (Prohibition) Act, 1988 for acquiring *benami* property. Further, a law should be enacted to provide for forfeiture of benami property of corrupt public servants as well as non-public servants.

[Para 6.19]

(116) The Government should examine enacting a law for confiscation of illegally acquired assets on the lines suggested by the Supreme Court in *Delhi Development Authority* vs. *Skipper Construction Co. (P) Ltd.* (AIR 1996 SC 2005). There is no need to set up an additional independent Authority to determine this issue of confiscation. The Tribunal constituted under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, (SAFEMA) 1976, which could deal with similar situation arising out of other statutes may be conferred additional jurisdiction to determine cases of confiscation arising out of the Benami Transactions (Prohibition) Act, 1988 and the Prevention of Corruption Act, 1988, (as may be amended) and other legislations which empower confiscation of illegally acquired assets. Tribunal will exercise distinct and separate jurisdictions under separate statutes.

[Para 6.20.2]

(117) The Prevention of Corruption Act, 1988 should be amended to provide for confiscation of the property of a public servant who is found to be in possession of property disproportionate to his/her known sources of income and is convicted for the said offence. In this case, the law should shift the burden of proof to the public servant who was convicted. In other words, the presumption should be that the disproportionate assets found in possession of the convicted public servant were acquired by him by corrupt or illegal means. A proof of preponderance of probability shall be sufficient for confiscation of the property. The law should lay down that the standard of proof in determining whether a person has been benefited from an offence and for determining the amount in which a confiscation order is to be made, is that which is applicable to civil cases, i.e. a mere

preponderance of probability only. A useful analogy may be seen in Section 2(8) of the Drug Trafficking Act 1994 in United Kingdom.

[Para 6.20.3]

(118) *The Constitution should provide for appointment of Lok Pal.* The Prime Minister should be kept out of the purview of the Lok Pal.

[Para 6.21.1]

(119) The Union Government should take steps for early enactment of the Central Vigilance Commission Bill, already introduced in Parliament.

[Para 6.22]

(120) *The Constitution should contain a provision obliging the States to establish the institution of Lokayuktas in their respective jurisdictions in accordance with the legislation of the appropriate legislatures.*

[Para 6.23.2]

(121) When once a Commission of Inquiry is constituted under the Commissions of Inquiry Act, 1952 or otherwise, the Government should consult the Chairperson of the Commission in respect of time required for completion / finalisation of the report. Once such a time is specified, the Commission should adhere to it. The Action Taken Report on the report should be announced by the Government within a period of three months from the date of submission of the report.

[Para 6.24.2]

CHAPTER 7: THE JUDICIARY

(122) In the matter of appointment of Judges of the Supreme Court, it would be worthwhile to have a participatory mode with the participation of both the executive and the judiciary in making recommendations. The composition of the Collegium gives due importance to and provides for the effective participation of both the executive and the judicial wings of the State as an integrated scheme for the machinery for appointment of judges. *A National Judicial Commission under the Constitution should be established.*

The National Judicial Commission for appointment of judges of the Supreme Court shall comprise of:

(1) The Chief Justice of India	:	Chairman
(2) Two senior most judges of the Supreme Court:		Member
(3) The Union Minister for Law and Justice	:	Member
(4) One eminent person nominated by the President after consulting the Chief Justice of India:		Member

The establishment of a National Judicial Commission and its composition are to be treated as integral in view of the need to preserve the independence of the judiciary.

[Para 7.3.7]

(123) A committee comprising the Chief Justice of India and two senior-most Judges of the Supreme Court will comprise the committee of the National Judicial Commission exclusively empowered to examine complaints of deviant behaviour of all kinds and complaints of misbehaviour and incapacity against judges of The Supreme Court and the High Courts. If the committee finds that the matter is serious enough to call for a fuller investigation or inquiry, it shall refer the matter for a full inquiry to the committee [constituted under the Judges' (Inquiry) Act, 1968]. The committee under the Judges Inquiry Act shall be a permanent committee with a fixed tenure with composition indicated in the said Act and not one constituted ad-hoc for a particular case or from case to case, as is the present position under section 3(2) of the Act. The tenure of the inquiry committee shall be for a period of four years and to be re-constituted every four years. The inquiry committee shall be constituted by the President in consultation with the Chief Justice of India. The inquiry committee shall inquire into and report on the allegation against the Judge in accordance with the procedure prescribed by the said Act, i.e. in accordance with the sub-sections (3) to (8) of Section 3 and sub-section (1) of Section 4 of the said Act and submit their report to the Chief Justice of India, who shall place before a committee of seven senior-most judges of the Supreme Court. The Committee of seven Judges shall take a decision as to - whether (a) findings of the inquiry committee are proper and (b) any charge or charges are established against the judge and if so, whether the charges held proved are so serious as to call for his removal (i.e. proved misbehaviour) or whether it should be sufficient to administer a warning to him and/or make other directions with respect to allotment of work to him by the concerned Chief Justice or to transfer him to some other court (i.e. deviant behaviour not amounting to misbehaviour). If the decision of the said committee of judges recommends the removal of the Judge, it shall be a convention that the judge promptly demits office himself. If he fails to do so, the matter will be processed for being placed before Parliament in accordance with articles 124(4) and 217(1) Proviso (b). This procedure shall equally apply in case of Judges of the Supreme Court and the High Courts except that in the case of a Supreme Court Judge the judge against whom complaint is received or inquiry is ordered, shall not participate in any proceeding affecting him.

In appropriate cases the Chief Justice of the High Court or the Chief Justice of India, may withhold judicial work from the judge concerned after the inquiry committee records a finding against the judge.

[Para 7.3.8]

(124) Article 124(3) contemplates appointment of Judges of Supreme Court from three sources. However, in the last fifty years not a single distinguished jurist has been appointed. From the Bar also, less than half a dozen Judges have been appointed. It is time that suitably meritorious persons from these sources are appointed.

[Para 7.3.9]

(125) The retirement age of the Judges of the High Court should be increased to 65 years and that of the Judges of the Supreme Court should be increased to 68 years.

[Para 7.3.10]

(126) In the matter of transfer of Judges, it should be as a matter of policy and the power under article 222 and its exercise in appropriate cases should remain untouched. The President would transfer a Judge from one High Court to any other High Court after consultation with a committee comprising the Chief Justice of India and the two senior-most Judges of the Supreme Court.

[Para 7.3.11]

(127) *A proviso should be inserted in article 129 so as to provide that the power of court to punish for contempt of itself inherent only in the Supreme Court and the High Courts and is available as part of the privilege of Parliament and State Legislatures, and no other court, tribunal or authority should have or be conferred with a power to punish for contempt of itself.*

[Para 7.4.7]

(128) *A suitable provision may be inserted in the Constitution so as to provide that except the Supreme Court and the High Courts no other court, tribunal or authority shall exercise any jurisdiction to adjudicate on the validity or declare an Act of Parliament or State Legislature as being unconstitutional or beyond legislative competence and so ultra vires. Such a provision may be made as clause (5) of article 226.*

[Para 7.5]

(129) A 'Judicial Council' at the apex level and Judicial Councils at each State at the level of the High Court should be set up. There should be an Administrative Office to assist the National Judicial Council and separate Administrative Offices attached to Judicial Councils in States. These bodies must be created under a statute made by Parliament. The Judicial Councils should be in charge of the preparation of plans, both short term and long term, and for preparing the proposals for annual budget.

[Para 7.7]

(130) The budget proposals in each State must emanate from the State Judicial Council, in regard to the needs of the subordinate judiciary in that State, and will have to be submitted to the State Executive. Once the budget is so finalized between the State Judicial Council and the State Executive, it should be presented in the State Legislature.

[Para 7.8.1]

(131) The entire burden of establishing subordinate courts and maintaining subordinate judiciary should not be on the State Governments. There is a concurrent obligation on the Union Government to meet the expenditure for subordinate courts. Therefore, the Planning Commission and the Finance Commission must allocate sufficient

funds from national resources to meet the demands of the State judiciary in each of the States.

[Para 7.8.2]

(132) The presiding officers in courts should be adequately trained. To ensure competence, there should be a proper selection, freedom of action, training, motivation and experience. To maintain their competence it is necessary to have continuing education for the judges. Some national judicial institutions have to be properly structured to give such training. There should be a proper monitoring of moving the judges where work demands such movement from places where there are no arrears of work. There has to be systematic assessment of training needs of judicial personnel at different levels.

[Para 7.10.2]

(133) The Government should ensure basic infra-structure needed to all courts and arrange to ensure that courts are not handicapped for want of infra-structural facilities. Governments, both at the Centre and in the States, should constitute committee of secretaries to review government litigation with a view to avoid adjudication, wherever possible, give priority in filling of written statements, wherever required, and instruct government advocates to seek early decision on government litigation.

[Para 7.10.4]

(134) In the Supreme Court and the High Courts, judgements should ordinarily be delivered not later than ninety days from the conclusion of the case. If a judgement is not rendered within such time – it is possible that the complexities of the case and the effect the decision may have on another similar situation might compel greater and larger judicial consideration and contemplation – the case must be listed before the court immediately on the expiry of ninety days for the court to fix a specific date for the pronouncement of the judgement.

[Para 7.10.5]

(135) An award of exemplary costs should be given in appropriate cases of abuse of process of law.

[Para 7.11]

(136) The recommendations of the Law Commission of India in regard to the Nagar Nyayalayas, Conciliation Courts, ADR systems of urban litigation, evidence recording by Commissioners, etc. as incorporated in the Code of Civil Procedure (Amendment) Act, 2000 should be brought into force with such modifications as would take care of a few serious objections.

[Para 7.13.3]

(137) The provisions relating to conciliation in the Arbitration and Conciliation Act, 1996 should suitably be amended to provide for obligatory recourse to conciliation or mediation in relation to cases pending in

courts. Further, the scope and functions of the Legal Services Authorities constituted under the Legal Services Authorities Act, 1987 should be enlarged and extended to enable the Authorities to set up conciliation and mediation fora and to conduct, in collaboration of other institutions wherever necessary, training courses for conciliators and mediators.

[Para 7.13.4]

(138) Each High Court should, in consultation with the judicial councils referred to in para 7.7, prepare a strategic plan for time-bound clearance of arrears in courts under its jurisdiction. The plan may prescribe annual targets and district-wise performance targets. High Courts should establish monitoring mechanisms for progress evaluation. The purpose is to achieve the position that no court within the High Court's jurisdiction has any case pending for more than one year. This should be achieved within a period of five years or earlier.

[Para 7.13.5]

(139) The criminal investigation system needs higher standards of professionalised action and it should be provided adequate logistic and technological support. Serious offences should be classified for purpose of specialized investigation by specially selected, trained and experienced investigators. They should not be burdened with other duties like security, maintenance of law and order etc., and should be entrusted exclusively with investigation of serious offences.

[Para 7.14.2]

(140) The number of Forensic Science Institutions with modern technologies such as DNA fingerprinting technology should be enhanced.

[Para 7.14.3]

(141) The system of plea-bargaining (as recommended by the Law Commission of India in its Report) should be introduced as part of the process of decriminalisation.

[Para 7.14.4]

(142) In order that citizen's confidence in the police administration is enhanced, the police administration in the districts should periodically review the statistics of all the arrests made by the police in the district as to how many of the cases in which arrests were made culminated in the filing of charge-sheets in the court and how many of the arrests ultimately turned out to be unnecessary. This review will check the tendency of unnecessary arrests.

[Para 7.14.5]

(143) The legal services authorities in the States should set up committees with the participation of civil society for bringing the accused and the victims together to work out compounding of offences.

[Para 7.14.6]

(144) Statements of witnesses during investigation of serious cases should be recorded before a magistrate under Section 164 of the Code of Criminal Procedure, 1973.

[Para 7.14.7]

(145) The case for a viable, social justice-oriented and effective scheme for compensation victims is now widely felt. The Government at the Union level and in the States are well advised under the directive principles as well as under International Human Rights obligations to legislate on the subject of an effective scheme of compensation for victims of crime without further delay.

