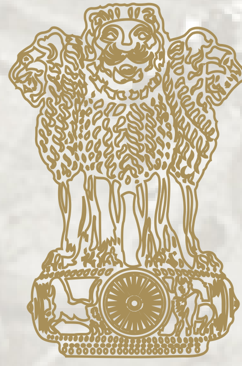

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COMMISSION ON CENTRE-STATE RELATIONS

REPORT

VOLUME - VII

SOCIO-ECONOMIC DEVELOPMENT, PUBLIC POLICY AND GOOD GOVERNANCE

MARCH 2010

REPORT OF THE COMMISSION ON CENTRE-STATE RELATIONS. MARCH 2010
VOLUME - VII SOCIO-ECONOMIC DEVELOPMENT, PUBLIC POLICY AND GOOD GOVERNANCE

COMMISSION ON CENTRE-STATE RELATIONS

REPORT

VOLUME VII

SOCIO-ECONOMIC DEVELOPMENT, PUBLIC POLICY AND GOOD GOVERNANCE

MARCH 2010

THE COMMISSION

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Shri Justice Madan Mohan Punchhi (Retd.)
Former Chief Justice of India

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Former Secretary to the
Government of India

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National Judicial Academy, Bhopal, and
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Shri Vijay Shanker
Former Director,
Central Bureau of Investigation,
Government of India

Dr. Amaresh Bagchi was a Member of the Commission from 04.07.2007 to 20.02.2008, the date he unfortunately passed away. The Commission expresses its deep gratitude to late Dr. Bagchi for his signal contribution during his tenure as a Member.

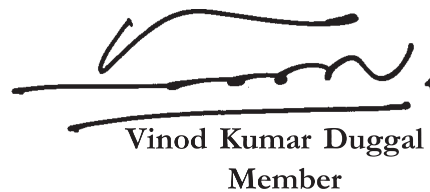
SECRETARIES

Shri Amitabha Pande	(17.07.2007 - 31.05.2008)
Shri Ravi Dhingra	(25.06.2008 - 31.03.2009)
Shri Mukul Joshi	(01.04.2009 - 31.03.2010)

The Commission on Centre-State Relations presents its Report to the Government of India.

Justice Madan Mohan Punchhi
Chairman

Dhirendra Singh
Member



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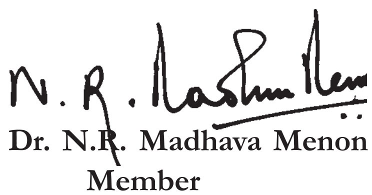

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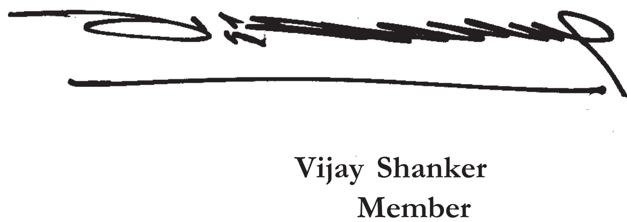

Vijay Shanker
Member

New Delhi
31 March, 2010

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CHAPTER 1

INTRODUCTION

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1

INTRODUCTION

SOCIO-ECONOMIC DEVELOPMENT, PUBLIC POLICY AND GOOD GOVERNANCE

1.1 Introduction

1.1.01 The Constitution of India has clearly articulated the social and economic goals for the Republic and has provided roles and responsibilities to different levels and organs of Government to achieve the promised social revolution. Ensuring good governance and achieving social and economic justice are among the most important Constitutional goals in independent India's democratic journey since 1950. A lot has been achieved; but a lot more remains to be fulfilled. If in the initial periods the problem was more in respect of scarcity of resources, of late, the problem is with lack of good governance. The Constitution provided the social justice agenda in the form of "Directive Principles of State Policy" and left it to the State to formulate appropriate public policies and manage governance at all levels responsibly and responsively. It is futile to continue to debate whether the institutions of governance that have failed or whether the men and women who worked those institutions who have failed to deliver the Constitutional promises of social justice and development. While analyzing the performance of successive governments on socio-economic development and delivery of basic services for the welfare of people, in this report, the Commission would focus on the dynamics of public policy and good governance under the Indian Constitutional Scheme and make some recommendations on how governance and Centre-State relations need to be organized to improve the quality of public services and promote inclusive development.

1.1.02 The subject is proposed to be discussed under the following topics some of which are overlapping and cross-cutting on issues and concerns around policy and governance:

1. Public Policy, Constitutional Governance and Public Administration
2. Socio-Political Developments and Its impact on Governance

3. Basic Needs of People, Directive Principles and State Accountability
4. Centrally-Sponsored Development Schemes and Federal Relations
5. Migration, Human Development and Challenges to Constitutional Governance
6. Good Governance and Delivery of Public Services
7. Conclusions and Recommendations

CHAPTER 2

PUBLIC POLICY, CONSTITUTIONAL GOVERNANCE AND PUBLIC ADMINISTRATION

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2

PUBLIC POLICY, CONSTITUTIONAL GOVERNANCE AND PUBLIC ADMINISTRATION

2.1 Policy making to be more Inclusive and Consultative

2.1.01 Admittedly, in organizing governance, development of policy plays a crucial role. More so, in a federal system where implementation of policies are in the hands of multiple layers of government having diversified powers and responsibilities. Converting policies into legislative measures and executive programmes becomes easier if policy making is preceded by consultation with all stakeholders. It is imperative for good governance in a democratic polity that all major policies should be finalized only after 'mandatory consultation' through a series of public hearings in all parts of the country. This is not impossible or impractical since, at present, 'Environment Impact Assessment' of major projects mandates such public hearings. At least in area-specific matters, a beginning could be made in evolving development policies which affect the common people through public hearings or other forms of civil society consultation.

2.1.02 Given the realities of elections in the country, dominated as they are by religion, caste, money and muscle power, results cannot be construed as endorsement of party manifestos, especially when the winner need not secure a majority of total votes polled. It is true today that several bills on sensitive matters are referred to Committees of Parliament which in turn, hold wide consultations with individuals and organizations before submitting their reports to Parliament. But on strictly policy issues, consultations are not well structured nor made intensive and inclusive. Instead of courts intervening at every instance, through PIL or otherwise the scheme of constitutional governance itself should provide for such mandatory consultation with all the stakeholders who are affected by important public policy concerning livelihood and social security issues. The idea of bottom-up planning process envisaged by the Panchayati Raj amendments to the Constitution is supposed to strengthen the policy making in this regard.

2.1.03 The policies themselves should clearly identify the different categories of stakeholders who would be affected, in one way or other by the policy. The governments, both at the Centre and in the States, should clearly respond to the views expressed and concerns raised at these public hearings before finalizing the policies for adoption. The

policies should also contain clear guidelines on implementation and monitoring with reference to identified parameters and targets. All this would help formulation of socially acceptable policies which will have the support of the people and hence easier and effective to be implemented.

2.1.04 Another important aspect of policy formulation will be to build in flexibilities necessitated by the diversities in the Indian polity, among regions and states. "One policy fit all" approach would sooner or later end in local agitations, ad hoc amendments and emergent modifications which sometimes lose of sight of the original objectives of the policy itself.

2.1.05 A related issue is whether we can believe that all matters of public interest would be catered for by the political system through the executive and legislative arms of the 'State'. We should have, in the Constitution, a provision for the citizens to seek policies in areas of concern to them which, very likely, may be of little priority to the political parties. An instrument is required to be constitutionally established through which a prescribed minimum number of citizens could ask governments to come forth with policies on the subject(s) specified. This would be better than, the action, at present being resorted to, where citizens seek Public Interest Litigations (PILs) and requesting Courts to direct governments to frame policies. Citizens petitioning to the governments would be more legitimate and democratic and is in accordance with the constitutional scheme of separation of powers between the three arms of the 'State'.

2.2 Constitutional Governance and the Culture of Public Administration

2.2.01 The Constitution took for granted that if public power is exercised in the spirit of the Preamble, Fundamental Rights and Directive Principles, good governance would be the natural result. It would then be unnecessary to stipulate good governance as an independent right of citizens. That is why in Article 37 the Constitution declared that the Directives are fundamental in the governance of the country.

2.2.02 Unfortunately, the way public administration came to be organized in different states and at the centre on the mould of the colonial regime proved to be ineffective and non-accountable in several respects. There is no commitment or consistent effort on the part of governments to improve the quality of governance. Today it has become necessary to put good governance as part of the rights of citizens and to seek a mechanism to monitor progress in this regard. As a first step, it may be added as one of

the Directive Principle so that governments may not ignore it altogether. That would give the necessary mandate and authority to the Central Government to set certain minimum standards of public administration both in Central Government departments, in State and local bodies and seek compliance incrementally. In this regard, the Central and State Governments be asked to give to Parliament and State Assemblies respectively a status report on implementation of Directive Principles every two years. This is on the model followed by the Human Rights Committee of U.N. to extract accountability from Member States.

2.2.03 The introduction of the Right to Information Act did bring about a sense of urgency for being transparent and accountable in governmental decision-making. What is now required is to demand efficiency from civil servants for which the rules of recruitment, remuneration and career progression need to be completely revamped on the lines recommended by the Second Administrative Reforms Commission. The civil servants need also to be insulated from political pressures to be able to perform their functions objectively and fairly. It is sad that the Supreme Court had to intervene repeatedly to bring about elementary reforms in the police which have been recommended by several committees and commissions appointed from time-to-time by the Government itself. Still State governments are reluctant to implement the Supreme Court orders or give the police the necessary freedom and wherewithal to operate as a service agency under rule of law.

2.2.04 Public administration is organized under a set of rules and procedures which need constant revision with a view to update and simplify them to be citizen-friendly. Too many levels for processing cases breed delay and corruption. Performance evaluation systems need to be revamped to make them more objective, transparent and reliable. Then only rewards and punishments would become meaningful to make the system more efficient. The use of information and communication technology at all levels of government has become imperative to improve efficiency and accountability of the system.

2.2.05 The reluctance on the part of an increasing number of officers of the All India Services to be politically neutral and professionally independent has become a matter of serious concern to those who seek good governance under rule of law. The matter needs immediate attention of government if the momentum in economic development were to be converted into the improvement of quality of life of the people. The Panchayati Raj institutions can also help in the transformation provided functions and finances are

duly devolved and the civil servants co-operate for better delivery of public services to the people. The Vigilance structure in the Centre and States along with Lok Ayuktas have to take a proactive role to improve the administrative system to ensure timely delivery of services to the people. Despite the presence of the laws and the institutions, the system is faltering because of governance failures in many States and in basic sectors of public administration. It will be desirable to disseminate the achievements and good practices of better performing States through publicity campaigns and conferences to make citizens realize what their fellow citizens in some other States have been able to achieve much better services from Governments with same or less resources. Unless such civil society pressures are created, the administration will not wake up from slumber and business as usual attitude will continue. The Indian problem, Nehru had stated, was not to foster stability in the system but to transform it. The "law and order" mindset and pre-occupation of the bureaucracy mind, it is said, led to the entrenchment of the system which the Constitution has promised to transform in the service of people. A fundamental flaw vitiating governance emanated from the lack of conviction that the consent of the people is the basis of exercising public power and governmental decision-making.

2.3 Citizen's Charters and Public Accountability

2.3.01 Article 350 of the Constitution speaks about citizen representations for redress of grievances. Every person is entitled to submit a representation for the redress of any grievance to any officer or authority of the Union or a State in any of the languages used in the Union or in the State, as the case may be.

2.3.02 Delivery of public services is the most neglected area of public administration. Good governance in these sectors requires that the Service Providers prepare and publish the entitlements of citizens in the form of a Citizens' Charter and the time schedule under which he could expect the services. To ensure that citizens receive public goods and services as per the Charter, governments should set up mechanisms like Ombudsman to be moved for redressal in case the person fails to receive the services in the manner and to the extent set out in such Charters.

2.3.03 Enormous sums are being transferred from Centre to States and local self-government institutions for social development. There is no effective and verifiable accountability system to ensure that the benefits reach the targeted population. Oversight mechanisms at the village level are imperative to monitor these schemes and prevent leakages. Social audit on the working of these schemes be made mandatory and there should be third party inspections and assessments on a regular basis.