[Para 7.15.3]

(146) The tremendous support which the criminal justice might derive from the people once the compensation scheme is introduced even in a modest scale, and the possibilities of advancing the crying need for social justice in a very real sense, are attractive enough for the State to find money to float the scheme immediately.

[Para 7.15.4]

(147) The National Informatics Centre in collaboration with or with the assistance of the Indian Law Institute and the Government Law Departments should set up a Digital Legal Information System in the country so that all courts, legal departments, law schools would be able to access and retrieve information from the data bank of the important law libraries in the country."

[Para 7.17.2]

(148) Progressively the hierarchy of the subordinate courts in the country should be brought down to a two-tier of subordinate judiciary under the High Court. Further, strict selection criteria and adequate training facilities for the presiding officers of such courts should be provided. In order to cope up with the workload of cases at the lower level and also to curtail arrears and delay, the States should appoint honorary judicial magistrates selected from experienced lawyers on the criminal side to try and dispose less serious and petty cases on part-time basis on the pattern of Recorders and Assistant Recorders in UK. They could set for, say, 100 days in a year and hold court later in the evenings after regular court hours. This would relieve the load on the regular magistracy.

[Para 7.18]

(149) Since the issues relating to human rights, more particularly relating to unlawful detention, have now occupied a center-stage, both nationally and internationally, it shall be desirable that the Protection of Human Rights Act, 1993 may be suitably amended to provide that, in addition to the powers generally vested in that Court, such courts shall have the power to issue directions of the nature of a *habeas corpus* as was available to the High Courts under section 491 of the Code of Criminal Procedure, 1898. Vesting of such power will go a long way in

providing help to the indigent and vulnerable sections of the society in view of the proximity and easy accessibility of the Court of Session.

[Para 7.19.3]

CHAPTER 8: UNION-STATE RELATIONS

Legislation

(150) Individual and collective consultation with the States should be undertaken through the Inter-State Council established under article 263 of the Constitution. Further, the Inter-State Council Order, 1990, issued by the President may clearly specify in para 4(b) of the order the subjects that should form part of consultation in the Inter-State Council.

[Para 8.2.13]

(151) *"Management of Disasters and Emergencies, Natural or Man-Made" should be included in List III of the Seventh Schedule.*

[Para 8.2.14]

Finance

(152) It might be worthwhile to provide explicitly for taxing power for the States in respect of certain specified services. For the Union also an explicit entry would be helpful, rather than leaving it to the residuary power of entry 97. However, it may be better to first let a consensus list of services to be taxed by the States come into force to be treated as the exclusive domain of the States, even if the formal taxing power is exercised by the Union. A *de facto* enumeration of services that can be taxed exclusively by the States should get priority from policy makers with a view to augmenting the resource pool of the States. Specific enumeration of services that may become amenable to taxation by the States should be made. *An appropriate amendment to the Constitution in this behalf should be made to include certain taxes, now levied and collected by the Union, to be levied and collected by the States.*

[Para 8.5]

Trade, Commerce and Intercourse

(153) For carrying out the objectives of articles 301, 302, 303 and 304, and other purposes relating to the needs and requirements of inter-State trade and commerce and for purposes of eliminating barriers to inter-state trade and commerce Parliament should, by law, establish an authority called the "Inter-State Trade and Commerce Commission" under the Ministry of Industry and Commerce under article 307 read with Entry 42 of List-I.

[Para 8.8.2]

(154) *Article 139A, which confers power on the Supreme Court to withdraw cases involving the same or substantially the same question of law, which are pending in Supreme Court and one or more High Courts, should be amended so as to provide that it can withdraw to itself cases even if they are pending in one court where such questions as to the legislative competence of the Parliament or State Legislature are involved.*

[Para 8.9.4]

(155) As river water disputes being important disputes between two or more States and/or the Union, they should be heard and disposed by a bench of not less than three Judges and if necessary, a bench of five Judges of the Supreme Court for the final disposal of the suit.

[Para 8.11.7]

(156) Appropriate provisions may be made as envisaged by article 145(1) in consultation with the Supreme Court or if the Supreme Court so opts to provide for the same by the Supreme Court Rules to appoint Commissioners or Masters and to have the evidence recorded not by the Supreme Court itself but by the Commissioners or Masters so that the precious time of the Supreme Court is saved.

[Para 8.11.8]

(157) Appropriate Parliamentary legislation should be made for repealing the River Boards Act, 1956 and replacing it by another comprehensive enactment under Entry 56 of List I. The new enactment should clearly define the constitution of the River Boards and their jurisdiction so as to regulate, develop and control all inter-State rivers keeping intact the adjudicated and the recognized rights of the States through which the inter-State river passes and their inhabitants. While enacting the legislation, national interest should be the paramount consideration as inter-State rivers are 'material resources' of the community and are national assets. Such enactment should be passed by Parliament after having effective and meaningful consultation with all the State Governments.

[Para 8.11.9]

(158) In resolving problems and coordinating policy and action, the Union as well as the States should more effectively utilize the forum of inter-State Council as recommended by the Commission on Centre-State Relations (Sarkaria Commission). This will be in tune with the spirit of cooperative federalism requiring proper understanding and mutual confidence and resolution of problems of common interest expeditiously.

[Para 8.12.4]

(159) In order to reduce tension or friction between States and the Union and for expeditious decision-making on important issues involving States, the desirability of prior consultation by the Union Government

with the inter-State Council may be considered before signing any treaty vitally affecting the interests of the States regarding matters in the State List.

[Para 8.13.3]

Executive

(160) The powers of the President in the matter of selection and appointment of Governors should not be diluted. However, the Governor of a State should be appointed by the President only after consultation with the Chief Minister of that State. Normally the five year term should be adhered to and removal or transfer should be by following a similar procedure as for appointment i.e. after consultation with the Chief Minister of the concerned State.

[Para 8.14.2]

(161) In the matter of selection of a Governor, the following matters mentioned in para 4.16.01 of Volume I of the Sarkaria Commission Report should be kept in mind:-

- ❖ He should be eminent in some walk of life.
- ❖ He should be a person from outside the State.
- ❖ He should be a detached figure and not too intimately connected with the local politics of the State.
- ❖ He should be a person who has not taken too great a part in politics generally, and particularly in the recent past.

In selecting a Governor in accordance with the above criteria, the persons belonging to the minority groups should continue to be given a chance as hitherto.

[Para 8.14.3]

(162) There should be a time-limit – say a period of six months – within which the Governor should take a decision whether to grant assent or to reserve a Bill for consideration of the President. If the Bill is reserved for consideration of the President, there should be a time-limit, say of three months, within which the President should take a decision whether to accord his assent or to direct the Governor to return it to the State Legislature or to seek the opinion of the Supreme Court regarding the constitutionality of the Act under article 143.

[Para 8.14.4]

(163) *Suitable amendment should be made in the Constitution so that the assent given by the President should avail for all purposes of relevant articles of the Constitution.* However, it is desirable that when a Bill is sent for the President's assent, it would be appropriate to draw the attention of the President to all the articles of the Constitution, which refer to the need for the assent of the President to avoid any doubts in court proceedings.

[Para 8.14.6]

(164) *A suitable Article should be inserted in the Constitution to the effect that an assent given by the President to an Act shall not be permitted*

to be argued as to whether it was given for one purpose or another. When the President gives his assent to the Bill, it shall be deemed to have been given for all purposes of the Constitution.

[Para 8.14.7]

(165) *The following proviso may be added to article 111 of the Constitution:*

"Provided that when the President declares that he assents to the Bill, the assent shall be deemed to be a general assent for all purposes of the Constitution."

Suitable amendment may also be made in article 200.

[Para 8.14.8]

(166) Article 356 should not be deleted. But it must be used sparingly and only as a remedy of the last resort and after exhausting action under other articles like 256, 257 and 355.

[Paras 8.18 and 8.19.2]

(167) In case of political breakdown, necessitating invoking of article 356, before issuing a proclamation thereunder, the concerned State should be given an opportunity to explain its position and redress the situation, unless the situation is such, that following the above course would not be in the interest of security of State, or defence of the country, or for other reasons necessitating urgent action.

[Para 8.19.5]

(168) The question whether the Ministry in a State has lost the confidence of the Legislative Assembly or not, should be decided only on the floor of the Assembly and nowhere else. If necessary, the Union Government should take the required steps, to enable the Legislative Assembly to meet and freely transact its business. The Governor should not be allowed to dismiss the Ministry, so long as it enjoys the confidence of the House. It is only where a Chief Minister refuses to resign, after his Ministry is defeated on a motion of no-confidence, that the Governor can dismiss the State Government. In a situation of political breakdown, the Governor should explore all possibilities of having a Government enjoying majority support in the Assembly. If it is not possible for such a Government to be installed and if fresh elections can be held without avoidable delay, he should ask the outgoing Ministry, (if there is one), to continue as a caretaker government, provided the Ministry was defeated solely on a issue, unconnected with any allegations of maladministration or corruption and is agreeable to continue. The Governor should then dissolve the Legislative Assembly, leaving the resolution of the constitutional crisis to the electorate.

[Para 8.20.3]

(169) The problem of political breakdown would stand largely resolved if the recommendations made in Chapter 4 in regard to the election of the leader of the House (Chief Minister) and the removal of the

Government only by a constructive vote of no-confidence are accepted and implemented.

[Paras 8.20.3 and 8.20.4]

(170) Normally, President's Rule in a State should be proclaimed on the basis of Governor's Report under article 356(1). The Governor's report should be a "speaking document", containing a precise and clear statement of all material facts and grounds, on the basis of which the President may satisfy himself, as to the existence or otherwise of the situation contemplated in article 356.

[Para 8.20.5]

(171) *In clause (5) of article 356 of the Constitution, in clause (a) the word "and" occurring at the end should be substituted by the word "or" so that even without the State being under a proclamation of Emergency, President's rule may be continued if elections cannot be held.*

[Para 8.21.3]

(172) Whenever a proclamation under article 356 has been issued and approved by the Parliament it may become necessary to review the continuance in force of the proclamation and to restore the democratic processes earlier than the expiry of the stipulated period. *For this, new clauses (6) & (7) to article 356 may be added on the following lines:* -

"(6) Notwithstanding anything contained in the foregoing clauses, the President shall revoke a proclamation issued under clause (1) or a proclamation varying such proclamation if the House of the People passes a resolution disapproving, or, as the case may be, disapproving the continuance in force of, such proclamation.

(7) Where a notice in writing signed by not less than one-tenth of the total number of members of the House of the People has been given, of their intention to move a resolution for disapproving, or, as the case may be, for disapproving the continuance in force of, a proclamation issued under clause (1) or a proclamation varying such proclamation:

(a) to the Speaker, if the House is in session; or
(b) to the President, if the House is not in session,

a special sitting of the House shall be held within fourteen days from the date on which such notice is received by the Speaker, or, as the case may be, by the President, for the purpose of considering such resolution.".

[Para 8.21.4]

(173) *Article 356 should be amended so to ensure that the State Legislative Assembly should not be dissolved either by the Governor or the President before the proclamation issued under article 356(1) has*

been laid before Parliament and it has had an opportunity to consider it.

[Para 8.22.3]

(174) Government may consider the demands of the Coorgies for a Sainik School, a Development Board and a University for them in Coorg.

[Para 8.23.1]

(175) Steps may be taken for better protection of Sindhi language and culture by setting up of a Centre of Sindhi Language and Culture with the State providing necessary facilities for the same. The difficulties faced by the Sindhi migrants may be examined and corrective measures taken to facilitate grant of citizenship as per the existing law.

[Para 8.23.2]

CHAPTER 9: DECENTRALISATION AND DEVOLUTION

Panchayats

(176) *Article 243K and 243Z should be amended on the following lines:-*

1. **Amendment of article 243K.-**
In article 243K,-

(a) for clause (1), the following clauses shall be substituted, namely:-

"(1) Subject to the provisions of clause (1A), the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.

(1A) The Election Commission shall have the power to issue any directions or instructions to the State Election Commission for the discharge of its functions under clause (1).".

(b) after clause (4), the following clause shall be inserted, namely:-

"(5) The State Election Commission shall submit its annual report to the Election Commission and to the Governor, every year and it may, at any time, submit special reports on any matter which in its opinion is of such urgency or importance that it should not be deferred till the submission of its annual report.".

2. Amendment of article 243ZA.-

In article 243ZA, for clause (1), the following clauses shall be substituted, namely:-

> "(1) Subject to the provisions of clause (1A), the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Municipalities shall be vested in the State Election Commission referred to in article 243K.
>
> (1A) The Election Commission shall have the power to issue any directions or instructions to the State Election Commission for the discharge of its functions under clause (1).".

[Para 9.6.2]

(177) Panchayats should be categorically declared to be 'institutions of self-government' and exclusive functions be assigned to them: *For this purpose, article 243G should be amended to read as follows:-*

"Powers, authority and responsibility of Panchayats

243G. Subject to the provisions of this Constitution, the Legislature of a State shall, by law, vest the Panchayats with such powers and authority as are necessary to enable them to function as institutions of self-government and such law shall contain provisions for the devolution of powers and responsibilities upon Panchayats at the appropriate level, subject to such conditions as shall be specified therein, with respect to-

(a) preparation of plans for economic development and social justice;

(b) the implementation of schemes for economic development and social justice as shall be entrusted to them including those in relation to the matters listed in the Eleventh Schedule.".

Similar amendments should be made in article 243W relating to the powers, authority and responsibilities of Municipalities, etc.

[Paras 9.7.1 and 9.7.2]

(178) *The Eleventh and Twelfth Schedules to the Constitution should be restructured in a manner that creates a separate fiscal domain for Panchayats and Municipalities. Accordingly, articles 243H and 243X should be amended making it mandatory for the legislation of the States to make laws devolving powers to Panchayats and Municipalities.*

[Para 9.8.2]

(179) *In order to enable the Finance Commission to take a macro-level view, the provisions sub-clauses (bb) and (c) of clause (3) of article 280 should be amended. The words "on the basis of the recommendation" in these sub-clauses should be replaced by the words "after taking into consideration the recommendations."*

[Para 9.8.3]

(180) *In the part of clause (1) of article 243-I which calls for constitution of State Finance Commission (SFC) at the expiration of every fifth year, in line with article 280(1), the words "or at such earlier time as the Governor considers necessary" may be added after the words 'fifth year'.* While it is for the State Legislature to ensure that the Government implements fully its assurances, there should be constitutional obligations for placing the Action Taken Report (ATR) before the legislature within 'six months' after the submission of the report. Clause (4) of article 243-I may need to be amended accordingly.

[Para 9.8.4]

(181) *The necessary legislative power of fixing upper limit of taxes on professions, trades, callings and employment under article 276 should be vested in Parliament by suitably amending that article.*

[Para 9.8.5]

(182) All local authorities may be allowed to borrow from the State Government and financial institutions.

[Para 9.8.6]

(183) *An enabling provision should be made in Part IX of the Constitution permitting the State Legislature to make, by law, provisions that would empower the State Government to confer on the Panchayats full power of administrative and functional control over such staff as are transferred following devolution of functions, notwithstanding any right they may have acquired from State Act/Rules.* They should also have the power to recruit certain categories of staff required for service in their jurisdiction.

[Para 9.9.1]

(184) *A proviso to clause (1) of article 243E should be inserted to the effect that a reasonable opportunity of being heard shall be given to a Panchayat before it is dissolved.*

[Para 9.10]

(185) *A provision for constitution of a State Panchayat Council under the chairmanship of the Chief Minister [on the pattern of Gujarat State Council for Panchayats as provided in the Gujarat Panchayats Act, 1993] should be made in the Constitution on the analogy of the provision in article 263 of the Constitution relating to the Inter-State Council.* The leader of the opposition may be made *ex-officio* vice-chairman of the Council to provide a consensual approach to the

development of Panchayats as fully democratic, efficient and responsible institutions.

[Para 9.11]

(186) Necessary provisions should be made for audit of Panchayat accounts to ensure that all works related to audit (conduct of audit, submission of audit report and compliance with audit objections if any) are completed within a year of the close of a financial year. To ensure uniformity in the practice relating to audits of accounts, the Comptroller and Auditor-General of India should be empowered to conduct the audit or lay down accounting standards for Panchayats.

[Para 9.12]

Municipalities

(187) Whenever a Municipality is superseded, a report stating the grounds for such dissolution should be placed before the State Legislature.

[Para 9.13]

(188) All provisions regarding qualifications and disqualifications for elections to local authorities should be consolidated in a single law and until that is done, each State should prepare a manual of existing provisions for public information.

[Para 9.14]

(189) The State Election Commission (SEC) should have the authority to prescribe ceiling of expenses and code of conduct in elections. Further, the State laws should clearly specify the powers of the SEC to disqualify candidates or set aside elections in the event of violations of those laws.

[Para 9.15]

(190) It should be the duty of a State and the Union (in case of Panchayats and Municipalities located in Union territories) to ensure the completion of elections within the stipulated limits. It should also be duty of the State Election Commissioner to ensure this and in the event of possible delay make a report to the Governor of the State drawing his attention to the problems and suggesting remedial action to fulfill the requirements of the Constitution. *Articles 243K and 243 ZA should be suitably amended to specify that the responsibility for the conduct of elections shall include all preparatory steps for the same including the electoral rolls and matters connected therewith and the responsibility for the same shall vest with the State Election Commission.*

[Para

(191) The functions and responsibilities of delimitation, rotation of seats and matters connected therewith a delimitation Commission constituted by legislature and not in the SEC.

1206 LJ&CA/2002—25A

(192) The Representation of the People Act and State laws should specify that common polling stations should be used for elections to local bodies, State Legislatures and Parliament.

[Para 9.17.2]

(193) The State laws should provide guidelines for the delimitation work such as parity, as far as possible, in the ratio between the population of a territorial constituency and the number of seats within the same class of Panchayats or Municipalities.

[Para 9.17.3]

(194) State laws should specify that changes in the administrative boundaries of districts, sub-divisions, taluks, police stations, etc., should not be made within six months prior to a panchayat or a municipal election.

[Para 9.17.4]

(195) *To remove ambiguities, articles 243D and 243T should be suitably amended to provide for rotation and changes only at the time of delimitation and not in between.* State laws should provide the guidelines for the process of reservation which should ensure transparency and adequate opportunities for eliciting voter response.

[Para 9.18.2]

(196) *To clarify the precise position of reservation under clause (6) of article 243D and clause (6) of article 243T to be provided by the State law, the overall total of reserved seats and reserved offices in Panchayats and Municipalities should be specified.*

[Para 9.18.3]

(197) The State Election Commissioner should have a fixed term of 5 years. He/she should be equal to a Judge of the High Court. The broad qualifications for a State Election Commissioner may be specified under the State law.

[Para 9.19.1]

(198) *The concept of a distinct and separate tax domain for municipalities should be recognised. This concept should be reflected in a list of taxes in the relevant schedule. Carving out items from the existing State lists such as item 49 (taxes on land and buildings) and item 52 (taxes on entry of goods into a local area for consumption) should not be difficult.*

[Para 9.21]

Institutions in North East India

(199) The North Eastern part of India with its large number of tribal communities and emerging educated elites has self-governing village councils and organized tribal chiefdoms. Efforts are to be made to give all the States in this region the opportunities provided under the 73rd and 74th Constitution Amendments. However, this should be done

1206 LJ&CA/2002—25B

with due regard to the unique traditions of the region and the genius of the people without tampering with their essential rights and giving to each State the chance to use its own nomenclature for systems of governance which will have local acceptance.

[Para 9.22.3].

(200) Careful steps should be taken to devolve political powers through the intermediate and local-level traditional political organisations, provided their traditional practices carried out in a modern world do not deny legitimate democratic rights to any section in their contemporary society. The details of state-wise steps to devolve such powers will have to be carefully considered in a proper representative meeting of traditional leaders of each community, opinion builders of the respective communities and leaders of State and national stature from these very groups. A hasty decision could have serious repercussions, unforeseen and unfortunate, which could further complicate and worsen the situation. To begin with, the subjects given under the Sixth Schedule and those mentioned in the Eleventh Schedule could be entrusted to the Autonomous District Councils (ADCs). The system of in-built safeguards in the Sixth Schedule should be maintained and strengthened for the minority and micro-minority groups while empowering them with greater responsibilities and opportunities, for example, through the process of Central funding for Plan expenditure instead of routing all funds through the State Governments. The North Eastern Council can play a central role here by developing a process of public education on the proposed changes, which would assure communities about protection of their traditions and also bring in gender representation and give voice to other ethnic groups.

[Para 9.23(i)]

(201) Traditional forms of governance should be associated with self-governance because of the present dissatisfaction. However, positive democratic elements like gender justice and adult franchise should be built into these institutions to make them broader based and capable of dealing with a changing world.

[Para 9.23(ii)]

(202) The implementation of centrally funded projects from various departments of the Union Government should be entrusted to the ADCs and to revived village councils with strict monitoring by the Comptroller and Auditor-General of India.

[Para 9.23(iii)]

(203) The process of protection of identity and the process of development and change are extremely sensitive. These twin processes need to be understood in the framework of a changing world and the role of all communities, small and large, in that world. Therefore, the North Eastern Council should be mandated to conduct an intensive programme of public awareness, sensitization and education through

non-government organizations, State Governments, and its own structure to help bring about such an understanding of the proposals.

[Para 9.23(iv)]

(204) The provisions of the Anti-Defection Law in the proposed revised form as recommended in para 4.18.2 of the Report should be made applicable to all the Sixth Schedule areas.

[Para 9.23(v)]

(205) Given the demographic imbalance which is taking place in the North-East as a result of illegal migration from across the borders, urgent legal steps are necessary for preventing such groups from entering electoral rolls and citizenship rolls of the country. Reservations for local communities and minorities from other parts of the country should be made in the State Legislatures. Issuance of multi-purpose identity cards to all Indian citizens should be made mandatory for all Indian residents in the North East on a *high-priority basis* and the National Citizenship Law to be reviewed to plug the loopholes which enable illegal settlers to become 'virtual' citizens in a short span of time, using a network of touts, politicians and officials.

[Para 9.23(vi)]

(206) A National Immigration Council should be set up under law to examine and report on a range of issues including Work Permits for legal migrants, Identity Cards for all residents, a National Migration Law, a National Refugee Law, review of the Citizenship Act, the Illegal Migrants Determination by Tribunal Act and the Foreigners Act.

[Para 9.23(vii)]

(207) Local communities should be involved in the monitoring of our borders, in association with the local police and the Border Security Force.

[Para 9.23(viii)]

(208) As regards Nagaland, the Naga Councils should be replaced by elected representatives of various Naga society groups with an intermediary tier at the district level. Village Development Boards should be less dependent on State and receive more Centrally-sponsored funds.

[Para 9.25]

(209) As regards Assam, –

(i) the Sixth Schedule should be extended to the Bodoland Autonomous Council with protection for non-tribal, non-Bodo groups,

(ii) other Autonomous Councils be upgraded to Autonomous Development Councils with more Central funds for infrastructure development; within the purview of the 73rd Amendment but also using traditional governing systems at the village level.

[Para 9.28]

(210) As regards Meghalaya, –

(i) A tier of village governance should be created for a village or a group of villages in the Autonomous District Councils, comprising of elected persons from the traditional systems plus from existing village councils with not more than 15 persons at each village unit.

(ii) The number of seats in each of the Autonomous District Councils in Meghalaya should be increased by 10 seats, *i.e.*, to a total number of 40 seats. Of the 10 additional seats, having regard to the non-representation of women and non-tribals, the Governor may nominate up to five members from these categories to each of the ADCs. The other five may be elected as follows:-

(a) By Syiems and Myntris, from among themselves to the Khasi Autonomous Council.