2.4 Conclusions and Recommendations

Policy making to be more inclusive and Consultative

2.4.01 In a large, complex and diverse country like India, policy making on major issues affecting the lives and livelihoods of people to be acceptable and practical need to be not just consultative but perceived to be so. It is therefore recommended that in sector-specific subjects, mechanisms like public hearings may be statutorily employed involving Panchayats and Municipalities. This should be done through holding of 'mandatory consultation' wherein the governments, both at the Centre and in the States, should clearly respond to the views expressed and concerns raised at these public hearings before finalizing the policies for adoption.The Commission also recommends that the policies themselves should clearly identify the different categories of stakeholders who would be affected, in one way or other by the policy. Further, the policies should contain clear guidelines on implementation and monitoring with reference to identified parameters and milestones.

2.4.02 The Commission emphasizes the need to have flexibility in the policies with the object of catering to the diversity. The Commission strongly suggests stopping the "one policy fit all" approach.

2.4.03 As a corollary to the above approach, the Commission also recommends constitutional empowerment of the people to petition the appropriate government for making or amending policies wherever needed. Today this is happening through the intervention of the Court in public interest petitions. Article 350 does envisage such a procedure for redressal of grievance in respect of delivery of public services. This approach would have a two-fold purpose: first, would help to preserve the separation of powers, and second, would enable the policies to be citizen-centric.

Need to improve Vigilance Systems in public administration

2.4.04 Civil Society involvement in public policy and administration is the best strategy for good governance. What is important therefore is to maximize opportunities therefore while making policies and programmes. In this regard, the Commission recommends, *inter alia*, the following steps:

(a) Let "good governance" be introduced as a Directive Principle of State Policy.

(b) The citizen's right to have a corruption-free government be acknowledged as part of administrative law.

(c) To increase the efficiency from civil servants, the rules of recruitment, remuneration and career progression need to be completely revamped on the lines recommended by the Second Administrative Reforms Commission (2008). The civil servants need also to be insulated from political pressures to be able to perform their functions objectively and fairly.

(d) There is a need for the All India Services to be politically neutral and professionally independent. Vigilance structures and Lok Ayuktas need to be strengthened to constantly monitor and improve the quality of public services.

(e) It will be desirable to disseminate the achievements and good practices of better performing States through publicity campaigns and conferences to make citizens realize what their fellow citizens in some other States have been able to achieve with same or less resources.

(f) All service providers, government or private, be asked to prepare and publish the entitlements of citizens in relevant sectors through "Citizens' Charters".

(g) Social Audit of the major policy initiatives of government at periodic intervals be made a mandatory practice and reports be placed on the table of the Legislature every two years with comments from appropriate governments.

CHAPTER 3

SOCIO-POLITICAL DEVELOPMENTS AND ITS IMPACT ON GOVERNANCE

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3

SOCIO-POLITICAL DEVELOPMENTS AND ITS IMPACT ON GOVERNANCE

3.1 Regional and Sectarian Pulls and National Purpose

3.1.01 The emergence of strong regional parties with limited presence in one state alone as well as parties representing caste groups and their growing influence in the formation of Governments, at the States and at the Centre, have been the most significant political developments in the last two decades or so. The political parties with all-India presence have been forced to align with one or the other of these regional parties to win some parliamentary seats for themselves while again relying on the latter's support for forming government at the centre. This development can be genuinely perceived by many as fissiparous and weakening the integrity of the federal structure of the polity. Yet, the alliance between the regional and caste parties with the all-India parties, on the other hand, could be seen as a mitigation of this very unity-threatening development. Given the access to political power and the vast resources at the command of the Central Government, the regional parties have had to temper their strong regional bias and act with greater restraint and seemingly greater responsibility on national-level issues. The experience of the coalition governments at the centre over the past decade could stand testimony to this view. In the long run, however, it is perceived that it would be a significant obsession to the all-India parties to work on a strategy to achieve a reconciliation between strong regional pulls and greater national perspective.

3.1.02 A corollary to this development is the increasing embarrassment for the Central Government when two States are at loggerheads over some issue for instance, sharing of river waters, especially when one or both States are under the rule of parties in coalition at the Centre.

3.1.03 There is need to adopt a balanced and mature approach towards the assertion of regional identities by various States, or by forces within States. On the one hand, it is clear that the sovereignty and integrity of the Nation are paramount, and that any force which threatens the existence of the Nation must be forcefully countered. It is, unfortunately, clear by now that these threats are no more hypothetical in nature. Over

the past few decades, separatist movements have been immensely influential in the States of Jammu & Kashmir, Punjab and several of the North-Eastern States. Furthermore, radical Naxalite insurgencies have paralyzed several State Governments, and virtually installed parallel administrations, in large parts of Central and Eastern India. Even within existing States, which grievances and perceptions of minority groups are marginalized or alienated, it may often erupt into violence. The recent violence concerning the demand for the creation of a State of Telangana is a prime example.

3.1.04 Nevertheless, it remains vitally important to distinguish between divisive sectarian sentiments, and legitimate regional aspirations. First of all, it must be borne in mind that the Indian Constitution never envisaged an overly centralized State. The Centre and the States were always intended to be sovereign within their respective spheres of operation, with the Supreme Court acting as the ultimate arbiter of the legality of their actions. The framers of the Indian Constitution, in their wisdom, appreciated that a Nation as complicated, diverse and plural as India could never be administered by one Central Government. Aside from administrative difficulties and practical considerations, the sentiments of various regions of the country would have stood in the way of any other form of government. Hence, it is important to bear in mind that the constitutional structure - which must be preserved - itself allows sufficient room and flexibility for the many diverse identities that make up this Nation.

3.1.05 In fact, giving due regard for the legitimate aspirations of regional identities may often go a long way in curbing tensions, and thereby contribute towards national integration in a more meaningful sense.

3.1.06 For much the same reasons, this Commission cannot endorse the viewpoint which regards coalition politics as inherently problematic, or as an impediment to national development. Firstly, coalition politics has emerged in the last few decades as the product of conscious electoral choices made by the Indian people on many different occasions. It would be somewhat presumptuous to assert that such conscious democratic choices have been entirely without logic or reason. Rather, this reality points to the fact that the existing political parties must have been perceived to have failed in addressing the unique problems of several regions of the country, particularly those which are economically depressed or those deeply cherished cultural and linguistic traditions. Arguably, these electoral choices go some way towards making the Central and State Governments more genuinely accountable at the grass-roots level.

3.1.07 A number of States in their responses to the Commission's Questionnaire have also reiterated these sentiments with some force. One State has responded as follows:

> "It is a fact that recent decades have witnessed increasing political mobilization on sectarian identities. This has also coincided with the rise of political parties with regional identity and programme. Very often it is these regional parties that have been resorting to sectarian identities and appeals as the means of mobilization. This development may appear to be a threat to the principle of unity in diversity that defines the idea of India. In fact, this is only a superficial reading of the situation. Unity in diversity actually calls for the preservation and celebration of diverse identities. As long as all political parties express full faith in the Constitution of India, the danger of the unity of the nation being called into question does not really exist. True, at times it may appear that some political parties or forces are stretching the political fabric a bit too much. This is an inevitable part of the political growth process and need not be a cause of undue alarm. The solution to the problems thrown up by these developments ultimately lies in the political realm, rather than legal or constitutional systems."

Another State has echoed similar sentiments in these terms

"India is having language, cultural, ethnic differences which really recognize the "diversity in unity" principle. Since 1990, there has been a coalition government of the Union Government with the support of the regional parties…Hence, [this State] strongly believes that unity of the country can best be preserved not by centralization of polity but by recognizing, appreciating and even strengthening the rich diversities of India. And the emergence of regional parties can't and should not be interpreted as "sectarian identities" and "threat to the unity and integrity of the country". In fact, their emergence is the concrete evidence, produced by our democratic experiment, pointing towards true federalism."

3.1.08 Thus, this Commission endorses the view expressed by these States to the effect that the inherent diversities in our polity and the emergence of regional political entities cannot be regarded, in and of itself, as a threat to the unity and integrity of the nation. Rather, the correct test must be whether the entity in question, in the ultimate analysis, reposes faith in the Constitution of India and the Indian Union. It is clear that the Naxalite movement generally rejects the Constitution and constitutional mechanisms

for elected government. Similarly, at least the more extreme sections of the separatist movements in Jammu & Kashmir and the North-Eastern States reject the Indian Constitution, and any possible accommodation within the framework of that document. Those, then, are the threats to Indian sovereignty that are the gravest in nature. Each of these movements and insurgencies obviously present unique challenges. This Report while discussing issues of security in an earlier volume has adverted to these challenges and offered some solutions.

3.1.09 It may be pointed out, in this context, that despite various contemporary problems of a serious nature, there also exist a number of "success stories" which demonstrate that constructive cooperation and good faith negotiations can often resolve situations which at one point appear to be full-blown crisis. The almost complete eradication of militant separatism from Punjab is an excellent example. A second example could be language related tensions between southern States and the Indian Union, which have also been diffused in view of the accommodations and flexibility displayed by all concerned.

3.1.10 Thus, all that needs to be reiterated at this juncture is that movements within States that demand additional accommodation for regional identities, while otherwise desiring to remain within the fold of the Constitution, ought to be treated with respect and consideration, even in situations where the Central Government might not entirely share the sentiments and perceptions of that movement. Such accommodation and sensitivity will, in fact, strengthen national integration in the long term.

3.2 Local Self-Government and Centre-State Relations

3.2.01 One of the most important ways in which Centre-State relations might be impacted is an increasing tendency on the part of the Union Government to interact directly with local bodies and to bypass the machinery of the State Governments, even in respect of subjects which fall within the domain of States. A number of States have strongly expressed the view that such bypassing of the executive machinery of the States is extremely counter-productive, and harmful to federal relations.

In this connection, one State has observed as follows

> "With 73rd and 74th Amendments, more empowered local political leadership has resulted. But, it has also generated new political tensions and conflicts at grass-roots. Three tiers of Panchayat and urban local bodies have to be

integrated within the ambit of the State Government. There has been a recent tendency for the national government to provide direct funds to the local bodies. This should be curtailed. The State Governments should be encouraged to devolve powers to the local bodies and provide them direction and vision. The representatives in local bodies should be made accountable through social audit and power of the electorate to recall them. Similarly, aspirations of local bodies and their representatives should be adequately reflected in decentralized district planning process."

3.2.02 The Commission concurs with the view expressed above to the extent that the Central Government should be cautious about bypassing the machinery of States while allocating funds to these local bodies. This is for a number of inter-related reasons. Firstly, many of the areas in respect of which funds are allocated (for example, healthcare) are actually the domain of States from a legal perspective. Thus, keeping States out of the process leads to an anomalous situation where the entity with the constitutional powers (and concomitant responsibilities) with regard to certain facets of social and economic policy, are deprived of the power to function effectively. Additionally, it may so happen that the Central Government allocates funds for a certain period of time, but it afterwards unable or unwilling to continue disbursing funds. In such a situation, unless State Governments and the Central Government are in close coordination, certain welfare programmes could languish altogether, with grave consequences for general public interest.

3.2.03 In view of the Centre's generally more robust financial position, it is inevitable (and desirable) that it would be allocating funds for the purposes of economic and social development in the States. However, it is felt that such funds should invariably be allocated through the machinery of the State Governments. This is likely to go a long way towards mitigating some of the problems discussed above.

3.3 Conclusions and Recommendations

(1) Need to develop a positive approach to sectarian mobilisation

3.3.01 Given the multiple identities and diversities of people, it is natural to expect political mobilization around sectarian and regional interests, sometimes appearing to jeopardize national purpose. There is a need to take a balanced and mature approach towards such developments particularly by parties ruling the Central Government.

3.3.02 The Indian Constitution allows enough flexibility to accommodate regional identities and sectarian and even separatist movements as long as they abide by the Constitutional parameters. Unity in diversity is a beautiful concept difficult to practice in a federal arrangement; nevertheless the experience of 60 years of the Republic is proof of strong foundations and sound understanding of the idea that is INDIA.

3.3.03 Thus, the Commission is of the view that movements within States that demand additional accommodation for regional identities, while otherwise desiring to remain within the fold of the Constitution, ought to be treated with respect and consideration, even in situations where the Central Government might not entirely share the sentiments and perceptions of that movement. This issue is discussed in detail in Internal Security Volume V of the Report.

(2) Coalition politics is a game to be played within the Constitutional Framework

3.3.04 Coalition politics need not be inherently problematic as long as the parties follow the rules of the game and respect the authority of the law and the Constitution. It may slow down the pace of development occasionally; but the practice of evolving the 'Dharma' of common minimum programme did help to overcome difficulties while controlling the excesses of the dominant coalition partners. Coalition government can be looked at as a sign of genuine accountability of the uniquely Indian polity and its system of governance.