(b) By Dolois from among themselves to the Jaintia Autonomous District Council; and

(c) By Nokmas from among themselves to the Garo Autonomous District Council.

[Para 9.29]

(211) As regards Tripura, –

(i) The changes which may be made in respect of other Autonomous Councils should also apply in respect of the Autonomous District Council(s) in Tripura.

(ii) The number of elected members in the Council should be increased from 28 to 32.

(iii) The number of nominated members should be increased to six from the current two. The existing non-tribal seats (currently, they have three elected seats) be converted to tribal seats. Three non-tribals may be nominated by the Governor and three tribal women may be nominated by the Chief Executive Member.

[Para 9.30]

(212) As regards Mizoram, –

(i) An intermediary elected 30-member tier should be developed at the district level in areas not covered by the Sixth Schedule, *i.e.*, excluding the Chakma, Lai and Mara District Autonomous Councils. There would thus be two tiers below the State Legislature: the District and the Village.

(ii) Village Councils in non-Scheduled areas should be given more administrative and judicial powers; two or more villages be combined to form one village council, given the small population in the State.

(iii) Consideration should be given to groups seeking Sixth Schedule status, depending on viability of the demand, including size of population, territorial and ethnic contiguity.

(iv) Central funding as outlined in general recommendations should be provided to the ADCs.

(v) Nominated seats for women, non-tribals and Sixth Schedule tribes in non-scheduled area (not to exceed six over and above the size of the Councils, making a total of 36 members); current size of ADCs should be increased to 30 with a similar provision for women and non-scheduled tribes.

[Para 9.31]

(213) As regards Manipur,

(i) the provisions of the Sixth Schedule should be extended to hill districts of the State,

(ii) the 73rd Amendment should be implemented vigorously in the areas of the plains where, despite elections, the system is virtually non-existent.

[Para 9.32]

CHAPTER 10: PACE OF SOCIO-ECONOMIC CHANGE AND DEVELOPMENT

(214) The Citizens' Charters be prepared by every service providing department/agency to enumerate the entitlements of the citizens. In case a citizen fails to receive the public goods and the services in the manner and to the extent set out in such charters, he/she should have recourse to an easy and effective system of grievance redressal through chartered Ombudsman. These citizen's charters should include specifically the entitlements of citizens belonging to Scheduled Castes (SCs), Scheduled Tribes (STs) and other deprived classes. In the case of these deprived classes the charters can with advantage provide for National and State Commission for SCs, STs, BCs (Backward Classes), Minorities, women, safai karamcharis to function effectively as ombudsman-bodies. The charter of these National and State Commissions and the way they are constituted should be such as to facilitate the role, *inter alia*, as ombudsman-bodies for different deprived classes.

[Para 10.3.2]

(215) The Civil Services Boards, recommended to be set up under Chapter 6 for considering promotions and placements, should be directed to specifically consider the performance of officers in promoting the welfare of Scheduled Castes, scheduled tribes and other deprived categories. When officers are being considered for promotion and placement economic agencies/ministries, weightage should be given to officers who have worked conscientiously and efficiently to implement constitutional values and norms under the law and rules and regulations for the welfare, development and empowerment of the above disadvantaged categories and those who have failed in this and those who have not worked at least for five years in the areas and sectors pertaining to these categories should be excluded from placements in economic ministries/agencies. For this purpose, the

provision should be made for Social Justice Clearance before an officer of class I or class II is promoted along the lines detailed in para 3.2 at pages 1390-1391 of Book-3, Vol.II.

[Para 10.3.3]

(216) Reservation for members of the SCs and the STs should be brought under the purview of a statute covering all aspects of reservation, as detailed in para 8.10 at pages 1406-1408 of Book-3, Vol.II, including setting up *Arakshan Nyaya Adalats* or Tribunal to adjudicate upon all cases and disputes pertaining to reservation in posts and vacancies in Government, Public Sector, Banks and other financial institutions, Universities and all other institutions and organisations to which reservations are and become applicable. These Tribunals should have the status of High Courts, appeals lying only to the Supreme Court. These Tribunals should have their main Bench at Delhi and other Benches in the States. The Chairperson, Vice-Chairperson and other Members of the Tribunal and its benches should be selected on the basis of their record in the implementation of Reservation in their earlier positions. The statute should, *inter alia*, have a penal provision including imprisonment for those convicted of wilfully or negligently failing to implement reservation. The statute and related provisions should be brought under the Ninth Schedule to the Constitution.

[Para 10.3.4]

(217) The three Constitution amendments enacted in the last two years to undo the harm done in 1997 to the long pre-existing rights of SCs and STs in reservations should be put into effect forthwith. The Central and State Governments should amend the executive orders issued in 1997 regarding the roster and restore the pre-1996 roster. This should also be brought under the purview of the statute mentioned above.

[Para 10.3.5]

(218) The Reservation for backward classes should also be brought under a statute which, while containing the specificities of reservation for BCs should also contain provisions for *Arakshan Nyaya Adalats* or Tribunal for providing Justice in reservation, penal provisions, etc. as recommended in the case of the statute in respect of SCs and STs.

[Para 10.3.6]

(219) It should be mandatorily stipulated in the Memoranda of Understanding (M.O.Us.) of privatisation or dis-investment of public sector undertakings that the policy of reservation in favour of SCs, STs and BCs shall be continued even after privatisation or dis-investment in the same form as it exists in the Government and this should also be incorporated in the respective statutes of reservation. As a measure of social integration there should be a half per cent reservation for children of parents one of whom is SC/ST and the other parent is non-SC/non-ST and this reservation should be termed as reservation for the Casteless.

[Para 10.3.7]

(220) In view of the weighty opinion against the formal introduction of reservation in the higher judiciary, and the fact that over fifty years, the progress of education, however tardy, has certainly produced adequate number of persons of the SC, ST and BC in every State who possess the required qualifications, having necessary integrity, character and acumen required for Judges of Supreme Court and High Courts for appointment as Judge of the superior judiciary, a way could and should, therefore, be found to bring a reasonable number of SCs, STs and BCs on to the Benches of the Supreme Court and High Courts in the same way in which, in practice, it is found is followed in respect of advocates from different social segments/regions of the country/States or different religious communities so that on the one hand the overwhelming opinion against formal reservation in the Supreme Court and High Courts is respected and on the other hand, the feeling of alienation of the vast majority of Indians comprising SCs, STs and BCs that, in spite of having persons of requisite calibre and character among them, they are being ignored in the appointment of Judges, is resolved.

[Para 10.3.9]

(221) There should be reservation for SCs, STs and BCs (including BC minorities and especially More and Most Backward classes), with a due proportion of women from each of these categories in the matter of allotment of shops under the public distribution system, and other allotments like petrol stations, gas agencies, etc. for distribution of commodities by public authority. There is need for support mechanism to help entrepreneurs among these deprived sections to help them to come up in these business ventures. These measures should be taken on the lines as spelt out in para 4.6 at page 1393 of Book-3 Vol.II.

[Para 10.3.10]

(222) Massive programmes of employment should be undertaken and expanded to cover all such people and provide them employment at statutory minimum wage fixed for agricultural labourers at least for 80 days in the year over and above the unsteady employment they normally have. The nature of the work to be undertaken, the mode of payment of wages etc. should be as detailed in para 4.5 at pages 1392 to 1393 of Book-3 of Volume-II. Inclusion of Right to Work as a fundamental right has been recommended in para 3.13.2 of this Report and this will provide the necessary constitutional base and support for this programme.

[Para 10.3.11]

(223) Residential schools for SCs and STs should be established in every district in the country – one each for SC boys and SC girls, and ST boys and ST girls, as one item of an important package of comprehensive measures required for the development and empowerment of SCs and STs. Similarly, the Commission recommends that residential schools should be set up for the BCs in every district, one each for BC boys and BC girls, including minorities

who belong to BCs and with special attention to More Backward and Most Backward classes among BCs. The proportion of the students of the specific category of weaker sections (say 75 per cent) and of other social categories (say 25 per cent), the principles of location, methodology of covering the Minority B.C., phasing and funding, mode of selection of the candidates, management etc. should be as detailed in paras 5.4 and 6.2 at pages 1395 to 1397 of Book 3 of Volume II. This system has got the support of the precedent and experience for the last two decades in Andhra Pradesh state, providing ground for hope in this important and indispensable measure. In addition, the Commission recommends that it is also necessary to see that the SCs, STs and BCs especially the More and Most Backward classes of BCs from poor and middle-class families get due benefit of good and prestigious private educational institutions in the country as well as in foreign educational institutions at all levels and in all disciplines, at state cost. Funding for this can be found by measures outlined in sub-para (v) of para 5.4 at page 1396 of Book 3 of Volume II. The measures detailed in sub para (ii) and (iv) of para 5.4 at pages 1395 and 1396 of Book 3 of Volume II should be followed in the matter.

[Para 10.4.1]

(224) Incentives should be offered to students to prepare for such courses of study in technical, vocational, scientific and professional disciplines. Only a massive transfer of resources to the educational programmes for the scheduled castes and scheduled tribes will enable us to achieve the kind of quantitative expansion needed to bring these communities on par with others in terms of skills and knowledge base to engage with the modern world. It is only then that they would be in a position to compete on the basis of their own strength and rise to the leadership role in different spheres of public life. This aspect of measures for building up a reservoir of highly educated professional, scientific and technological manpower among these categories in population equivalent proportion should be borne in mind along with its earlier recommendations regarding residential schools of high quality and elementary education, and provisions and outlays should be made accordingly.

[Para 10.4.3]

(225) Social policy should aim at enabling the SCs, STs and BCs (including BC minorities and especially the More and Most Backward Classes among BCs) and with particular attention to the girls in each of these categories to compete on equal terms with the general category. This was always necessary but this becomes more important and increasingly urgent in the context of a knowledge society that is emerging. Reservation has helped the above deprived categories to enter state educational institutions from which they had been debarred and / or otherwise excluded in the past. Reservation continues to be necessary since these adverse factors have not ceased to exist. But with the growth of high quality educational institutions built up by the wealthier sections, almost entirely drawn from non-SC, non-ST, non-BC categories, as a high quality stream distinct and separate from the

state educational system, it becomes important to ensure that other measures in addition to reservations are introduced. Without these measures, along with the Commissions, recommendations on elementary education, the gap between the SC, ST and BC on the one hand and the rest of society will inexorably continue and even be widened.

[Para 10.4.4]

(226) The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993, should be strictly enforced to bring to an early end to this degrading practice of manual scavenging so offensive to human dignity without abridgement of the employment and income of existing Safai Karamcharis. Automatic applicability of the Act to all States should be brought about by the amendment suggested in para 7.2 at page 1399 of Book 3 of Volume II. Further, the specifics and details of the abolition of the manual scavenging system and the liberation and rehabilitation of safai karamcharis and protection of safai karamcharis during the transition period should be as detailed in para 7.3 of pages 1399 to 1401 of Book 3 of Volume II, including its incorporation in the System of Social Justice Clearance of officers at the time of their consideration for promotion. Limitations placed on the National Commission for Safai Karamcharis should be removed and it should be given the same powers and functional autonomy as is being enjoyed by the National Human Rights Commission; it should be adequately equipped to achieve its objective of total liberation and full rehabilitation of safai karamcharis. This should form an integral part of a National Sanitation Policy-cum-National Social Justice Policy.

[Para 10.5]

(227) The bleak situation will continue to bedevil the SCs and STs and the nation unless appropriate new institutions are created to take charge of the full quantum of outlay of SCP and TSP (i.e. outlay not less than the population equivalent proportion of the total plan outlay of the Centre/each State) and manned by competent experts of SCs and STs and others genuinely working for them, to formulate Plans in accordance with the developmental needs and priorities of the SCs and STs and ensure that these plans are implemented effectively. This new institutional system should consist of an integrated network of National Development Council for SCs and STs, and National SCs and STs Development Authority, State SCs and STs Development Authorities and District SCs and STs Development Authorities. Out of the total plan outlay of the Centre and of each State, before sectoral allocations are made, an outlay equivalent to the population proportion of SCs and STs should be placed at the disposal of the National and respective State Authorities, as the corpus of SCP and TsP for formulation of plans in accordance with the needs and priorities of SC & ST. For this, the system as detailed in para 9.2 at pages 1409 to 1411 of Book-3, Volume-II should be established. The schemes as illustrated in sub-para (9) of para 9.2 at pages 1410-1411 of Book-3, Volume-II should also be taken up on a massive scale.

This will at one stroke remove the various limitations and difficulties faced by the SCP and TSP and create a powerful, integrated instrument of social transformation based on the vision of economic liberation, educational equality and social dignity of the SCs and STs.

[Para 10.6.2]

(228) Land reforms involving distribution and allotment of lands from different sources (i.e. Government lands not required for genuine public use, Bhoodan lands, ceiling surplus lands, etc.) to the SCs and STs along with supportive mechanism in the shape of supply of subsidised capital and credit and extension be made, and development of these lands through irrigation and other means be undertaken. In this context, the measures recommended at (b) of sub-para (9) of para 9.2 at page 1410 of Book-3, Volume-II and in para 14(i) to (vi) at pages 1416 to 1417 of Book-3, Volume-II should be implemented. Similarly, with regard to enforcement of the Minimum Wages Act for agricultural labour, the methodology recommended at (c) of sub-para (9) of para 9.2 of page 1410 Book-3, Volume-II should be followed. Strong legal action is needed to prevent alienation of lands belonging to the tribal communities and effective prior rehabilitation of tribals before displacement due to developmental projects. For this purpose, the measures listed in para 13.2 at page 1414 to 1415 of Book-3, Volume-II should be undertaken. Additionally, the tribal communities have to be associated with the management of forest resources, for not only their livelihoods, but also for protecting their way of life and cultural identity which are indissolubly linked to forests. For this purpose, action as recommended in sub-paras (10) and (11) of para 13.2 at page 1416 of Book-3, Volume-II should be taken.

[Para 10.7.1]

(229) In the matter of harmonising the preservation of the land ownership of STs, industrial and other development, action should be taken as outlined in sub-paras (6), (8) and (9) of para 13.2 of pages 1415 to 1416 of Book-3, Volume-II.

[Para 10.7.2]

(230) Special safeguards should be provided to protect the wholesome traditions of the cultural heritage and of the intellectual property rights of the tribal people. This is no less important for the tribal identity than the effort to prevent alienation of land and land-related institutional rights of tribal people.

[Para 10.7.3]

(231) *All areas governed by the Fifth Schedule to the Constitution should be forthwith transferred to the Sixth Schedule extending the applicability of the Sixth Schedule to tribal areas other than the North Eastern States to which alone the Sixth Schedule now applies, and all tribal areas which are neither in the Fifth Schedule nor in the Sixth Schedule should also be brought forthwith under the Sixth Schedule.* Special programmes of training and orientation for the elected representatives

of the Sixth Schedule bodies and related officials should be undertaken and conducted regularly in order to secure the full potential of local developmental and administrative autonomy envisaged under the Sixth Schedule.

[Para 10.7.4]

(232) The Government should step in firmly and clearly, if the gap is to be bridged between private prejudices, in the name of "efficiency" on the one hand and the just aspirations of the SC, ST, BC including BC minorities, and women. For this, the Government should take the initiative along the lines suggested in para 11.3 at pages 1412 and 1413 of Book-3, Volume-II.

[Para 10.7.5]

(233) Further, the Government should examine other economic and activity sectors at every level of each such sector and see whether the SCs and STs are adequately represented in each of them. If they are not, remedial measures either through reservation or through other means should be undertaken to see that they are adequately represented at every level in every such sector. Similar action should also be taken with regard to backward classes including BC minorities, especially More and Most Backward Classes and women of all categories. This is possible, if non-economic prejudices are excluded, without watering down the genuine requirements of efficiency.

[Para 10.7.6]

(234) Agriculturists and other traditional producing classes face certain adverse effects of sudden and unprepared exposure to the regimes of WTO, IPR, etc. In order to protect them from these adverse effects while at the same time to secure the benefits of those regimes, a national convention should be convened involving Ministers in charge of Ministries connected with globalisation and Ministers in charge of Agriculture and other sectors of traditional produce and authentic representatives of the peasant organizations as well as organisations of other traditional producing classes, to identify remedial Steps arrive at a consensus about them and these should be implemented quickly. There should be a continuing mechanism involving all these to continuously monitor implementation and corrections and modifications required from time to time.

[Para 10.7.7]

(235) Agriculturists and many other traditional producing classes suffer from the adverse effects of natural calamities like drought, cyclone, floods, etc. A similar national convention should identify the measures required to protect them from such adverse effects of natural calamities including crop insurance, preparedness etc., arrive at a consensus about these measures and institute a continuing machinery of continuous monitoring and corrections and modifications.

[Para 10.7.8]

(236) On the one hand, there should be an effective legal structure to protect the SCs and STs against atrocities and discriminatory practices based on untouchability and along with such structure and its efficient functioning and on the other hand, there should also be attitudinal change of a profound nature in the general society.

[Para 10.8.1]

(237) With regard to legal structure, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 needs to be strengthened and its effective enforcement ensured. This include the establishment of special courts exclusively to try offences under this Act, inclusion of certain crimes in the list of atrocities, certain penal provisions where they do not exist, appropriate plugging of certain loopholes and comprehensive rehabilitation of victims and so on. For this purpose, the measures suggested in para 8.2.1, 8.2.2, 8.2.3, 8.3 and 8.4 (a) to (p) of Book-3, Vol.II at pages 1401 to 1404 should be taken.

[Para 10.8.2]

(238) Regarding untouchability which continues to be widely prevalent in old classic forms as well as in new forms in line with modern developments, multi-pronged measures covering human rights education, moral education, building up of a strong democratic movement against untouchability and effective punitive action under the Protection of Civil Right Acts, 1955 (PCR Act) are required. In view of this, the entire gamut of measures suggested in paras 8.6 to 8.8 at pages 1404 and 1405, Book-3, Vol.II should be taken.

[Para 10.8.3]

(239) The National Science and Technology Commission referred to in Chapter 6 should also promote measures for extending the umbrella of modern science and technology and higher scientific and technological research to cover SCs, STs and BCs, women and other poor sections of the society, devise means by which they can also be introduced into this field and potential talent among them identified and nurtured so that they also are enabled to contribute to the advancement of higher scientific and technological research in the country and so that there is no feeling that they are shut out from this important area on account of non-scientific prejudices.

[Para 10.9]

(240) The Constitution of India contains distinct provisions for the protection and promotion of the interests of Scheduled Castes and Scheduled Tribes, Backward classes, women, minorities and other weaker sections. It is necessary to strengthen these provisions by amendments, etc. and certain other similar steps. Accordingly, *the amendments to the Constitution listed in para 15 at pages 1417 and 1418 of Book-3, Vol.II, covering articles 46, 335, 16, 15 and List III of the Seventh Schedule should be carried out.*

[Para 10.10]

(241) As regards the minorities, the following shall be implemented:-

(a) Steps should be taken for improvement of educational standards amongst the minority communities. Special programmes should be drawn up after the widest consultation with the leaders of minority communities including leaders of BCs, SCs and STs among Minorities from academic, professional, business, and socio-political spheres and from low-occupational spheres. Such programmes should be generously funded. Only educational and cultural advancement will help the cause of national integration as well as raise the capabilities of the communities. This is the high road to national cohesion.

(b) At present the political representation of minority communities in legislatures, especially Muslims, has fallen well below their proportion of population. The proportion of BCs among them is next to nil. This can lead to a sense of alienation. It is recommended that in situations of this kind, it is incumbent for political parties to build up leadership potential in the minority communities, including BCs, SCs and STs among them, for participation in political life. The role of the state for strengthening the pluralism of Indian polity has to be emphasised.

(c) Backward classes belonging to religious minorities who have been identified and included in the list of backward classes and who, in fact, constitute the bulk of the population of religious minorities should be taken up with special care along with their Hindu counterparts in the developmental efforts for the backward classes. This should be on the pattern of the approach to the development of Backward Classes formulated by the Working Group for the Development and Empowerment of Backward Classes in the Tenth Plan referred to separately under Backward Classes.

(d) An effort needs to be made to carry out special recruitment of persons belonging to the underrepresented minority communities in the police forces of States, para military forces and armed forces.

[Para 10.11.2]

(242) In every State, the linguistic minorities should be provided the facility of having instruction for their children at elementary stage of education in their mother tongue. Numerous recommendations in this behalf and other matters have been made by the Commissioner for Linguistic Minorities in his successive Annual Reports regarding the various problems faced by the linguistic minorities. The Government of India in the Ministry of Social Justice and Empowerment and the Ministry of Human Resources Development should collate all these recommendations and see that substantive action is taken on each of them.

[Para 10.11.3]

(243) The denotified tribes/communities have been wrongly stigmatized as crime prone and subjected to highhanded treatment as well as exploitation by the representatives of law and order as well as by the general society. Some of them are included in the list of Scheduled Tribes and others are in the list of Scheduled Castes and list of backward classes. The special approach to their development has been delineated and emphasized in the Reports of the Working Groups for the Development of Scheduled Tribes, Scheduled Castes and Backward Classes in successive Plans and also in the Annual Reports of the Commissioners for Scheduled Castes and Scheduled Tribes, National Commission for Scheduled Castes and Scheduled Tribes and the National Commission for Backward Classes. There are also special reports available on de-notified tribes. Their recommendations have not received attention. The Ministry of Social Justice and Empowerment and the Ministry of Tribal Welfare should collate all these materials and recommendations contained in the reports of the working groups and the reports of the National Commissions and other reports referred to and strengthen the programmes for the economic development, educational development, generation of employment opportunities, social liberation and full rehabilitation of denotified tribes. Whatever has been said about vimuktajatis also holds good for nomadic and semi-nomadic tribes/communities. Similar action should be taken in respect of nomadic and semi-nomadic tribes/communities as done in the case of de-notified tribes or vimuktajatis. The continued plight of these groups of communities distributed in the list of Scheduled Castes, Scheduled Tribes and backward classes is an eloquent illustration of the failure of the machinery for planning, financial resources allocation and budgeting and administration in the country to seriously follow the mandate of the Constitution including article 46. The setting up of an integrated net work of National Scheduled Castes and Scheduled Tribes Development Authority, etc. recommended in para 10.5.2 to 10.5.3 will provide a structural mechanism to deal in a practical way with the vimuktajatis as well as nomadic and semi-nomadic tribes/ communities within the frame work of the SCP and TsP. Similarly the approach to the development of backward classes referred to at para 10.14 contains the approach to deal in a practical way with the Vimuktajatis and nomadic and semi-nomadic tribes/communities who are in Backward Class list.

[Para 10.12.1]

(244) The Commission also considered the representations made on behalf of the De-notified and Nomadic Tribal Rights Action Group and decided to forward them to the Ministry of Social Justice & Empowerment with the suggestion that they may examine the same preferably through a Commission.

[Para 10.12.2]

(245) The Union legislation for agricultural workers, drafted as far back as 1978-80, should be introduced and passed immediately. A realistic scheme of credible implementation of minimum wages Acts with

particular attention to agricultural labours, relying to a suitable degree on the district Collectors/Dy. Commissioners and district superintendents of police, should be immediately put into action. For this purpose the measures suggested in para 17.2 at page 1413 of Book 3 Vol.II should be followed.

[Para 10.13.2]

(246) Despite prohibition of begar and other forms of forced labour by the Constitution, the practice of bonded labour has not ended as it is patronised by the most powerful sections in the rural areas. Child labour too is widespread. In order to deal effectively with this problem in keeping with the mandate of the Constitution, the Commission recommends that a fully empowered National Authority for the Liberation and Rehabilitation of bonded labour, as recommended by the Commission for Rural Labour in 1990-91, should be set up immediately along with similar authorities at the State level. In addition, simultaneous rehabilitation of released Bonded Labourers and education for released bonded child labourers and other measures referred to in para 19.2 at page 1414 of Book 3,Vol.II should be taken.