3.3.05 What is important is to ensure that the Constitutional status of State Governments is given due recognition by the Central Government while taking decisions particularly in relation to local governments. The culture of shared governance is to be carefully nurtured if good governance is to be offered to the people.

(3) On Local Self-Government and Centre-State Relations

3.3.06 The Commission is of the view that the Central Government should be cautious about bypassing the machinery of States while allocating funds to the local bodies, primarily for two reasons. First, keeping States out of the process leads to an anomalous situation where the entity with the constitutional powers with regard to certain facets of social and economic policy, are deprived of the power to function effectively. Second, it may so happen that the Central Government allocates funds for a certain period of time, but it afterwards unable or unwilling to continue disbursing funds, thereby resulting in languishing of certain welfare programmes with grave consequences for general public interest.

3.3.07 In view of the Centre's generally more robust financial position, it is inevitable (and desirable) that it would be allocating funds for the purposes of economic and social development in the States. However, the Commission is of the view that such funds should invariably be allocated through the machinery of the State Governments.

CHAPTER 4

BASIC NEEDS OF PEOPLE, DIRECTIVE PRINCIPLES AND STATE ACCOUNTABILITY

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4

BASIC NEEDS OF PEOPLE, DIRECTIVE PRINCIPLES AND STATE ACCOUNTABILITY

4.1 Introduction

4.1.01 In this chapter we discuss the important question of the constitutional demarcation of responsibilities between the Central and State Governments with respect to the fulfillment of the Fundamental Rights, as well as Directive Principles of State Policy, enshrined in the Constitution. As is well known, the fundamental rights enshrined in Part III of the Constitution are, in general, guarantees of liberty to the citizens and act as a limitation on the powers of the State. On the other hand, the Directive Principles are equally fundamental, though legally non-enforceable, constitutional goals, in the realm of socio-economic justice, to be kept in mind by the State while devising and executing policies. In a broad sense, these fundamental rights could be considered to correspond to the civil and political rights enshrined in the International Covenant on Civil and Political Rights and the Directive Principles could be considered analogous to the rights enshrined in the International Covenant on Social, Economic and Cultural Rights. Additionally, fundamental rights generally operate as restraints on the power and authority of the State; while Directive Principles call for a positive intervention on the part of the State to eliminate existing socio-economic injustices in society. The Supreme Court has held that the balance between Fundamental Rights and Directive Principles is itself a facet of the basic structure of the Indian Constitution. Thus, both Fundamental Rights and Directive Principles are vitally important to the vision of the framers of the Constitution, and neither can be absolutely prioritized over the other.

4.2 Constitutional Responsibility for Implementation of Directive Principles

4.2.01 The question that requires consideration in the context of Centre-State relations is the demarcation of responsibilities between the Centre and States with respect to the fulfillment of this constitutional vision. The question shall be considered both from a technical and legal, as also from a pragmatic perspective.

4.2.02 Article 13(2) of the Constitution states that: "*[t]he State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of contravention, be void.*"

4.2.03 Furthermore, Article 12 of the Constitution defines the meaning of State for the purposes of the Chapter on Fundamental Rights. It states as follows: "*In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.*"

4.2.04 It is therefore clear on a plain reading of the constitutional provisions that the restrictions and safeguards imposed by Part III of the Constitution apply to all levels of Government at the State as well as Union level. The Fundamental Rights would evidently be illusory if they bound only a particular level of Government, but not others.

4.2.05 Part IV of the Constitution enumerates the Directive Principles of State Policy. Article 37 states as follows: "*The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.*" Additionally, Article 36 clarifies that, unless the context requires otherwise, the term "*the State*" has the same meaning as in Part III of the Constitution.

4.2.06 Hence, in a technical legal sense, both the Central and State Governments are equally accountable for the protection of the Fundamental Rights, and implementation of the Directive Principles, enshrined in Parts III and IV of the Constitution respectively. As has already been stated earlier, the provisions of Part III are enforceable through the medium of the Courts. In fact, the right to approach the Hon'ble Supreme Court for redressal in relation to the violation of guaranteed Fundamental Rights is itself a Fundamental Right in terms of Article 32 of the Constitution. With respect to the Directive Principles, the fundamental (though judicially non-enforceable) constitutional duty would attach equally to the Central and State Governments.

4.2.07 It is in the context of this constitutional position that the issue of Centre-State relations will have to be considered. While, in a general sense, a constitutional duty may arise on the part of both the Centre as also the States, this is surely distinct from asserting that both the Centre and the States are required to act in identical manner in fulfillment of such duty.

4.2.08 First of all, the capacities of the Centre and the States are very different. As discussed at an earlier point, the Union Government is generally in a more robust financial situation, whereas State Governments are often in a fiscally precarious situation.

In such circumstances, relative capacity undoubtedly has to be taken into account while considering the respective responsibilities of the Union and State Governments.

4.2.09 Secondly, the constitutional powers of the Union and State Governments are very different. Several vital legislative responsibilities – such as Police and healthcare, for example, are entrusted to the States, in terms of Article 245 read with the Seventh Schedule to the Constitution. Thus, legislative and executive functions in relation to these responsibilities would, evidently, have to be discharged by the State Governments. In similar fashion, legislative powers entrusted to the Union government would have to be implemented by the Union, and cannot be usurped by States. This would apply even in respect of the constitutional mandate to ensure education and healthcare and it must be considered the duty of all levels of Government, for reasons explained above. It is this anomaly that calls for cooperative federalism, and constructive collaboration between all levels of government.

4.2.10 In light of the discussion above, it is concluded that the Central Government cannot disown its responsibility to provide funds for healthcare in the States (assuming such demands are otherwise legitimate in terms of the particular facts of the given demand) on the pretext that "healthcare" falls within the domain of the States. The enactment of legislation and the implementation of the same might primarily fall within the domain of the States, but the constitutional responsibility of all levels of government remains, so to speak, joint and several.

4.2.11 There has been no objective assessment of the manner and extent of enforcement of the Directive Principles by the Central and State Governments excepting occasional surveys by the Planning Commission. There is need for such periodical assessments of policies of Part IV of the Constitution and reporting to Parliament so that the matter is brought to public scrutiny. The Indian State is forced to report on the matter to the U.N. Human Rights Committee under treaty obligations. It is necessary that such reports should come for public discussion in the State and Central legislatures as well.

4.2.12 This Commission also feels that there is need for periodical updating of the Directive Principles in view of vast changes taking place in society. For example, issues like global warming, emergence of new technologies like IT and of knowledge society need to find its reflections in Directive Principles of State Policy as they cast new responsibilities on the State. It is also necessary that "Good Governance" should become an explicit policy for the State to follow and it should be included in Part IV for guidance of Governments.

4.3 Central Intervention Tendencies and Centre-State Relations

4.3.01 The question of a Constitutional bias towards a strong Centre working out to curtail State's powers under List II has been examined elsewhere in the Report (Volume II). Citing the example of Agriculture (Entry 14 in the State List), it is pointed out how this situation is resulting to the disadvantage of States. The windows for central intervention are listed as follows:

(i) Broad Scheme of Part XI (Legislative and Administrative Relations).

(ii) Aspects relating to Agriculture falling under Part XIII on Trade and Commerce.

(iii) Entries 42, 43 and 44 of Union List relating to inter-State trade.

(iv) Establishing standards of goods for export under Entry 51 of List I.

(v) Control of industries including agricultural industry under Entry 52 of List I.

(vi) Entries 64 and 65 in List I relating to scientific education and research.

(vii) Entry 66 of List I on standards in higher education.

(viii) Entry 20 of List III on economic and social planning.

(ix) Entry 29 of List III on prevention of infections diseases in plants.

(x) Entry 33 of List III on trade and commerce.

(xi) Entry 34 of List III on price control.

There are other provisions of a similar nature in the Scheme of distribution of powers which tend to increase the legislative space of the Centre while correspondingly reducing that of the States. The grievances of States need to be appreciated in the above context. The analysis of Centre-State relations here is approached with a view to restore the federal balance while maintaining the Constitutional division of powers.

4.4 Right to Education and State Accountability: Little Done, Vast Undone

4.4.01 Article 45 of the Directive Principles (DPSP) states, "*The State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.*"

4.4.02 It was in the case of *Mohini Jain v. State of Karnataka*[1] that the Supreme Court pointed out that the right to education is indeed a fundamental right and is

[1] (1992) 3 SCC 666.

enforceable through Courts. The correctness of this decision was examined by a larger bench of five judges in *Unnikrishnan J.P. v. State of Andhra Pradesh.*[2]

4.4.03 In *Unnikrishnan*, the Court asserted that Article 45 has a ten year limit for a reason, and noted that it is the only article in Part IV of the Constitution to contain such a time limit. It held, therefore, that the passage of 44 years since the enactment of the Constitution had effectively converted the non-justiciable right to education of children under 14 into one enforceable under the law. However, the Court expressed dismay in adding; 'it is relevant to notice that Article 45 does not speak of the "limits of its economic capacity and development" as does Article 41, which amongst other things speaks of right to education.'

4.4.04 The Court added that "the right to education further means that a citizen has a right to call upon the State to provide educational facilities to him within the limits of its economic capacity and development. By saying so, we are not transferring Article 41 from Part IV [Directive Principles within the Constitution] to Part III [Fundamental Rights within the Constitution] - we are merely relying upon Article 41 to illustrate the content of the right to education flowing from Article 21. We cannot believe that any State would say that it need not provide education to its people even within the limits of its economic capacity and development. It goes without saying that the limits of economic capacity are, ordinarily speaking, matters within the subjective satisfaction of the State."

4.4.05 The Court continued by asserting the right to education's position as being fundamental to enjoying the right to life: 'We must hasten to add that just because we have relied upon some of the Directive Principles (DPSP) to locate the parameters of the right to education implicit in Article 21, it does not follow automatically that each and every obligation referred to in Part IV [of the Constitution] gets automatically included within the purview of Article 21. We have held the right to education to be implicit in the right to life because of its inherent fundamental importance. As a matter of fact, we have referred to Articles 41, 45 and 46 merely to determine the parameters of the said right.'

4.4.06 Hence, the court broke new ground in the matter of justiciability and enforceability of the DPSP. The decision in *Unnikrishnan* has been applied by the court in formulating broad parameters for compliance by the government in the matter of eradication of child labor.

[2] (1993) 1 SCC 645.

4.4.07 The State responded to this declaration nine years later by inserting, through the Constitution Amendment Act of 2002, Article 21-A, which provides for the fundamental right to education for children between the ages of six and fourteen. It requires the State to provide free and compulsory education to all children from the age of six to fourteen years. In 2005, the government circulated a draft of the Right to Education Bill, which would implement the Constitutional Amendment. Subsequently, the Right of Children to Free and Compulsory Education Bill, 2008 was introduced and it details the responsibilities of the Central and State Governments, teachers, parents, and community members in ensuring all children between the age of six and fourteen years receive free and compulsory elementary education.

4.5 The Question of Shared Responsibility between the Union and the States in Implementation

4.5.01 With the passing of the Right of Children to Free and Compulsory Education Bill, 2008 on June 20, 2009 in the Rajya Sabha and July 4, 2009 in the Lok Sabha, the big question that we must answer is relating to the financial and administrative responsibility of the Centre and the State in the implementation of this right. This is a question that must be answered in light of the oft-advanced argument that it is the Centre and not the States which is given the upper hand in the advancement and enforcement of economic, social and cultural rights. It will be worthwhile to appreciate the responsibilities of the Central Government, State Government and Local Authorities within the aforesaid Act.

Authority	Functions
Central Government	(**1**) Create a national curriculum framework with assistance from the academic authority; (**2**) Develop and enforce teacher training standards; (**3**) Provide State Governments with technical assistance for innovation, research and capacity building.
Appropriate/State	(**1**) Provide free and compulsory elementary education for children aged 6-14 years; (**2**) Ensure compulsory admission, attendance, and completion of elementary education; (**3**) Provide for availability of neighborhood schools; (**4**) Prevent discrimination of children from weaker sections or

	disadvantaged groups; (**5**) Provide infrastructure including staff, equipment, teacher training facilities, special student training facilities, and school building; (**6**) Ensure admission, attendance, and completion of elementary education; (**7**) Maintain quality education as per the standards and norms specified; (**8**) Ensure timely prescription of curriculum and courses; and (**9**) appoint an academic authority.
Local Authority	(**1**) Provide free and compulsory education and a neighborhood school to every child; (**2**) Ensure children from weaker sections are not discriminated against or prevented from completing elementary education; (**3**) Maintain records of all children up to 14 years; (**4**) Ensure admission, attendance, completion of elementary education, infrastructure, teaching training facilities, and student training facilities; (**5**) Ensure timely prescription of curriculum and courses; and (**6**) Monitor schools and decide the academic year.