[Para 10.14]

(247) The Government should immediately implement every one of the recommendations of the Working Group on Employment of Backward Classes in the Tenth Plan which covers all aspects and fields of their development – Economic, Educational, social, employment, reservation, etc. – taking in with particular care those backward classes who belong to religious minorities along with their Hindu counterparts in a cohesive manner. For example, some of the residential talent schools earmarked for Backward Classes should be located in areas of concentration of Muslim B.Cs. Further there should be residential talent schools for backward classes as separately recommended for SCs and STs at the rate of one each for boys and girls in each district, 75% being taken from backward classes and 25% from other categories. The Government should without any delay introduce reservation for backward classes in seats in educational institutions since absence of promotion of their education through reservation and other means when there is reservation of employment is anomalous.

[Para 10.15]

(248) Action in accordance with the suggestions made in para 16.2 at page 1412 of Book 3 Vol.II, covering reservation, development, empowerment, health including malnutrition and maternal anaemia and protection against violence should be taken.

[Para 10.16]

(249) The problems relating to prostitution, child prostitutes and children of prostitutes have been the subject of a landmark judgment of the Supreme Court in Gaurav Jain's case of 9th July, 1997 and the Report of Committee of Secretaries on Prostitution, Child Prostitutes and children of Prostitutes set up in 1997 as explained in para 20.1 and

20.2 at pages 1414 to 1415 of Book 3 Vol.II. In respect of this area of problem, the Government should take action according to the suggestion listed at para 20.3 at page 1415 of Book 3 of Vol. II, covering implementation of the judgement and the Secretaries' report, eliminating the Devadasi system, provision of development and education and prevention of HIV / AIDS.

[Para 10.17]

1206 LJ&CA/2002—26A

NOTES OF MEMBERS

CONTENTS

		Page No.
1.	Note of Justice Shri B.P. Jeevan Reddy	372
2.	Note of Dr. Subhash C. Kashyap	375
3.	Note of Shri C.R. Irani	386
4.	Note of Smt. Sumitra G. Kulkarni	392

Dissenting Note by Justice B.P. Jeevan Reddy, Member,
National Commission to Review the Working of the Constitution

1. Superior Judiciary

A Consultation Paper was prepared and circulated by the Commission. The Consultation Paper dealt with the appointment and removal of the Judges of the High Courts and the Supreme Court and the transfer of the Judges of the High Court.

The paper was considered by the Commission on 18-12-2001 when I was not present on account of my absence from India and certain decisions were taken regarding the procedure for appointment. After I returned, and at the instance of the members, including myself, a special session (15th meeting of the Commission) was convened from 5th to 8th January, 2002, to consider this issue and two other controversial issues. So far as the procedure for appointment of Judges to the High Courts and the Supreme Court was concerned, there was a sharp division of opinion at the special session/meeting. The first question put to vote was whether there should be any change in the existing procedure. By a majority of six to four, it was decided that no change is called for in the existing procedure. In this view of the matter, the necessity of constituting a National Judicial Commission for the said purpose and/or its composition did not come up for consideration. It may be remembered that this session/meeting was attended by all the members and the Chairman of the Commission. One should have thought that this decision was final. But when the draft Report prepared by the Editorial Committee was being finalized, the said issue was re-opened again, even though all the members were

not present. There appears to have been a change in the opinion of some members meanwhile on this subject. With some members absent, the Commission now decided in its Sixteenth meeting held from 25th February, 2002 to 1st March, 2002, that a National Judicial Commission should be constituted with a particular composition. In my opinion, there was no occasion or justification for re-opening an issue which was considered and decided upon at a special session/meeting of the Commission convened specially to consider this issue along with two other controversial issues. In view of the change of opinion by some members and absence of some other members, I did not call for a division and voting, yet, my view is that the very re-opening of the said issue was not called for and not justified in the circumstances aforestated. In my view, the existing procedure relating to the appointment of Judges to the High Courts and the Supreme Court should be allowed to work for some more years – it is hardly nine years since it is in vogue before one can consider a change. There is no material before the Commission warranting a change in the existing procedure.

2. Liability of the State in Torts

An elaborate Consultation Paper was prepared and circulated by the Commission on this subject and in the light of the responses received, a draft report was also prepared for consideration of the Commission. However, when the draft report came up for consideration of the Commission during its Fifteenth meeting held from 5th to 8th January, 2002, the very subject was dropped on the ground that the draft report (and the Consultation Paper) did not suggest any amendments to the Constitution and it merely recommended enactment of a law; it was observed

by some members that this issue need not be considered by the Commission and that it is a more appropriate subject for, may be, the Law Commission of India to consider.

In my view, the ground upon which the said subject was dropped was not tenable or justified. The recommendations being made by the Commission do not all pertain to the amendment of the Constitution; in deed, a large majority of them pertain to amendment of laws or enactment of new laws. If so, dropping of this subject on the aforesaid ground is inconsistent with the principle underlying the majority of its recommendations. Secondly, as pointed in the Consultation Paper and the draft Report, the law on the subject, evolved by the decisions of the Courts, is wholly unsatisfactory and is putting the rights of the citizens in serious jeopardy. Though Article 300 of the Constitution contemplates a law being made on the subject clarifying the position and, notwithstanding the repeated observations of the Supreme Court and the High Courts, neither the Parliament nor the State Legislatures have deemed it fit to enact a law. In my opinion, there could be no principled opposition to making a recommendation by the Commission for enactment of a law clarifying the State's liability in the matter of torts committed by its officers and the exemptions to that rule (including the defence of 'exercise of sovereign powers'). Such a recommendation would have been salutary and would have advanced the public interest.

[*Justice* **B.P. JEEVAN REDDY**]
Member, N.C.R.W.C.

Dated: 21 March, 2002.

Note by Dr. Subhash C. Kashyap, Member of the Commission and Chairman of its Drafting and Editorial Committee.

1. It is with extreme reluctance and a deep sense of sadness that I am constrained to pen this note to qualify the report of the Commission of which in the words of the Chairman I was "the principal author" as the Chairman of the Drafting and Editorial Committee.

2. My sadness at the results becomes more poignant because for nearly ten years, I had personally crusaded for a review of the working of the Constitution and appointment of a Commission for the purpose. Five books, a host of articles in national dailies and several seminars and conferences all over the country suggesting, *inter alia,* setting up of such a body preceded the appointment of the Commission. Finally, in pursuance of the national agenda for good governance, the NCRWC was appointed by the President in February 2000.

3. The Commission was entrusted with a historic task of great responsibility. It was expected to act independently and objectively, without fear or favour and with a sense of serving the best interests of the country and thereby helping the Government and the Parliament of India to consider desirable reforms in the working of the Constitution within the parameters of the parliamentary system and the basic structure of the Constitution. I had the pleasure of defending the appointment and work of the Commission at dozens of seminars and conferences in different parts of India during the last two years (without any cost to the Commission).

4. The positive outcome of the whole exercise is that it has been possible to see through the Commission a number of very significant suggestions and to arrive at unanimity in several matters. The most important recommendations made by the Commission are those concerning electoral processes and political parties, Union-State Relations, Decentralization and Devolution and parliamentary reforms. The entire Commission is in full agreement on matters like (1) the election of the Leader of the House by the Lok Sabha/State Assembly and appointment of such leader as P.M./C.M., (2) constructive vote of no-confidence, (3) freedom of the press and other media and freedom of information as fundamental rights, (4) truth in public interest as good defence in contempt of court cases, (5) ridding the election process of evils like booth capturing, bogus voting, criminalisation and spreading caste and communal hatred, (6) maintenance and audit of election and political party accounts and declaration of assets and liabilities by candidates for election and those holding public office, (7) limiting by law the size of Councils of Ministers, (8) disqualifying all defectors – individual or group – and (9) rotation of reserved seats.

5. The Commission also recommends (1) examination of the issue of prescribing a minimum of 50% plus vote for winning an election, (2) discouraging independent candidates, (3) regulating by law the registration, recognition and functioning of parties, (4) codification of parliamentary privileges, (5) discontinuation of MP LAD Scheme, and (6) measures for combating corruption and confiscation of ill-gotten property.

6. The following comments and reservations in regard to some of the chapters may be noted :-

(i) It was decided by the Commission that each chapter of the Report would not exceed 15 to 20 pages and that unnecessary quotations particularly from foreigners would be avoided. It was, however, left to the Chairperson himself to prepare and finalise the Introductory chapter on the 'The Basic Approach and Perspective".

(ii) In regard to Chapter 3 titled 'Fundamental Rights, Directive Principles and Fundamental Duties', I would like to iterate some of the unanimous decisions of the Drafting and Editorial Committee (DEC) which were as follows:

(a) "It may be neither necessary nor proper to include in the text of our Constitution all the provisions of international conventions etc., for, where acceptable, many of these can be adopted by ordinary legislation. Also, enlargement of fundamental rights through judicial verdicts does not always call for constitutional amendments, for judicial interpretations and verdicts are amenable to review by courts themselves."

(b) "The Commission noted that the ultimate aim of affirmative action of reservation should be to raise the levels of capabilities of people of the disadvantaged sections and to bring them at par with the other sections of society. Reservations should not separate certain sections from others and should not become a permanent feature of Indian society. In this connection, it is important to recall that Dr. Ambedkar was opposed to reservations for Scheduled Castes in perpetuity. He would have liked it to be for forty years instead of ten years but thereafter he did not want Parliament to have the power to extend it by law because he did not like the dalit class stigma on Indian society to become permanent. Unfortunately, during the last fifty years and more, reservations have not enabled these disadvantaged sections come closer to others to desired levels. Reservations have also not really benefited those sections for whom these were meant. In many instances, these have been monopolized by certain privileged sections within those groups."

(c) "In regard to articles 29 and 30, the Commission recommends that the cultural and educational rights available under the articles should be available equally to all groups in society so that there is no discrimination between communities or social groups in the matter of establishment and maintenance of educational institutions, etc."

It is difficult to understand why some members of the Commission could not agree to the Drafting and Editorial Committee's unanimous suggestion of extending to all religious and linguistic groups without any discrimination the right to establish and administer educational institutions of their choice insofar as this could be done without in any way adversely affecting the existing rights of minorities.

(iii) Para 3.20.2 of the Report recommends that besides every child having the right to free education until he completes the age of 14 years, every girl and members of the Scheduled Castes/Scheduled Tribes will have a judicially enforceable fundamental right to education until the age of 18 years. It is doubtful whether the actual costs of providing free and compulsory education to nearly half of India's population upto the age of 18 years have been worked out before making such recommendation.

(iv) In regard to Chapter 4 titled 'Electoral Process and Political Parties', I would like to iterate the following unanimous decisions of the Drafting and Editorial Committee which were based on the decisions taken by the whole Commission earlier with one Member expressing some reservations in regard only to (a):

(a) "The second approach which the Commission recommends for adoption, suggests that **we should only have representatives who win on the basis of 50%+1 vote. If, in the first round, nobody gets over 50% then there should be a run-off contest the very next day or soon thereafter between the top two candidates so that one of them will win on the basis of over 50% of the votes polled.** Several representations from organisations and individuals favoured this option to achieve the objective of better representation. The Chief Election Commissioner confirmed that the task of run-off elections can be managed. Actually, the run-off vote is like a re-poll in certain constituencies. There is no revision of electoral rolls, no fresh nominations, no fresh campaigning or the like. It is the same polling booth with the same administration and therefore there are no complications of heavy costs or fresh security arrangements. There are substantial advantages of following the policy of 50%+1 vote. On the one hand, it resolves the problem of representation. On the other, it also makes it in the self-interest of various political parties to widen their appeal to the electorate. It can help push political rhetoric in a direction that the mobilizing language might take on comparative "universal" tones as opposed to "sectoral" tones of the present day. With the need to be more broad based in their appeal, issues that have to do with good governance rather than with cleavages and narrow identities might start to surface in the political vocabulary. With EVMs we can easily plan on a two-day election all over the country. The second day may be for

run-offs. This means that at the end of the day, through the use of computer technology, the constituency will know whether someone has won by getting over 50% or that a run-off is necessary. If it is the latter, the announcement would mention the names of the two candidates. The final results can be announced with all others. If implemented properly, this suggestion has the potential of forcing political parties and candidates to think of strategies to obtain over 50% votes in the first election itself. This will discourage the non-serious candidates and fringe players from jumping in the fray and it will encourage making of pre-election agreements between parties and this should lead to moderation and stability. Also, while on the first occasion, there may be many run offs, with each successive election the number may be reduced to only a few.