The Act states that the Central Government and the State Government shall have concurrent responsibility for providing funds for carrying out the provisions of the Act. The Central Government shall prepare estimates of expenditures and provide the State Government with a percentage of these costs, in consultation with the State Government. The Central Government may ask the Finance Commission under sub-clause (d) of clause (3) of article 280 to examine the need for additional resources to be provided to any State Government so that the said State Government may provide its share of funds for carrying out the provisions of the Act.

4.6 SARVA SHIKSHA ABHIYAN Experience in Administration of Primary Education

4.6.01 The Sarva Shiksha Abhiyan (SSA), a centrally sponsored scheme is an extensive scheme to universalize elementary education through district based, decentralized specific planning and implementation strategy by community ownership of the school system.

4.6.02 Main strategies of the scheme

1. Institutional Reforms - As part of the SSA, the Central and the State Governments would undertake reforms in order to improve efficiency of the delivery system. The States would have to make an objective assessment of their prevalent education system including educational administration, achievement levels in schools, financial issues, decentralisation and community ownership, review of State Education Act, rationalization of teacher deployment and recruitment of teachers, monitoring and evaluation, status of education of girls, SC/ST and disadvantaged groups and policy regarding private schools.

2. Community Ownership - The programme called for community ownership of school-based interventions through effective decentralization and community based monitoring with full transparency.

3. Focus on Special Groups - There has to be a focus on the inclusion and participation of children from SC/ST, minority groups, urban deprived children, children of other disadvantaged groups and children with special needs, in the educational process.

4. Finance - Unlike the other centrally assisted schemes the Government of India would release funds directly to the State implementation Society. The further installments would be released to the Society only after the State Government has transferred its matching funds to the Society and expenditure of at least 50% of the funds (Centre and States) transferred has been effected. When the scheme started, the assistance under the programme of Sarva Shiksha Abhiyan was on a 85:15 sharing arrangement during the IX Plan and 75:25 sharing arrangement during the X Plan. Under the current five year plan, the funding pattern of SSA has been modified in a tapering off ratio between the Centre and the Sates. Starting with the ratio of 65:35 in the first two years of 11th Plan it will become 50:50 in 2011-12 (last year of the 11th Plan).

CAG Observations

4.6.03 In 2006, 5 years after the introduction of the scheme, the CAG released its observations on the implementation of the scheme, where it was highly criticized on the following grounds:

1. 40 per cent of the children in the age group of 6-14 years remained out-of-school four years after the implementation of the scheme and after the Government had incurred an expenditure of Rs.11133.57 crore.
2. The budget allocation and release of grants to the State Implementing Societies were below the amounts required as per their Annual Work Plan and Budget (AWP&B).
3. Funds were irregularly diverted to activities/schemes, which were beyond the scope of SSA. In the districts test checked by audit in 11 states (Assam, Bihar, Gujarat, Himachal Pradesh, Karnataka, Madhya Pradesh Maharashtra, Meghalaya, Tamil Nadu, Uttar Pradesh and West Bengal), Rs. 99.88 crore was spent on items not permitted under SSA. Besides, in 14 states/union territories, financial irregularities of Rs. 472.51 crore were also noticed.
4. Five States/UT's failed to maintain the SSA norm of 1:40 for teacher student ratio.
5. Supervision and monitoring of the scheme was ineffective both at the National and State levels.
6. It was also noted that the infrastructural facilities were dismal, scheme guidelines relating to the disabled were not implemented, text books were not made available and expenses were shown for building non-existent schools.

4.6.04 In another study[3] , it was observed that the states met 80 per cent of the government expenditure through non-plan expenditure on education, while the union government met relatively a small amount of the same. It was further noted that in the case of elementary education, a disproportionately large amount of expenditure on the noon meals and Sarva Siksha Abhiyan (SSA) was funded through the Pararambhik Shiksha Kosh (PSK) that was set-up as a dedicated non-lapsable fund with the revenues of the education cess. Thus, the two major components of elementary education received very little resources from general tax and non-tax revenues.

4.6.05 The Committee on Human Resource Development in its 213th Report on the Right of Children to Free and Compulsory Education Bill, 2008 noted that presently, 18 states and 2 union territories have their own legislation dealing with compulsory education. The experience of the states in the implementation of the law has not been encouraging primarily because the laws do not actually make elementary education compulsory. In fact, they merely contain enabling provisions by which the states could

[3] Jandhyala BG Tilak, Education in 2008-09 Budget, Political and Economic Weekly, May 17, 2008.

notify the areas and schemes for free and compulsory education. The focus in the state laws had been on determining the regulatory authority to determine pass attendance orders and impose penalties upon defaulting parents. The committee also noted that another reason for the ineffectiveness was the weak community involvement that had made the Acts purely administrative in nature, and the state Acts made no commitments for improving the quality of education.

4.7 Critique of the Right to Education Act, 2009

4.7.01 The Right of Children to Free and Compulsory Education Act, 2009 provides for free and compulsory education for all children up to the age of 14 years.

4.7.02 The major highlights of the Act are:

1. All children between the ages of 6 and 14 years shall have the right to free and compulsory elementary education in a neighbourhood school.
2. Kendriya Vidyalayas, Navodaya Vidyalayas, Sainik Schools, and unaided schools shall admit at least 25% of students from disadvantaged and economically weaker groups.
3. *The Central Government and the State Government would have concurrent responsibilities for providing funds for carrying out the provisions of the Act.* For the same, the Central Government should provide Grant-In-Aid revenues to the State governments in consultation with them. The State Government to be responsible to provide funds for implementation of the provisions of the Act. (Emphasis supplied)
4. The 'appropriate government'[4] and the 'local authority'[5] to provide compulsory education to the children.
5. It shall be the duty of every parent or guardian to admit or cause to be admitted his or her child or ward, as the case may be, to an elementary education in the neighbourhood school.

[4] "appropriate Government" means-
(i) in relation to a school established, owned or controlled by the Central Government, or the administrator of the Union territory, having no legislature, the Central Government;
(ii) in relation to a school, other than the school referred to in sub-clause (i), established within the territory of-
(A) a State, the State Government;
(B) a Union territory having legislature, the Government of that Union territory.

[5] "local authority" means a Municipal Corporation or Municipal Council or Zila Parishad or Nagar Panchayat or Panchayat, by whatever name called, and includes such other authority or body having administrative control over the school or empowered by or under any law for the time being in force to function as a local authority in any city, town or village.

6. The National Commission for Protection of Child Rights or, as the case may be, the State Commission for Protection of Child Rights constituted under section 17, of the Commissions for Protection of Child Rights Act, 2005 (4 of 2006), shall, in addition to the functions assigned to them under that Act, also perform the following functions, namely -

(a) examine and review the safeguards for rights provided by or under this Act and recommend measures for their effective implementation;

(b) inquire into complaints relating to child's right to free and compulsory education; and

(c) take necessary steps as provided under sections 15 and 24 of the said Commissions for Protection of Child Rights Act.

Notwithstanding anything contained in the above section, any person having any grievance relating to the right of a child under this Act may make a written complaint to the local authority having jurisdiction. Any person aggrieved by the decision of the local authority may prefer an appeal to the State Commission for Protection of Child Rights or the authority prescribed under sub-section (3) of section 31, as the case may be.

4.7.03 The analysis of this Act shows the following lacunae:

1. **Shared and concurrent responsibilities of the State Government and the Panchayats**: Both the State Government and the local authority have the duty to provide free and compulsory elementary education. Sharing of this duty may lead to neither Government being held accountable. From the perspective of federalism, the Act states that those schools established by the State Government would be under the authority of the State while those established by the centre, would be under the authority of the Central Government. Further, the Panchayats have the duty to provide free education at the local level. However, as past experience has shown with NREGA, as also the NRHM, this only results in vagueness of demarcation of responsibilities among the various stakeholders. This is because while devolution of authority to the local Panchayats is essential for ensuring that the local needs of education are comprehensively met, at the same time, the mechanism as structured at present does not adequately integrate itself with the PRIs. If the local Panchayats have to make neighbourhood schools, monitor them and also

provide for infrastructure and other teaching and student training facilities, then it is only just that these local bodies have the financial resources within their ambit. However, there is no mechanism to provide for the local panchayat to get the funds from the State Governments for the local schools. In such a situation, it becomes plain that the local panchayats have no real authority to implement and monitor the provisions of the Act in the local community.

2. **Financial deficits**: Even with respect to the State Government, whose functions are co-terminus with that of the local Panchayats, there is a joint responsibility between the State Governments and the Centre for providing the financial resources. The Central Government has to give the grant-in-aid to the states, but ultimately no definite formula sharing plan has been provided under the Act itself. Although the State Government can ask the Finance Commission for the additional expenditure, however, the same is a very weak provision to ensure adequate funds for the State Governments to implement the provisions of the Act. Ultimately, without adequate financial guarantee to implement the Act even at the state level, the Centre continues to exercise strong influence over the State Governments, thereby limiting the freedom of the same in ensuring universal education.

3. **Redressal mechanism**: Third, the mechanism provided for implementing the Act is also ambiguous. As things stand at present, there seems to be a blatant vagueness on whose ultimate responsibility does enforcing the right to education vest. The Act provides for redressal of complaints by devolving the powers to the National Commission for Protection of Child Rights or, as the case may be, the State Commission for Protection of Child Rights constituted under section 17, of the Commissions for Protection of Child Rights Act. However, as is common knowledge even five years after the enactment of the Child Rights Protection Act, every state does not have a state commission set up. Further, without prejudice, the Act also confers the same powers upon the Panchayats without providing for an appropriate enforcement structure. In the present context under the Act, the state is the local authority. If the children themselves are considered incapable of enforcing their right, and thus require either the parent/the guardian to represent them, how will they be in a position to effectively pursue complaints against violations of their rights in a multiple system of distribution of responsibility? Should it not be that since the rights of the child reach beyond the legal system, and refer to all the public authorities, and since macro-economic and fiscal

procedures can jeopardize the implementation of these public policies, should there not be a more simple redressal mechanism in place where the child would have the right to enforce his basic human right? Can this not be done through the adoption of a single and comprehensive mechanisms wherein there is no overlapping of different government (centre, state and panchayat), and the public institutions (both private and public schools), each with a specific agenda and a limited responsibility?

4.7.04 From the perspective of Centre-State relations, the problem with ensuring elementary education lies with the fact that since the issue of education is essentially the case of policy and programme decentralization, it becomes even more urgent to understand the mode of shared authority between the three tiers of the government. At present, the education models in place are such that the states depend excessively upon the centre for finance, and also are required to contribute certain amount of their financial resources in the scheme of "shared financial responsibility". As a result, even if the state has been given the entire responsibility to set up neighborhood schools, provide the entire infrastructure for training the teachers, school buildings, make the appointments, ensure the enforcement of elementary and compulsory education for all the children, but not the financial means, thereby resulting in excessive concentration of power in the centre, any noble intention of providing the citizens with free and compulsory education gets undermined. Further, even where there is an attempt to decentralize education by making it the responsibility of the local Panchayats to provide for compulsory education at the grassroots level, there is no prescribed fiscal formula for devolution of resources by the state to the Panchayat, and there is an overlapping of functions between the state and the Panchayat, with no clear demarcation of responsibilities . Therefore, at present the manner in which the federal powers are being shared may result in the alienation of one of the tiers of the government *vis-à-vis* the others. As a result, it might so happen that there would be an imbalance of power created among the three tiers of the government, thereby resulting in unaccountability to the child. Thus, it is time to respond to these questions to realize the inherent right of free and compulsory education.

4.7.05 In this regard, notice may be taken of the observations made by the states to this Commission:

1. Education is on the current list. Hence, with the consent of the State Government, a common standard with an effective system of accreditation, certification and quality assurance can be developed for the whole country.[6]

[6] Daman & Diu

2. A universal accreditation system and standard setting body with participation from the centre, state and the private sector may be considered. The standard setting process can take into consideration elements of best available international systems of accreditation and seek to ensure the portability of standards.[7]

3. i) The move to reduce central funding of the SSA from 75 per cent to 65 per cent and eventually to 50 per cent is extremely retrograde and militates against the right to education. It must be immediately reversed.

   ii) The pattern of funding of the SSA and the emphasis on expansion of enrollment has led to emergence of parallel streams of schooling, with "education centres" operating with minimal infrastructure and resources, which cannot be accepted as schools. There must be emphasis upon the minimum quality norms, which in turn requires changes in the minimum financial norms per student.

   iii) Any attempt to avoid central legislation with financial resources, for example by allowing states to enact their own legislation must be resisted. It is incumbent upon the Central Government to ensure this right, with appropriate financial provision.

4.7.06 Regarding the current Right to Education Bill, a leading political party had the following recommendations to make:

1. Financing the right to education: It should be noted that State Governments already bear the brunt of financing school education (estimated to be around 84 per cent of the total expenditure). While universal education is achieved in some states, in several others it will simply not be possible without significant additional funding, which is simply not available with the concerned State Governments. Also, there are major issues of inferior quality that stem from inadequate funding even in states where enrolment has been increased.

The proposed legislation leaves it to the discretion of the Central Government as to how much of the additional expenditure required will be provided by the Central Government. Instead of this, it is proposed that the allocations be made in a transparent manner through the Finance Commission awards. According to this, the Finance Commission would ensure additional resources for the right to education to all states, on a per capita basis. This will not discriminate against the states that have already ensured near universal

[7] Ministry of Tourism and Ministry of Development of North Eastern Region

education, and will provide resources to those states that have large gaps in current provisioning. In addition, in some states with large gaps , there are likely to be large requirements of additional infrastructural spending to ensure the right to education - such allocations should be made by the Planning Commission.

2. The need for flexibility: While the minimum norms for quantity and quality in schooling must be laid down by the central legislation and rigidity adhered to, it is important to allow for flexibility in the mode of operation. For example, the current norms of SSA are excessively rigid, and do not allow for regional, spatial and rural-urban differences. The new legislation is also very rigid. For example, it lays down the exact nature of decentralization of management even down to specifying the required composition and powers of the School Management Committees and District Education Committees. Instead, State Governments should be allowed to choose their own manner of provisioning, as long as it meets certain basic criteria as well as the norms for quantity and quality.

3. Punishment for not ensuring the right: The proposed legislation is extremely weak in terms of the responsibility of the state, as well of private schools that do not conform and does not provide for adequate complaint and redressal mechanisms where the right to education is not adequately provided. Instead, the onus of blame, along with the susceptibility to punishment, is placed on parents/guardians. This uniformly discriminates against poor and marginalized sections.

4. Regulation of private provision of school education: The law should allow some scope for the monitoring of private schools, in terms of ensuring a transparent admissions process, ensuring participation of non-fee paying students according to the specified criteria , regulation of fee structures , as well as meeting the minimum set standards for quality of teaching and infrastructure. These should be accompanied by defining transparent and norm-based procedures for the recognition of private schools.[8]

4.7.07 It is the view of this Commission that the above suggestions of the states regarding having an universal accreditation system and standard setting body with participation from the centre, state and private bodies is worthy of being considered. In this manner, there is a guarantee of formulation of national standard of education indicators. Further, as is seen in the present Education Act, creating a national curriculum

[8] Communist Party of India

framework and developing and enforcing teaching standards are vested with the union. However, if the state and the local authorities have to carry out their respective functions according to the different demands and circumstances of the various states and localities, it becomes necessary that the states and the local Panchayats are also equal partners in setting such standards. To ensure their participation, having an independent bipartisan body for setting such universal education standards is recommended. It is also the view of the Commission that the criticism regarding the devolution of financial resources to the states, and the unilateral decrease in educational finance for central schemes such as the SSA by the union also needs to be noted.

4.8 Federal Experience in Managing Primary Education in USA

4.8.01 The general proposition that states bear principal responsibility for education policy provides initial form to the contours of education federalism in the United States.[9] Critical federal institutions - including the courts - reinforced the prevailing ethos that education in the United States was the principal dominion of state and local authority. In light of the constitutional framework and sources of school funds, the federal government's historic involvement with elementary and secondary schools, while persistent, was largely confined to the margins.[10]

4.8.02 In 1965, President Lyndon Johnson signed the Elementary and Secondary Education Act as a part of his War on Poverty initiative that provided for approximately $2 billion in federal funding to improve educational opportunities for the disadvantaged. Over the next four decades, the ESEA was reauthorized eight times, and the federal government's involvement in education grew. By 2002, the law had ballooned into the 1,100-page No Child Left Behind Act of 2001, funded at $22 billion. Despite significant increases in federal funding for K-12 education over the past three decades, evidence indicates little improvement in academic achievement over this period.[11]

[9] The shift of educational policy-making authority to the states has been pronounced, especially since the 1980s. This shift coincided with two critical (and related) movements: one involving school finance litigation and the other standards and assessments. Both movements exerted considerable independent momentum for increased state control over education policy. Collectively, these two movements relocated significant education policy authority to the nation's state houses.
[10] Michael Heise, 'The Political Economy of Education Federalism
', available at www.law.emory.edu/fileadmin/journals/elj/56/1/Heise.pdf - United States
[11] Dan Lips, Evan Feinberg and Jennifer A. Marshall'The Charter State Option: Charting a Course Toward Federalism in Education.

4.9 The No Child Left Behind Act of 2001

4.9.01 President George W. Bush arrived in Washington promising to transform the federal role in education. During the 2000 campaign, Bush expressed a belief in a limited federal role in education: "I do not want to be the federal superintendent of schools," Bush explained in 2000. "I don't want to be the national principal. I believe in local control of schools". The Bush Administration unveiled a 31-page blueprint for reforming the ESEA. The plan, known as "No Child Left Behind" (NCLB), sought to accomplish four objectives: increase accountability for student performance, focus on what works, reduce bureaucracy and increase flexibility for states and school districts, and empower parents with school choice. The Administration also sought to build bipartisan support for fundamental reforms by proposing a significant increase in federal spending.[12]

4.9.02 After five years and a spending increase of nearly $6 billion, the NCLB highlights the limits and challenges of federal involvement in education. American students are not on track to meet the law's proficiency goals, and the NCLB has failed to accomplish two of the core objectives of President Bush's original blueprint for education reform: significantly increasing state and local flexibility and substantially expanding parental choice options.[13]

4.9.03 Early evidence suggests that the NCLB has not substantially changed American students' academic achievement. Moreover, some researchers have found that the law may be distorting pre-existing state assessments by creating dual accountability sys-tems and watered-down testing measures.[14]

4.9.04 Thus, it is argued that NCLB approaches but ultimately dodges a critical federalism question: whether to decouple education policy authority and funding responsibility. More specifically, NCLB invites us to consider whether, from a policy perspective, it is prudent to permit the federal government to exercise critical education policy influence beyond the extent of its financial contribution to states and local school districts. It is further emphasized that Federal efforts to steer education policy and ever-increasing funding have not led to improved student achievement. To the contrary, they have created a convoluted reporting system that has encouraged the proliferation of state bureaucracy and a compliance mentality among many state and local officials.[15]

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[12] Ibid
[13] Ibid
[14] Ibid
[15] Supra Fn. 10.

4.9.05 To decentralize bureaucracy in USA elementary education and to keep intact the accountability mechanism with respect to the NCLB, one suggestion that has been made is that the Congress should create a charter state option in which a state could opt for a contntractual relationship that would allow state and local authorities to make decisions based on how best to help students with the available resources. The contract would Free State and local authorities from federal regulations and red tape, reducing the federal government's role to a level commensurate with its 8 percent funding share in local education. Under the contract, state elected officials would have the discretion to consolidate and refocus their federal education funding on state-directed initiatives from phonics to class-size reduction - in exchange for monitoring and reporting academic results.[16]

4.9.06 The **Charter Option** would allow different states to pursue differing methods to enhance student learning. For example, one state could choose to build on promising school choice reforms and increase parental options by expanding access to charter schools or by implementing tuition scholarships or education tax credits. Another state could pursue reforms designed to improve teacher quality in low-performing public schools. Federalism would give each state the freedom to implement its reform strategies while learning from the successes and failures of other States' reforms.[17]

4.9.07 A charter state option would work in much the same way as a charter school contract. States choosing a charter status with the federal government would operate with greater freedom in exchange for results. Any state could choose the charter alternative by the decision of its legislative and executive branches. The state would specify which of its federal K-12 education programs would be part of the contract. The charter state would then be exempt from the program mandates, processes, and paperwork associated with the programs included in its contract, and the federal government would provide the money for these programs to the state in a single funding stream.[18]

4.9.08 In summary, the contract would consist of a designation of federal programs to be included in the flexibility agreement and a description of the state's academic testing, monitoring, and public reporting system. The charter option would change the relation-ship between the federal government and the states. Acknowledging states and localities as the appropriate formulators of education *policy*, the federal government would simply provide *aid* for education while verifying that states are account-able to their citizens for the expenditure of those funds and the results they yield.[19]

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[16] Supra Fn. 11
[17] Ibid
[18] Ibid
[19] Ibid

4.9.09 The Commission recommends the Union Government to consider the U.S. experience and examine whether something like a "Charter Option" will be an appropriate mechanism to adopt for effective implementation of the right of every child to free and compulsory education under the Act of 2008.

4.10 Justiciability of Directive Principles of State Policy

4.10.01 The opening words of the Preamble, which is an integral part to our Constitution declare the goals of the Republic in the following words:

> "WE, THE PEOPLE OF INDIA
>
> having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:
>
> JUSTICE, social, economic and political;
>
> LIBERTY of thought, expression, belief, faith and worship;
>
> EQUALITY of status and of opportunity;
>
> and to promote among them all
>
> *FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;"*

4.10.02 The preamble to the constitution itself lays down the roadmap for good governance for the government of India to follow. "We the People" signifies not only the moral and historical insight of founding fathers but serves to reaffirm that the people of India are the source of all constitutional authority and that the test of Good Governance was the measure of people's well being. [20]

4.10.03 Social and economic justice can be called as one of the basic objectives of the Constitution of India. They are two important pillars on which the edifice of constitutional law is constructed in India. The concept of social justice engrafted in the Constitution of India, consists of diverse principles essential for the orderly growth and development of personality of every citizen. The object of the concept of social justice is to bring economic equality, to provide a decent standard of living to the people and to safeguard the interests of the weaker section of society {*Lingappa* vs. *State of Maharashtra*

[20] Dr. Abid Hussain, A Consultation Paper on 'Some ideas on Governance', available at http://lawmin.nic.in/ncrwc/finalreport/v2b3-2.htm.

AIR 1985 SC 389}. The idea of economic justice is to make equality of status meaningful and life worth living at its best removing inequality of opportunity and status-social, economic and political {*Dalmia Cement Ltd.* vs. *Union of India* ***(1996) 10 SCC 104***}. In fact, this aspect of social justice and economic empowerment was held to be a fundamental right in {*CESC Ltd*. vs. *Subhash Chandra Bose* ***AIR 1992 SC 573***}.

4.10.04 The social justice scenario is to be investigated in the context of two streams of entitlements: (a) sustainable livelihood, which means access to adequate means of living, such as shelter, clothing, food, access to developmental means, employment, education, health, and resources; (b) social and political participation, which is built on the guarantee of fundamental rights, and promotion and empowerment of the right to participation in the government, and access to all available means of justice, and on the basis of which "justice as a political programme" becomes a viable reality.

4.10.05 Expounding the notion of social justice in **M. Nagaraj and Ors. Vs. Union of India (UOI) and Ors.** ,[21] the Supreme Court opined:

> *"Social justice is one of the sub-divisions of the concept of justice. It is concerned with the distribution of benefits and burdens throughout a society as it results from social institutions - property systems, public organisations etc. The problem is - what should be the basis of distribution? Writers like Raphael, Mill and Hume define 'social justice' in terms of rights. Other writers like Hayek and Spencer define 'social justice' in terms of deserts. Socialist writers define 'social justice' in terms of need. Therefore, there are three criteria to judge the basis of distribution, namely, rights, deserts or need. These three criteria can be put under two concepts of equality - "formal equality" and "proportional equality". "Formal equality" means that law treats everyone equal and does not favour anyone either because he belongs to the advantaged section of the society or to the disadvantaged section of the society. Concept of "proportional equality" expects the States to take affirmative action in favour of disadvantaged sections of the society within the framework of liberal democracy. Under the Indian Constitution, while basic liberties are guaranteed and individual initiative is encouraged, the State has got the role of ensuring that no class prospers at the cost of other class and no person suffers because of drawbacks which is not his but social."*

4.10.06 The Supreme Court of India has said in several cases that the Constitution set before Parliament and State legislatures the goal of creating a Welfare State. The

[21] 2006(10)SCALE301

Welfare State provides for a large number of social services, like public medical services, national health and unemployment insurance, widows and orphans pensions, old age pensions, public assistance, subsidizing house- building, the control of housing and supervision of town planning etc. All these are altogether independent of what had been done earlier, namely, factory legislation, Workmen's Compensation Acts, legislation restricting the employment of children under a certain age etc. This enlarged concept of social, economic and political justice enables us to make a natural transition to the Directive Principles which have been described as the manifesto of a Welfare State.[22]

4.10.07 Part IV of the Indian Constitution endorses the socio-economic rights in the form of "Directive Principles of State Policy". Article 38 in the Chapter of Directive Principles enjoins the State to promote the welfare of the people by securing and protecting effective social order in which socio-economic justice shall inform all the institutions of the national life. Article 39 assures to secure the right to livelihood, health and strength of workers, men and women and the children of tender age. The material resources of the community are required to be so distributed as best to subserve the common good. Social security has been assured under Article 41 and Article 47 imposes a positive duty on the State to raise the standard of living and to improve public health.