The proposal evoked favourable response from the people. Also, it found overwhelming support in the Commission and the general feeling was that this one proposal had the greatest potential of service to the cause of national integration and ridding Indian politics of the scourge of casteism and communalism."

(b) "Some scholars and concerned citizens suggested that voting should be made a citizenship obligation. Voting is compulsory in many countries. Many eminent Indians, including the distinguished former President and elder statesman, Shri R. Venkataraman strongly favoured making voting compulsory. He suggested that the responsibility of ensuring that all the voters exercise their franchise may be entrusted to Panchayats at the village level. "The advantage of compulsory voting is that the voter realises that he is not conferring a favour on the candidate but exercising his duty as a citizen." **The Commission recommends that voting be made compulsory as a fundamental citizenship obligation under the law."**

(c) "After careful consideration of all the aspects of the problem, the Commission reached the conclusion that only recognised national parties and pre-poll alliances (*i.e.* those that secure at least 10% of the votes cast) should be allotted common symbols to contest elections to Lok Sabha. This would, by prompting pre-poll alliances, automatically consolidate the vote and help in evolving some sort of federal parties or alliances providing more stable governments."

(d) "Section 60 of the Representation of the People Act, 1951, inter alia, makes a provision enabling the persons of the armed forces to cast their votes through postal ballot. It is reported that there have been inordinate delays in delivery of the postal ballots sometimes resulting in disenfranchising the personnel of the armed forces. Some suggestions have been made to the

effect that as an alternative at their option, the members of the armed forces may be allowed to cast their vote by appointing someone as proxy. **The Commission recommends that by making necessary changes in the Representation of the People Act, 1951, the facility of voting either by proxy or the existing postal ballot system, may be provided to members of the armed forces."**

(v) In para 4.31.2 of the Report, there is a serious typographical error which seems to suggest that national parties or alliances may be allowed to contest elections only for State legislatures or Council of States. Actually, it should read as follows:

> "Only parties or pre-poll alliances of political parties registered as national parties or alliances with the Election Commission be allowed a common symbol to contest elections for the Lok Sabha. State Parties may be allowed common symbols to contest elections for State Legislatures and the Council of States (Rajya Sabha)."

It is hoped this correction would be made in the Report before it is submitted even though several members have already signed it.

(vi) Para 4.21 of the Report as already signed by some of the members, *inter alia*, reads as follows :

> "At the same time, the other point of view put forward was that denial of the said high offices solely on account of the fact that the person was not a natural born citizen of India or his parents or grand parents were not citizens of India, would deprive worthy citizens from occupying these high offices".

This seems to imply or suggest that natural born citizens of India are not "worthy" and only those not born in India or of Indian parentage are "worthy". It is, therefore, suggested that the para may be modified before submission of the Report to read as follows:

> "At the same time, the other point of view put forward was that denial of the said high offices solely on account of the fact that the person was not a natural born citizen of India or his parents or grand parents were not citizens of India, might deprive some citizens from occupying these high offices even if they were otherwise worthy and acceptable".

(vii) In Chapter 5 of the Report devoted to 'Parliament and State Legislatures' as already signed by some of the Members, the last sentence in para 5.21.5 reads "the Commission recommends the setting up of a study Group of Parliament outside Parliament". It should actually read, "The Commission recommends the setting up of a

'Study of Parliament Group' outside Parliament. It is suggested that the correction may be carried out before the submission of the Report.

There may be some other similar typographical, factual or inadvertent errors. These may be taken care of.

(viii) Chapter 7 of the Report is titled 'The Judiciary'. This chapter particularly is seriously flawed and distorted. The much needed Judicial Reform issues have not been even touched or these got deleted in the final draft. In matters like appointment of judges, the approach in the final chapter is heavily and unconstitutionally weighed in favour of the judges themselves selecting their own colleagues thereby striking at the legitimate powers of the Executive and the Parliament and disturbing the delicate balance in the polity.

The Report of the Drafting and Editorial Committee which was unanimous in all matters, *inter alia*, contained the following useful observations:

> "The Commission took into account the consultation paper, the responses thereto and the views of eminent persons like the former President of India and some of the former Chief Justices of India including the one who delivered the majority judgement in the second judges case. When the matter came to be discussed before the Commission, divergent views were advanced and cited. According to one former C.J.I. (Justice E.S. Venkataramaiah), in the interpretation placed by the majority of judges on article 124, the "text of the Constitution seems to have been departed from. ..... The interpretation now given neutralises the position of the President and makes article 74 which requires the President to act on the aid and advice of the Council of Ministers irrelevant. ..... The construction now placed by the court makes the Supreme Court and the High Courts totally undemocratic. While in a parliamentary democracy the President may be a mere constitutional head when the power is exercised by him on the advice of the Council of Ministers he cannot be asked to play the same limited role where the Chief Justice of India who is not an elected representative advises him. One cannot ignore that this may lead on a future occasion to tyranny in another unexpected place... The new meaning given by the Supreme Court appears to be beyond the scope of mere interpretation and virtually amounts to re-writing the relevant constitutional provisions....."*.
>
> "Obviously there has been some rethinking on the subject. A former C.J.I. (Justice J.S. Verma) seemed to have revised his opinion and favoured "a review" in the light of the experience after the verdict in the *Second Judges'* case inasmuch he came

* E.S. Venkataramaih, *The Working of Indian Democratic Polity – An Appraisal*, Dr. Zakir Hussain Educational & Cultural Foundation and Indian Institute of Public Administration, New Delhi.

to advocate that the intent of the Constitution was not to accord "primacy to either" the judiciary or the executive, the "responsibility" of both was "to find the most suitable person for appointment" and this could best be done by a "National Judicial Commission, representing all wings, headed by the Vice President/ Prime Minister/ Chief Justice of India".

"The Judiciary, the Legislature and the Executive are the creatures of the Constitution and it is the Constitution, which is supreme. The Constitution is what it says and there should not be any attempt to alter it by an interpretative process by any of the limbs of the state. Power to interpret or declare the law does not include any power to change or make the law. It is a *fortiori* when a question arises as to in which of the limbs, the Constitution has vested the power of appointment. When it involves questions as to whether the power is in the Judiciary or Legislature or Executive, the Supreme Court's approach has to be in the following manner as observed by the Supreme Court *In Re Special Reference 1 of 1964* [1965(1) SCR 413 at 446] "... Legislators, Ministers and Judges all take oath of allegiance to the Constitution for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe allegiance.....". Also, it was noted that there is no country whose constitution provides for vesting the power of appointment of judges of superior courts in the judiciary itself. In this context, there was a general consensus in the Commission on the desirability of suggesting the mechanism of the National Judicial Commission to ensure that the power of appointment of judges was not exercised arbitrarily either by the executive or the judiciary."

The above observations are reiterated for consideration by the powers that be.

(ix) Attention is also invited to the decision taken by the Commission at its 14th Meeting held on 14-18 December, 2001. Para 16 of the minutes records that

"There shall be a National Judicial Commission for making recommendation as to the appointment of a Judge of the Supreme Court (other than the Chief Justice of India), a Chief Justice of a High Court and a Judge of any High Court."

"The composition of the National Judicial Commission would be as under:

a) The Vice-President of India
b) The Chief Justice of India

J.S. Verma, The Judiciary and Judicial Reforms in *Political Reforms: Asserting Civic Sovereignty*, Konark, New Delhi 2001, pp.145-180.

c) Two senior-most Judges of the Supreme Court, next to the Chief Justice
d) The Union Minister for Law & Justice."

"The National Judicial Commission shall meet as a round table. While meeting for making recommendation as to the appointment of a Judge of a High Court, the Chief Justice of the concerned High Court shall also be associated as a Member of the Commission."

"Proposals for appointment of Judges should originate either from the Chief Justice of India or the Chief Justice of a High Court, as the case may be."

"The retirement age of High Court and Supreme Court Judges should be uniform and it can be 65 years."

"The retired judges should not be appointed to any paid appointment under the Government. However, even for post-retirement non-paid assignments, it is recommended that, to eliminate room for irrelevant considerations, it would be appropriate to provide as a matter of law that where a retired Judge is sought to be appointed to a Tribunal/Commission or similar other body, such appointment should be made in consultation with the concerned Chief Justice. In the case of appointment of a retired Judge/Chief Justice of the Supreme Court, the Chief Justice of India will be consulted and in the case of appointment of a judge/Chief Justice of the High Court, the Chief Justice of that Court should be consulted. Such a course would help in eliminating irrelevant considerations and would also facilitate appointment of appropriate persons to these bodies."

"As regards the transfer of Judges, it should be as a matter of policy and the power under article 222 and its exercise in appropriate cases should remain untouched. The President would transfer a Judge from one High Court to any other High Court after consultation with a committee comprising the Chief Justice of India and the two senior-most Judges of the Supreme Court."

(x) At the 11th meeting of the Commission held on 15-18 September, 2001, the following suggestions about the 'The Judiciary" were made for being taken up for discussion by the Commission at the appropriate time.

"(i) Intensive training and orientation programmes should be organized for the members of the Judiciary at all levels at the time of their entry.
(ii) There should be refresher courses for upgradation of training and orientation programmes at regular intervals during the service for judicial officers from the lowest to the highest courts.
(iii) Similar training camps need to be organized for the lawyers for improving their professional skills and responsibilities.
(iv) There should be regulation of fee of the lawyers on the basis of their classification as categories, say A, B, C, etc.

(v) Cash payment of professional fees to the lawyers should be made illegal.

(vi) Limits should be prescribed on adjournments in courts.

(vii) The Judgments given by the Courts should not be unduly lengthy. Plurality and prolixity of judgments should be discouraged.

(viii) There should be only one judgment, whether unanimous or by a majority. There need not be any concurring or dissenting judgments.

(ix) Written arguments should be permitted and encouraged.

(x) The judges should not make laws or amend the Constitution by interpreting the same. The function of working of the Constitution and applying its provisions has been entrusted to various functionaries such as Speaker, Police and Magistrates, in addition to the Judges.

(xi) There should not be any summer or winter vacations for courts as these are colonial legacies.

(xii) A minimum of 220 days of working of the courts should be ensured in a calendar year.

(xiii) Fixed time schedules should be prescribed for clearing the arrears of cases.

(xiv) There should be time bound disposal of the cases.

(xv) The age limit for retirement should be increased for the judges of High Court and Supreme Court uniformly, say 70 years or 75 years and simultaneously judges should not be allowed to take up any paid appointments after their retirement.

(xvi) There should be increased use of alternative modes of resolution of disputes.

(xvii) Lawyers should encourage out-of-court settlement of disputes.

(xviii) There should be better use of the latest technological devices in the working of the courts.

(xix) The court procedures have to be made more citizen friendly.

(xx) The accountability to people applies as much to the judiciary as to the legislators.

(xxi) Neither the Parliament nor the Supreme Court is supreme under our Constitution as the duties and powers of each organ have been defined and delimited under the Constitution. In case of any doubt about the supremacy, it has to be vested in Parliament, which represents the will of the people."

The above suggestions are reiterated.