4.10.08 Article 43 provides that the state shall endeavour to secure by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas. Article 43-A provides that the state shall secure by suitable legislation the Participation of workers in management of industries. Article 46 imposes an obligation upon the state to promote the educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections and to protect them from social injustice and all forms of exploitation.

4.10.09 As has been correctly observed in ***Ashoka Kumar Thakur V. Union of India***[23], where it quoted extensively from ***Minerva Mills v. UOI***, to drive home the point the intricate link between the Directive Principles and Fundamental Rights to achieve socio-economic justice in India:

> *"From the constitutional history of India, it can be seen that from the point of view of importance and significance, no distinction can be made between the two sets of rights,*

[22] H.M.Seervai, "Constitutional Law of India" (3rd Edn) Vol.II, 1984, at page 1599.
[23] (2008)6SCC1

namely, Fundamental Rights which are made justiciable and the Directives Principles which are made non-justiciable. The Directive Principles of State Policy are made non-justiciable for the reason that the implementation of many of these rights would depend on the financial capability of the State. Non-justiciable clause was provided for the reason that an infant State shall not be made accountable immediately for not fulfilling these obligations. Merely because the Directive Principles are non-justiciable by the judicial process does not mean that they are of subordinate importance. In **Champakam Dorairajan's** case (supra), it was observed that "the Directive Principles have to conform to and run subsidiary to the Chapter of Fundamental Rights." But this view did not hold for a long time and was later changed in a series of subsequent decisions. (See : **In Re. Kerala Education Bill, 1957** 1959 SCR 995; **Minerava Mills** (supra))

In **Minerva Mills** : [1981]1SCR206 (supra) Bhagwati, J observed:

"The Fundamental Rights are no doubt important and valuable in a democracy, but there can be no real democracy without social and economic justice to the common man and to create socio-economic conditions in which there can be social and economic justice to every one, is the theme of the Directive Principles. It is the Directive Principles which nourish the roots of our democracy, provide strength and vigour to it and attempt to make it a real participatory democracy which does not remain merely a political democracy with Fundamental Rights available to all irrespective of their power, position or wealth. The dynamic provisions of the Directive Principles fertilise the static provisions of the Fundamental Rights. The object of the Fundamental Rights is to protect individual liberty, but can individual liberty be considered in isolation from the socio-economic structure in which it is to operate. There is a real connection between individual liberty and the shape and form of the social and economic structure of the society. Can there be any individual liberty at all for the large masses of people who are suffering from want and privation and who are cheated out of their individual rights by the exploitative economic system? Would their individual liberty not come in conflict with the liberty of the socially and economically more powerful class and in the process, get mutilated or destroyed? It is axiomatic that the real controversies in the present day society are not between power and freedom but between one form of liberty and another. Under the present socio- economic system, it is the liberty of the few which is in conflict with the liberty of the many. The Directive Principles therefore, impose an obligation on the State to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all, so that individual liberty will become a cherished value and the

dignity of the individual a living reality, not only for a few privileged persons but for the entire people of the country. It will thus be seen that the Directive Principles enjoy a very high place in the constitutional scheme and it is only in the framework of the socio-economic structure envisaged in the Directive Principles that the Fundamental Rights are intended to operate, for it is only then they can become meaningful and significant for the millions of our poor and deprived people who do not have been the bare necessities of life and who are living below the poverty level."

4.10.10 The above discussion entails that Part III and Part IV of the constitution comprises of the entire jurisprudence on what comprises social, economic and political justice, that is, what are the rights of the citizens of India, and what are the obligations on the part of the State in that behalf. Overriding the principle of subsidiarity of the Directive Principles of State Policy, the principles today constitute an integral part of governance in our country, and the rights so enumerated in that Part have to be given the same status as that of Fundamental Rights. In essence, Part III and Part IV of the Constitution provide for the *substantive rights* of the citizenry of India. As has been observed in *Kapila Hingorani v. State of Bihar*,[24]

"The States of India are welfare States. They having regard to the constitutional provisions adumbrated in the Constitution of India and in particular Part IV thereof laying down the Directive Principles of the State Policy and part IVA laying down the Fundamental Duties are bound to preserve the practice to maintain the human dignity."

4.10.11 The Supreme Court has interpreted the Preamble, Chapters on Fundamental Rights and Directive Principles to mean that the right to livelihood encapsulates a meaningful life, social security and disablement benefits which are integral parts of socio-economic justice. Right to health, free and compulsory education up to the age of 14 years, right to food, right to quality life, right to safe drinking water are considered as fundamental and thus basic human rights. The court has also held that right to shelter is a fundamental right and to make the right meaningful to the poor, the State is under a constitutional duty, to provide facilities and opportunity to build a house.

4.10.12 Thus, to sum up:

1. The basic constitutional scheme for realization of socio-economic goal is laid in Parts III and IV of the Constitution.
2. Entrenched and Justiciable Fundamental Rights enshrined in Part III provide Constitutional guarantee of these basic human rights as being inalienable and not subject to political vicissitudes.

[24] (2003)6SCC1

3. Directives for realization and effectuation of Part III are contained in Part IV that permeates the whole ethos of Part III.
4. Synthesis and integration of Fundamental rights with Directive Principles in the judicial process of constitutionalising social and economic rights has been crucial in giving impetus to the pace of realization of the Directive Principles not only as a means to effectuate Fundamental Rights but also as a source of law for a Welfare State.[25]

4.11 How are Socio-Economic Rights Implemented in Other Federations

(a) South Africa

4.11.01 The appropriate approach to socio-economic rights was intensely debated before ratification of the South African Constitution. The idea of including socio-economic rights was greatly spurred by International Law, above all by the International Covenant on Economic, Social and Cultural Rights. In part, this was a relatively abstract debate, posing a concrete real-world issue but founded on a set of theoretical considerations just sketched, involving judicial capacities and the proper place, if any, of socio-economic rights in a democratic constitution. The debate was greatly influenced by the particular legacy of apartheid and by claims about what to do about that legacy at the constitutional level. In the view of many of those involved in constitutional design, the apartheid system could not plausibly be separated from the problem of persistent social and economic deprivation. In the end the argument for socio-economic rights was irresistible, in large part because such guarantees seemed an indispensable way of expressing a commitment to overcome the legacy of apartheid – the overriding goal of the new Constitution. The South African constitution is a leading example of a transformative constitution. A great deal of the document is an effort to eliminate apartheid "root and branch." The creation of socio-economic rights is best understood in this light.[26]

4.11.02 Regarding the relationship among socio-economic rights, courts, and legislatures, the rights in question typically take the following form, in an evident acknowledgement of limited resources:

1. Everyone has the right to the relevant good.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

[25] Report of NCRWC, Chapter 4, Constitutional Provisions for Socio-economic Change: Fundamental Rights and Directive Principles of State Policy, available at http://lawmin.nic.in/ncrwc/finalreport/v2b1-2ch4.htm.
[26] Cass R. Sunstein, Social and Economic Rights? Lessons from South Africa, available at papers.ssrn.com/sol3/papers.cfm?abstract_id=269657

4.11.03 This is the basic form of constitutional rights to "an environment that is not harmful to their health or well-being" (Section 24); housing (Section 26); and health, food, water, and social security (Section 27).

4.11.04 A provision of this kind does not clearly create or disable judicial enforcement. On this view, the South African Constitution is, with respect to judicial enforcement, closely akin to the Indian Constitution.[27] The South African Constitutional Court has opined that such rights "are, at least to some extent, justiciable."[28]

4.11.05 In this background, it becomes interesting to observe the manner in which the Court is making the socio-economic rights justiciable and equating the same with the right to live with human dignity and thus making them a part of the human rights jurisprudence.

4.11.06 Judicial treatment of Socio-Economic rights in South Africa may be looked at from the following cases:

(1) REPUBLIC OF SOUTH AFRICA v. GROOTBOOM 2000 (11) BCLR 1169

The claim in Grootboom was brought on behalf of a group of people who had no shelter whatsoever and who were therefore destitute. They alleged that their circumstances violated S.26 of the African Constitution.

In making sense of this obligation, the Court focused upon the term "reasonable" contained in S.26(2). As for what reasonableness entails, the Court held that a "program that excludes a significant sector of society cannot be said to be reasonable" and that "[t]hose whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realisation of the right ... If the measures, though statistically successful, fail to respond to the needs of the most desperate, they may not pass the test".

On this basis, Yacoob J. found the state housing programme to be invalid to the extent that it failed to make provision for people in immediate and desperate need. Although laudable, the programme concentrated unduly on the goal of constructing permanent houses for as many people as possible over time, instead of providing shelter for the desperate in the interim. The Court therefore held that the programme would have to be modified so as to include a component catering for those in immediate need, even if this decreased the rate at which permanent houses could be constructed.

[27] Ibid

[28] Ex Parte Chairperson of the Constitutional Assembly, 1996 (4) SA 744, 1996 (10) BCLR 1243 (CC) at para 78.

What Grootboom effectively spells out is the doctrine of substantive equality. In Grootboom, the Court found that social programmes cannot exclude a "significant sector of society". This justifies the Court's finding that those whose needs are most basic should not be excluded - in the sense of not being specifically or adequately catered for - from the state's housing programme. They, in the view of the Court, constitute a "significant sector of society".

(2) Government of the Republic of South Africa v Treatment Action Campaign (2002 (5) SA 721) (CC)

Treatment Action Campaign (TAC) considered the constitutionality of the government's failure to make nevirapine—an anti-retroviral drug that reduces mother-to-child transmission of HIV/AIDS— generally available in the public health sector. The drug was, instead, restricted to two test sites in each province where, it was claimed, further research would be conducted about the viability of making it more widely available. The Court considered the reasons advanced in support of this policy—such as nevirapine's alleged potential toxicity—and found that they did not satisfy the standard of reasonableness. The Court therefore held that the policy violated the right of access to health care services and ordered the state *inter alia* to make nevirapine available at all public health facilities without delay.

Like Grootboom, TAC concerned the exclusion of a "significant sector of society" - HIV-positive pregnant women falling outside the designated test sites -from a social programme. Furthermore, the group in question - mainly poor, rural women - could not be expected to meet their socio-economic needs independently and were vulnerable in so far as they had limited means of drawing attention to their plight in the political arena. Therefore, TAC can be understood within the same framework as Grootboom and thus within the principles of substantive equality.

(3) Khosa v. Minister of Social Development (2004 (6) BCLR 569) (CC)

Khosa, represents an even clearer convergence between social rights and substantive equality. The case concerned a challenge, brought by permanent residents, to those provisions of the Social Assistance Act that reserved welfare benefits solely for South African citizens. Writing for the majority, Mokgoro J. found that the legislation violated the equality guarantee and the reasonableness standard. In Khosa, in other words, social rights and discrimination law expressly, as opposed to merely implicitly, converged.

In respect of discrimination law, the Court noted that it had previously held that citizenship is an analogous ground of discrimination, in part because non-citizens are "a minority in all countries, and have little political muscle". Mokgoro J. found further that the applicants had been unfairly discriminated against because the impact of the scheme was such that their dignity had been infringed-dignity serving, as explained, as the touchstone of equality for the Court.

As for social rights, the Court evaluated the reasons advanced by the state for excluding permanent residents from statutory benefits - such as that the state should cater to its own citizens first - and found that they did not meet the standard of reasonableness. Consequently, the state was ordered to extend social security to permanent residents.

In Khosa, Mokgoro J. elaborates what is entailed by reasonableness by importing a measure of proportionality: *"[i]n considering whether that exclusion is reasonable, it is relevant to have regard to the purpose served by social security, the impact of the exclusion on permanent residents and the relevance of the citizenship requirement to that purpose".*

(4) Soobramoney v. Minister of Health, Kwa-Zulu-Natal 1997 (12) BCLR 1696 (CC)

Soobramoney involves a petition for life-prolonging dialysis treatment filed by a plaintiff with chronic renal failure and no chance of long-term survival. Under the treatment guidelines of Addington Hospital in Durban, South Africa, the plaintiff did not qualify for dialysis because of his other health problems. The plaintiff subsequently filed suit claiming that his right to emergency healthcare under section 27(3) of the Constitution entitled him to dialysis. The Court rejected this claim, reasoning that chronic renal failure did not constitute an "emergency" condition. The Court then analyzed the claim under section 27(2), which enshrines the positive right to healthcare services, and upheld the hospital's rejection of the plaintiff's claim. Pointing to the limited availability of dialysis machines and applying a lenient rational basis standard of review, the Court held that the state had met its healthcare obligations to society under section 27(2). The Court further held that the right to healthcare services does not provide a direct personal entitlement to dialysis treatment. The Court grounded its reasoning in the limited nature of available resources, the fact that the illness was chronic and arguably not an emergency, and the disruptive effects unlimited entitlements to expensive medical treatment would have upon South Africa's national health program.

In directly addressing the available resources question, the Court in Soobramoney held:

> *"What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources."*

4.11.07 This language sheds light on important aspects of Soobramoney's available resources jurisprudence. The Court thus applied a rationality standard of review. In doing so, the Court found that the hospital's decision to limit treatment to those who could survive related rationally to the purpose of extending the right to healthcare to as many individuals as possible in light of resource limitations. Thus, because the hospital's scheme to limit treatment to those who could be cured was rational, and because resources were "not available," the Court denied plaintiff's petition.

4.11.08 Grootboom is the landmark Socio-Economic Rights case that comprehensively defined the context of the government's socio-economic rights obligations and the available resources question. The Constitutional Court directly addresses the question of "available resources" in a single paragraph.

4.11.09 As can be observed from the above South African Constitutional decisions, the Constitution has used a combination of two mechanisms to give teeth to the socio-economic rights. In the first place, the framers of the Constitution have taken the bold step of providing that socio-economic rights, like civil and political rights, are subject to judicial enforcement. If these rights are violated, the courts can be approached for appropriate relief. The recognition of economic and social rights in the Bill of Rights is also certain to influence the balancing of interests protected by the various groups of rights in Bill of Rights. The state is under a constitutional duty to realise certain economic and social rights. The "hard" or judicial protection of economic and social rights is limited by the fact that many of these rights do not create an entitlement to immediate implementation, free of charge. Rather one is entitled to have "access to" the relevant rights which the state must realise through "reasonable legislative and other measures". The state is expressly allowed the latitude to implement these rights "progressively" and with in available resources.[29] However, as illustrated by the above decisions of the South

[29] Christof Heyns, Socio-Economic Rights in South Africa, ESR REVIEWS, VOL 1 NO 1 MARCH 1998

African Court, the court has interpreted the term "reasonable legislative and other measures" in a manner in which it has taken the responsibility upon itself to ensure that the state implements the socio-economic rights even where the same would go beyond reasonable measures taken by the state. It is here in the latter case as illustrated by the above instances, that closely relate to the manner in which the Supreme Court despite the Directive Principles of State Policy (the socio-economic rights) being non-justiciable have been made justiciable as being a part of the fundamental rights. Other economic and social rights are less qualified and must be implemented without delay, for example, children's socio-economic rights, the right to basic education, and the right against arbitrary evictions.

4.12 State Accountability for Implementation of Directive Principles

4.12.01 It is necessary to consider the effect of the indirect transfer of non-justiciable Directive Principles into the ambit of the enforceable fundamental rights through judicial decisions or legislative action on state accountability. It is asserted by some that such an initiative only adds to the already over-centralized federal structure in India. Some ask if such initiatives would lead to the end of Federalism in India. In our opinion, India's federal structure is not threatened by such initiatives as long as they balance the role and responsibilities between the Centre, State and local governments. The key to good governance in a federal system is to ensure proper devolution on the basis of relevant criteria.

4.12.02 In organizing the delivery of public services, the following structural and procedural constraints have been noticed:[30]

(1) Firstly, there is extreme fragmentation in the policy making structure. For example, formulation of policy in one area, for instance health, fails to take into account its effect on other social sectors like education, housing, employment etc. with the result there is non-alignment of the policies across all the common issues. Lack of an integrated approach on closely related subjects has been pointed out by the Administrative Reforms Commission as responsible for poor results in governance and delivery of services.

(2) Secondly, there is an excessive overlap between policy making, programme formulation and implementation which creates a "tendency to focus on

[30] For a detailed analysis on weaknesses in policy making in India see, Public Policy Making in India: Issues and Remedies by O.P. Agarwal and T.V. Somanathan, available at, http://.grcgujarat.org/PDF/Public%20Policy/Public%20Policy%20Making%20in%20India%2014-2-0SOMANATHAN.pdf.

operational convenience rather than on public needs and expectations."[31] The National Health Bill, 2009, some NGOs point out, is an example of this tendency.

(3) Thirdly, there are inadequate non-governmental inputs and informed debate in the policy making processes.

Looking at the way these and related problems in development administration are addressed in other federal systems, one can identify several administrative models and appreciate their relative merits and de-merits which may be of relevance to reform the systems in India.

(a) UNILATERAL FEDERALISM: In scenarios in which there is "inter-dependence and the relationship is hierarchical, the relationship is described as unilateral federalism"[32] in which the "federal government, by and large directs provincial policy, usually through conditional funding".[33]

"An instance of this model is the *Canada Health Act*, 1984 that included a penalty regime, under which the federal government would hold back funding to those provinces that failed to meet any of the Act's criteria. Immediately following the Act's introduction in 1984, the federal government announced it would be applying penalties to those provinces that permitted user fees and extra-billing (the federal government later released the money it had held back, but only when the provinces had eliminated these practices). In the 1990s, the federal government applied the penalties on several occasions, mostly when provinces permitted the application of user fees in private medical clinics.

From the perspective of the federal government, the introduction of the *Canada Health Act* was an important instrument to maintaining certain national standards in public health care. The experience of this model in Canada has been that from the perspective of the provinces, the federal action was viewed as an encroachment on provincial authority and jurisdiction. This concern was magnified, moreover, by the fact that the federal government had significantly, and unilaterally, reduced its financial commitment to provincial public health care plans."[34]

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[31] Supra at pp. 11.

[32] Wilson K, Lazar H Creative Federalism and Public Health, pp. 7, available at www.queensu.ca/iigr/.../PublicHealth Series/Wilson_Harvey__PublicHealth.pdf

[33] Kumanan Wilson, Health care, federalism and the new Social Union pp. 2, available at http://www.cmaj.ca/cgi/content/full/162/8/1171

[34] Jay Makarenko, Canadian Federalism and Public Health Care: The Evolution of Federal-Provincial Relations, January 30, 2008, available at http://www.mapleleafweb.com/features/canadian-federalism-and-public-health-care-evolution-federal-provincial-relations

Thus, the model's major weakness is that it infringes upon jurisdictional autonomy. On the other hand, the model is considered the most effective for national programs and associated benefits due to minimum overlap between policies, and advantages of economies of scale. This is demonstrated well by the national medical and hospital care in Canada.

(b) COLLABORATIVE FEDERALISM: In scenarios in which there is "interdependence and the relationship is non-hierarchical, the relationship is described as **collaborative federalism**."[35] Here, "the federal and provincial governments work collaboratively to attain policy goals, and there is no coercion on part of the federal government."[36]

"An example is the Canadian Social Union Framework Agreement. The main features were the commitment to obtain provincial agreement before introducing new programs and the agreement on a collaborative mechanism for settling disputes. The provinces and territories agreed to eliminate residency-based policies that constrained access to social programs for migrants, and to use funds transferred from the federal government for agreed-upon purposes – which included health care policy. In return, the federal government agreed to limit the use of its spending powers by, for example, consulting with provincial and territorial governments prior to renewing or altering existing social transfers; not introducing new social programs funded through intergovernmental transfers without the agreement of a majority of provincial governments; and providing prior notification before introducing new Canada-wide social programs funded through direct transfers."[37]

The major strength of this model is that it allows for national programs while protecting jurisdictional autonomy. On the other hand, its weaknesses are that the model has the potential for excluding the public, requires an effective dispute resolution mechanism and blurs accountability.[38]

In the Australian context, the following are the characteristics of collaborative federalism:

• ***"Coordination***: Involving collective action to address such problems as drought/water management that cross state borders. States are also invited to participate in negotiations of international treaties in cases where State interests will be particularly affected;

[35] Supra note 32
[36] Supra note 33
[37] Supra note 34
[38] Supra note 33

• ***Harmonisation*:** Efforts are made to ensure that State and Commonwealth legislation do not clash and, possibly, force the Commonwealth to challenge the State's legislation under Section 109 of the Australian Constitution, which stipulates that when Commonwealth and State legislation conflict "the Commonwealth shall prevail";

• ***Financial Assistance:*** Specifically the use of **specific purpose payments**, can be used to further collaboration between the States, Territories and Commonwealth on issues of mutual concern *or* be exploited by the Commonwealth to further its own policy agenda;

• ***Ministerial Councils:*** Such as the Council of Australian Governments (COAG) and the Gene Technology Ministerial Council constitute collaborative arrangements between the States, Territories and Commonwealth to exchange information, discuss policy formulation and coordination, and establish protocols and regulatory frameworks in different policy areas; and

• ***Intergovernmental Agreements:*** Agreements that formalise arrangements between the Commonwealth and State ministers and set out the objectives, duration and procedures."[39]

(c) CO-OPERATIVE FEDERALISM: "It describes a system of federalism not where there is necessarily "cooperation" in the ordinary English sense of the word, but rather, where there needs to be cooperation between levels of government to get things done in the system. Germany is an example of a "cooperative" system of federalism. In Germany, what you find is a real division of labour between the Federal Government and the Länder. The Federal Government does not deliver health services but does provide the regulatory framework and policy settings within which the Länder and the private sector provide health care. This includes issues such as insurance, quality control, funding and national priorities in terms of health. Responsibility really is split but it tends to be a division of labour between the setting of regulatory and policy frameworks (Federal) and the delivery of services and provision of infrastructure (Länder /Gemeinde)."[40]

"In "cooperative federalism" it is not a case of everyone being responsible for everything. In Western systems of cooperative federalism, it is still important to define the roles and responsibilities of the different tiers of government. So, for example, in the case of German federalism, the Länder are more or less responsible for the delivery of services and the

[39] See The John Curtin Institute of Public Policy , Information Sheets, Collaborative Federalism, available at http://jcipp.curtin.edu.au/research/infosheets.cfm.

[40] Roger Wilkins, Federalism - Australia and New Zealand School of Government - 11 September 2008, available at, http://www.ag.gov.au/www/agd/agd.nsf/Page/AbouttheDepartment_Speeches_2008_Federalism-Australia andNewZealandSchoolofGovernment-11September 2008

Federal government is responsible for setting out the policy and regulatory frameworks.

Institutional design here is critical. The Constitution says that only the Länder can carry out administration in areas where they have jurisdiction. The Constitution also sets up a system where the Länder have to agree to spending requirements before they can be passed by the National Parliament. The Bundesrat, the "federal house" of the German Parliament, is composed of the governments of all the Länder. The Bundesrat system means that the Länder have a real veto power over policies and programs that affect their priorities and spending.

The most significant weakness of cooperative federalism as seen in the case of Germany is that with reunification and the increasing globalisation of the economy in 1980' s and 1990' s, the interests of the Federal Government and the Länder had become so "entangled" and "enmeshed" with one another that it was impossible to get anything decided or determined. Thus, the much needed reforms in healthcare, pension, education and industrial relations could not be achieved. The Germans are currently engaged in a series of difficult attempts to reform their system to "disentangle" the roles and responsibilities of the Federal Government and the Länder so that each has greater autonomy over certain areas of activity. ("Entflechtung") They are, in essence, attempting to shift the German system more in the direction of a "coordinate" system of federalism like Canada or the US."[41]

4.13 Public Policy Dispute Resolution Mechanism

4.13.01 In India, in the context of policy making, while this Commission suggests 'consultation' before the making of a public policy, at the same time the Commission also recommends providing a public policy dispute mechanism resolution system. Such a forum is not unheard of in countries like United States and South Africa which are using the collaborative approach by replacing the traditional dispute settlement that typically involves two parties. Public policy disputes typically involve many parties, not all of whom always recognize the legitimacy of other stakeholders. They revolve around the development and implementation of public policies and related legal, regulatory, institutional and resource allocation issues.[42]

[41] Ibid

[42] Western Justice Centre, 'South Africa Creates Public Policy Dispute Resolution Capability', available at, www.mediate.com/articles/wjcf.cfm.