7. The chapter on the Pace of Socio-economic Change and Development is largely ill conceived and likely to cause tremendous damage to the social fabric and unity of the nation. The recommendations in this Chapter would strike at the roots of economic development and nation building efforts. These go counter to the basic preambular principles including those of justice, equality and fraternity. Perhaps some of the recommendations made unwittingly are bound to be detrimental to the interests of the scheduled castes and minorities in particular and the people at large in general.

8. While no comments are being made on what went wrong in the procedure, priorities and perspective, it may be put on record that several of the recommendations now forming part of the report go directly counter to the clear decisions of the Commission on which the unanimously adopted draft report of the Drafting and Editorial Committee was based.

9. The Commission was appointed to review the working of the Constitution, I believe, so as to strengthen Indian polity and contribute to national rejuvenation. Unfortunately, as the minutes of the Commission in Volume II would show, before passing on the work to the Drafting and Editorial Committee only three meetings of the Commission (13th, 14th and 15th held late in November 2001 to early January, 2002) were devoted to any substantive discussion on the subject of the working of the Constitution. The three extensions brought the term of the Commission to over two years but the total period that the Commission itself and its Drafting and Editorial Committee could devote to the actual task was hardly three months. After the Draft Report was submitted to the Commission in time by the Drafting and Editorial Committee, the third extension for the Commission was sought and obtained without the Commission taking any such decision. It was during this third extended period that some of the decisions of the Commission arrived at after due deliberation and incorporated in the Draft Report were changed and several new points added.

10. If the independence, primacy and supremacy of the judiciary in its sphere is important – and doubtless it is important – so is the independence, primacy and supremacy of the Parliament in its sphere. After all, Parliament is the supreme representative institution of the people. The powers and functions of all the three organs of the State are only as defined and delimited by the Constitution which binds all the three of them equally. The purpose of recommending any amendments can only be to ensure control over any tendencies of any organ claiming overall supremacy or arbitrary powers disturbing the basic balance in polity. The effort has to be to make all the three organs more citizen-friendly and people-oriented rather than judge, lawyer, administrator or M.P./M.L.A interest-oriented.

11. Unfortunately, in some vital matters, certain recommendations have not found place in the final Report simply because one of the Members had some reservations. Also, some highly controversial matters of doubtful legitimacy have found place in the final report because of the insistence of one Member and the fear of a dissent from him while a matter very dear to one of the Members and which as many as 5 Members supported could not find place among the positive recommendations and this led to the resignation of the Hon'ble Member concerned. Also, while in some matters decisions were taken by majority, in others unanimity was insisted upon. In my humble opinion, it would have been better not to have relatively more exclusive focus only on the wish-list or demands of some individuals or groups and to think of the interest of the nation at large.

12. Lastly, I would like to mention that I had taken the liberty of reproducing large portions of my own earlier copyrighted writings and books published before the setting up of the Commission. I hereby accord my 'No Objection' to all such reproductions and use.

13. I would thank all the Hon'ble Members of the Commission for their indulgence, courtesy and consideration extended to me. In particular, I am most beholden to the Hon'ble Chairperson who has gone out of the way to say some of the nicest things about me personally. I shall always cherish my association with all the Hon'ble Members and look forward to their enduring friendship and companionship in the service of the nation.

(Subhash C. Kashyap)

30/3/2002

ADDITIONAL NOTE
to the Report of the
National Commission to Review the Working of the Constitution.

By C R Irani

I request that this Note be read in conjunction with my signature to the Report of the Commission.

1) Some aspects of the question of restricting eligibility to high public offices on the part of foreign-born nationals require to be elaborated in order to avoid misunderstandings. I would like to clarify that on the occasions on which this matter was discussed in my presence, I could not shake off the impression that we, in the Commission, feared that any endorsement of the view canvassed by our colleague, Purno Sangma, although on merits, would be interpreted as being directed against one individual. I had urged that it should be possible to de-link the question from individuals and it would be wrong to proceed that this would not be possible. Our decisions ought not to be influenced by possible or even probable reactions. It is also true that the division on the issue was at the instance of my friend Sangma and this was the only occasion that I can recall when an issue was so decided. As we have recorded faithfully in the Report the issue is important, in these days of multiple citizenship and we do not need to wait for a Fujimori case to arise before deciding that the safeguards in the American Constitution deserve a fuller and more public debate.

2) I am seriously concerned at the abuse of the provisions of law relating to criminal defamation by politicians and others. I wish to offer some illustrations from my personal experience in the last few months and years:

a) In January 2000, the RSS unit in Delhi send us a letter complaining of an article by AG Noorani, a respected commentator, on the RSS organisation, published that month. The letter is promptly published in full and without comment. On 14 March 2000, a criminal complaint is filed before a Magistrate in Midnapore District of West Bengal. Then follow 11 hearings and the matter is still pending in March 2002. On the same facts another functionary of the RSS in Delhi, files a criminal complaint in the Tees Hazari Courts in Delhi on 29 February 2000. Some of the defendants are not given exemption from personal appearance and the issue goes to Delhi High Court, where the judge rejects the terms suggested by the RSS for settlement and finally disposes of the entire matter by a consent order on terms acceptable to us on 25 February 2002. It had taken 19 hearings.

However the Midnapore Magistrate is still considering the terms endorsed by the Delhi High Court.

b) Jyoti Basu the West Bengal chief minister, at a time when he had resigned and had been asked to continue in office, sought and was denied sanction to file a prosecution by the Governor and later by the State Cabinet but nevertheless ordered his own departmental secretary to issue the sanction letter. It included three statements, which were false to the knowledge of the signatory, i.e. – that the papers were sent to the Governor, that he did apply his mind to it and that he did sanction the prosecution. The official is now the State's new Chief Secretary. The words complained of were in an Editorial *Unending Violence* –and read as follows:-

Just as in 1981 Basu justified the burning alive of 18 Ananda Margis in Bijan Setu which assured that the police did not proceed, now he and his party are defending the killing of Trinamul supporters for being anti-socials.

The judgment of the Hon. Mr Justice Kundu of the City Sessions Court, held that the sanction was invalid; the whole editorial should have been read and not a single sentence out of context; and that in any event there was no defamation of Jyoti Basu on a plain reading of the words complained of. Further, the judge held that by referring to the five cases filed in the Anada Marg case, all of which resulted in acquittal on the admission that witnesses were either not available or had turned hostile, the Public Prosecutor had not advanced his case. The summons had been issued on 7th November 2000 and judgment delivered on 18 May 2001. It was decided on our Application that there was no case to answer, otherwise it would have been prolonged further. Jyoti Basu suffered no inconvenience and the case was conducted at the expense of the state.

c) Prafulla Kumar Mahanta, when he was chief minister of Assam, similarly abused the provisions of the Criminal Procedure Code to get the Government of Assam to launch a criminal prosecution for an editorial, which criticised him in the discharge of his official duties. As in the case of Jyoti Basu, the sanction was purportedly granted by the Governor of Assam; when, it was stated, the papers were placed before him but His Excellency the Governor has confirmed to me later that he knew nothing about it! The case was filed in October, 1997, in the court of the Sessions Judge, Guwahati, several witnesses were examined; the High Court did not entertain an Application on

several pretexts and finally the new Government of Tarun Gogoi directed the Public Prosecutor that *the complainant* (the state of Assam) *was not interested to proceed with the case any further – in the changed circumstances.* It was withdrawn in November 2001 that is after four years and considerable expense and inconvenience. Let it be noticed that the proceedings were withdrawn in *the changed circumstances*, confirming that the prosecution was mala fide and motivated but Mahanta has suffered no inconvenience.

d) Sahara India Ltd were investigated by the Reserve Bank of India and several restrictions were imposed on them in the matter of collecting deposits from the public. We published two reports, based entirely on the Press Note issued by the RBI and confirmed by the Income-Tax authorities. We made no value judgments. In June 1997, Sahara India filed a criminal defamation case in the Alipore Court in Kolkata. The trial began, witnesses including myself were examined, after several hearings and arguments, the magistrate acquitted all the accused holding that no offence was committed. This was in 2002, after five years.

e) Sanchayani Savings and Investments (India) Ltd. file a criminal complaint of defamation in the Court of a Magistrate in Nagpur for publishing a report on the Reserve Bank of India's action taken to stop violation of the Bank's guidelines. Magistrate takes cognisance despite the fact that both complainant and The Statesman are based in Calcutta and issues summons. The case commences in June 1999 and is pending in the High Court for quashing.

I emphasise that these are illustrative examples and not by any means exhaustive. They demonstrate how the provisions of the Criminal Procedure Code are being misused and which has a chilling effect on the freedom of speech and expression. The specific inclusion of Freedom of the Press in the Fundamental Rights, recommended by the Commission, is small consolation if it is not matched with removal of criminal defamation from the statue book. Failing that or, I would like to hope, pending that, immediate action should be taken to require anyone complaining of defamation to enter the witness box first to prove that he or she has a reputation capable of being defamed. It follows that provisions of the Criminal Procedure Code allowing public servants or those who *have been* public servants to shelter behind state governments to harass those in the press who are doing their duty should be deleted. These provisions are – Section 199 (2), (3), (4) and (5) and consequential provisions.

3) It is now my unpleasant duty to refer to something that has happened for which I have no explanation. When we were working on the Chapter on Fundamental Rights we were very clear that our objective was to leave existing Rights inviolate and indeed to see whether we could enlarge and strengthen them. When we received the draft of the final Report however we found the following paragraph numbered 3.22.2. It read:-

> *In regard to Articles 29 and 30, the Commission recommends that the cultural and educational rights available under the Articles should be available equally to all groups in society so that there is no discrimination between communities or social groups in the matter of establishment and maintenance of educational institutions, etc.*

Article 29 already extends to *any section of citizens....* So it is not clear what was intended but the effect of this on Article 30 would be to

extinguish at one stroke the rights of minorities to establish and administer educational institutions of their choice. My colleague, Soli Sorabjee, who was abroad at the time appears to have spotted this at the same time as I did. I emphasise that as soon as the draft final Report came up before a meeting of the Commission, all members present promptly agreed to delete this paragraph but the fact remains that it appeared in bold type and was reflected in the Summary of Recommendations. Apart from the seriousness of this incident, I have two other comments to make. One, the abbreviation appears in the Summary of Recommendations also - whoever was responsible did not even stop to think that – etc – is wholly inappropriate in any statute let alone in the Constitution of the country! The other is to enter a caveat. We have not had the opportunity to examine the whole of the revised final draft thoroughly because of time constraints. While this is understandable in the circumstances I must state that I cannot be sure that another incident of this nature has not disfigured our work in some other part. I attribute no motives and accuse no one. I merely draw attention to something that is not, to my mind explained as a typographical error or a misunderstanding.

Subject to the foregoing Note, I have pleasure in signing this Report.

C.R. Irani

March 21, 2002

I, Sumitra Gandhi Kulkarni am signing this document with grave concerns and reservations. My concerns and reservations should be a part of the record of this Commission's work and its final report. My signature on this final report is conditional to the reservations and concerns as highlighted below.

(a) The Commission was set up to contemplate the challenges faced by the existing Constitution in dealing with issues that India will face in the 21st century and beyond – and consequently make recommendations in areas where the Constitution can be strengthened. We as members were expected to identify, debate and finally take a stand on issues. Members of this commission were not expected to sit o the fence with regards to serious issues. Unfortunately, there has been fence sitting.

(b) I have always believed that for a Constitution to be an effective framework for governance it must first be a framework for unification. I believe in a Unified and truly Secular India, however, the Commission debates seemed often to reduce the Constitution to being a platform for divisiveness and not unification.

(c) The Commission never initiated or promoted any debate in the public with regard to the issues that it was contemplating. The whole effort was to "evade and defer" instead of to "identify issues, table them for debate and to deal with them."

I feel that the Government met its promise to the People of India with regards to initiating a review of the Constitution, but I feel disappointed that the Commissio failed both the People and the Government by not delivering a top quality eff

Sumitra Gandhi Ku

11.3.2002

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