4.13.02 The basis for such a dispute mechanism exists in appreciating the nexus between policy formulation and deliberative democracy. Deliberative/participatory democracy poses an ideal. It imagines a situation in which opinions are shaped through respectful dialogue. It seeks a situation where the government gives equal weightage to the views of the marginalized as it gives to the special and more powerful interest groups. Further, it seeks to restore face-to-face deliberation in which the quality of reasoning carries weight as a public educational strategy.[43]

4.13.03 Thus, the public policy dispute mechanism is very attentive to the multi-stakeholders dialogic process and its management by the public policy professionals who are mediators.

4.13.04 Public policies disputes can polarize the citizens. In the United States, it has been observed that formal citizen participation through public hearings do not always ensure meaningful discussion of the policies or formulation of creative solutions. Facilitation encourages participation and involves the public in a greater manner. Facilitation may occur at the time of the assessment or at the design stage before the actual dispute has arisen. Facilitation encourages participation and is intended to ensure that the citizens are heard, information is shared and effective problem solving is encouraged.[44]

4.13.05 The Public Policies issues that are considered suitable for facilitation are:

i) formulating laws;

ii) developing plans and programs;

iii) managing specific projects;

iv) co-ordinating services and programs among government agencies;

v) assisting with strategic planning;

vi) working with task forces on contentious issues.[45]

4.13.06 In the context of India, with the implementation, monitoring, redressal of public services being under the eye of public debate, and with the increase in the number of public-private partnerships, the consultative process further demands such a public

[43] Lawrence Susskind, 'Can Public Policy dispute resolution meet the challenges set by deliberative democracy?', available at web.mit.edu/publicdisputes/projarea/pdf/dr_magazine.pdf

[44] Public Policy Dispute Resolution, A Guide for Public Policymakers , prepared by the Centre for Alternative dispute Resolution System, Haw'ai State Judiciary, available at www.courts.state.hi.us/docs/ARV/ARV019PublicbrochS.pdf.

[45] Ibid

policy forum where the professionals involved are mediators who are also policy specialists. This forum should be based upon the "collaborative governance model" as is being advocated in the other countries.

4.13.07 Chris Ansell and Alison Gash in their paper on "Pragmatism and Collaborative Governance"[46], explain the model in the following terms:

"Pragmatism suggests that although individuals and groups may have "interests," these interests are typically more ambiguous and malleable than rational choice perspectives typically allow, and are hence open to reinterpretation through interaction and deliberation with others with different or even opposing perspectives. Pragmatism suggests that more fruitful conflict is made possible through face-to-face social interaction and communication. Collaborative governance is similarly based on the assumption that antagonistic stakeholders may be able to transcend intractable disputes and achieve mutual gains through face-to-face deliberation.

4.13.08 The three reasons that are attributed for the emergence of collaborative governance in the USA are:

i) Legal fragmentation and multi-jurisdictional problem-solving are the two most important sources or symptoms of institutional complexity and interdependence.

ii) The highly adversarial nature of many agency decision-making processes has led to a search for more collaborative forms of governance.

iii) The highly disputed nature of public decision-making have led to a search for more direct modes of legitimating public decisions. The shift has broadly been from indirect modes of legitimation through forms of representative democracy to more direct and participatory democracy."[47]

"Thus, the model of collaboration is developed as an alternative to the adversarial excesses of interest group pluralism and to the accountability failures of managerialism (especially as science becomes more politicized), and implementation failure. As knowledge becomes more specialized and distributed and as the institutional infrastructure for problem-solving and deliberation becomes more developed and dense, the demand for collaboration increases. The extremely large literature that now exists on collaboration is of that between groups in social services, health management, education, among other that are more about

[46] Available at, http://www.ruc.dk/upload/application/pdf/2faadcbf/ChrisAnsell_paper.pdf.
[47] Ibid

inter-organizational coordination and cooperation problems than about dispute resolution. From the perspective of public agencies, collaborative governance *externalizes* the decision-making process. But from the perspective of stakeholders, collaborative governance *internalizes* the decision-making process. Externalization requires that public agencies transform their role from one of command-and-control to one of facilitation of the collaborative process (Bryson and Crosby 1992). Internalization creates a demand that the process be simultaneously inclusive and exclusive. Collaborative governance therefore requires that stakeholders forestall their desire to use other forums to achieve their goals, and specifically, to "venue shop" if their goals are not met. The process hence requires strong up-front commitment by stakeholders to the uncertain downstream results of a consensus-building process. This imperative of creating an "ownership of the process" is why Susskind and Cruikshank emphasize that public agencies must avoid controlling the agenda and must remain in a facilitative or meditative role."[48]

"One of the primary benefits of collaborative governance—and the reason for its legitimacy among organizations—is the recognition that each participant will have the opportunity to provide input and, in some meaningful way, have this input be incorporated into the final product. In order to satisfy each participants' needs and address varying perspectives, participants in the collective must compromise and negotiate. The second benefit of collaborative governance is that each participant has something the other participant needs. In other words, each has leverage. That implies that even if unassisted negotiation is not possible, the leadership role has to avoid subverting this ownership."[49]

The reason for using the process of facilitation in such a model is because "facilitation is the least intrusive on the management prerogatives of stakeholders; a facilitators' role is ensure the integrity of the consensus-building process itself. Mediation increases the role of third party intervention in the substantive details of the negotiation where stakeholders are ineffective in exploring possible win-win gains. Finally, if stakeholders cannot reach a consensus with the help of mediation, the third party may craft a solution (non-binding arbitration)."[50]

4.13.09 The Commission is of the view that the collaborative governance model would be an innovative way of ensuring that public policy dispute resolutions are carried on with the inclusive participation of the citizenry, thereby enhancing the democratic process.

[48] Ibid
[49] Ibid
[50] Ibid

4.14 Increasing Transparency and Accountability through a Social Audit Legislation

4.14.01 The instances of SSA, National Rural Health Mission (NRHM) and NREGA show that issues of implementation, monitoring and corruption continue to haunt our welfare schemes and legislations. It is alleged that the current amount of spending on these schemes is insufficient. However, when the very effectiveness of the delivery mechanisms is under scanner, it becomes difficult to put the burden on the theory of inadequate funds for neglecting the percolation of the benevolent schemes to the grassroots level. If democracy means participation by the people in the decision-making process, then perhaps it becomes more important to visualize a mechanism whereby the people have a complete control and *right* to ascertain the enforcement of the delivery mechanism by directing their government officials to do the needful. Social audit is indeed the tool in the hands of the people to claim such a right.

4.14.02 The mechanism of social audit in the form of guidelines provided under the Employment Guarantee Act has captured the nation by storm since it promises to be a new beginning towards democratizing welfare legislations. The NREGA guidelines dedicate an entire chapter to compulsory social audit. The guidelines state: *"An innovative feature of the National Rural Employment Guarantee Act is that it gives a central role to 'social audits' as a means of continuous public vigilance (NREGA, Section 17). One simple form of social audit is a public assembly where all the details of a project are scrutinized. However, 'social audit' can also be understood in a broader sense, as a continuous process of public vigilance."*

4.14.03 Social audit is a unique approach through which the people work alongside their government in the designing of policies, schemes and legislations. Further, the people's voice in the execution and implementation of them also becomes a pre-requisite and an indispensable component.

4.14.04 Thus, broadly understood from the perspective of good governance, in the words of the NREGA guidelines itself, "social audit is a continuous ongoing process through which the stakeholders and the intended beneficiaries of the project are involved at every stage: from planning and implementation to monitoring and evaluation." Social audit is thus conducted *jointly* by the government and the people who are affected by, or are the intended beneficiaries of, the activity being audited. The superiority of social audit lies in the fact that when contrasted to institutional or government audits, social audit actually guarantees that the decision-making process is informed by the views of

the stakeholders and the beneficiaries, and thus takes into account the local conditions appropriate for designing and implementation of the policies, thereby most effectively serving the public interest. Ultimately the core policy underlying the social audit is the obligation upon 'We the People' to remain vigilant.

4.14.05 Seen through such a perspective, social audit as a process moves beyond the entitlement of information. It is actually a new perspective on participation. It does not connote *negative liberty,* but positive participation to make good governance happen. Social Audit process is closely aligned to *active liberty*[51] which exhibits some elements of direct democracy as sharing of sovereign's power to govern. Capacity of people to participate is coextensive with the state's power to make decisions.

4.14.06 In the context of NREGA, social audit gives a worker, or groups of workers the right to participate in the monitoring and implementation of the NREGA. It gives any citizen the legitimacy, not just to seek information, but also record complaints, suggestions, and demand answers in the public domain. Thus, the social audit process in the NREGA Act consists of two main aspects: (i) participation in planning and implementation (ii) vigilance of the ongoing works.

4.14.07 The NREGA guidelines contemplate the following eleven stages of implementation wherein public vigilance and verification must act as the sign of accountability:

1. Registration of families;
2. Distribution of job cards;
3. Receipt of work applications and issue of dated receipts;
4. Preparation of shelf of projects and selection of sites;
5. Development and approval of technical estimates and issuance of work order;
6. Allotment of work to applicants;
7. Execution of works and maintenance of muster rolls;
8. Payment of wages;
9. Evaluation of work;
10. Payment of unemployment allowance;
11. Mandatory social audit in the Gram Sabha (Social Audit Forum).

[51] See Breyer, Stephen (2005): Active Liberty: Interpreting Our Democratic Constitution, Knopf "I say active liberty because I want to stress that democracy works if — and only if — the average citizen participates."Also see Posner, Richard,
Justice Breyer Throws down the Gauntlet, 115 Yale L.J. 1699 (2006)

4.14.08 The last of the stages, is intended to provide for 'Social Audit Forums' wherein information will be read out publicly, and people will be given an opportunity to question officials, seek and obtain information, verify financial expenditure, examine the provision of entitlements, discuss the priorities reflected in choices made, and critically evaluate the quality of work as well as the services of the programme staff.[52]

4.14.09 Strengthening people's participation is Section 4 of the Right to Information Act, 2005 which mandates the *proactive disclosure* of the important documents of NREGA to the people even without a demand being made to this effect by the person concerned.[53] Further, the Guidelines also direct the formation of a 'Citizen's Charter' which would "describe the specific steps involved in implementing the provisions of the Act, and laying down the minimum service levels mandated by these provisions on the Panchayats and the officers concerned."

4.15 Designing a Social Audit Legislation

4.15.01 Social Audit Norms at crucial stages of delivery framework of any entitlement can be the same ones so well captured in the NREGA Guidelines that provide for the following public norms as the essentials underlying any social welfare legislation delivery mechanism:

- **Transparency:** Complete transparency in the process of administration and decision making, with an obligation on the government to suo moto give people full access to all relevant information.
- **Participation:** An entitlement for all the affected persons (and not just their representatives) to participate in the process of decision making and validation.
- **Consultation and Consent:** In those rare cases where options are predetermined out of necessity, the right of the affected persons to give informed consent, as a group or as individuals, as appropriate.

[52] NREGA guidelines

[53] Proactive disclosure refers to the obligation on the government (in this context the PRIs) to publish key information on an ongoing basis, without being requested to do so by citizens. Some of the information which have to be proactively disclosed include the budget allocated to each PRI, indicating particulars of all plans, proposed expenditures and reports of disbursements; and detailed plan of the implementation of subsidy programmes, including the amounts allocated and the details and beneficiaries of such progarammes. In addition, the Panchayati Raj Acts of all states also indicate the proactive disclosure of information through Gram Sabha meetings or by putting up information on notice boards. The other way of obtaining information under the RTI Act is upon request, wherein citizens have to apply for information from the PIO who is then duty bound to handle requests provide the information sought within 30 days.

- **Accountability:** The responsibility of elected representatives and government functionaries to answer questions and provide explanations about relevant action and inaction to concerned and affected people.
- **Redressal:** A set of norms through which the findings of social audits and other public investigations receive official sanction, have necessary outcomes, and are reported back to the people, along with information on action taken in response to complaints.

4.15.02 Since social audit should be an ongoing process, and keeping in mind the above public norms as also the specific NREGA Guidelines on social audit, it is worthwhile to enumerate the activities as drafted by the Centre for Equity Studies on what should be included in a social audit:

a. Making people aware of their rights, entitlements and obligations under the scheme/programme.

b. Specifically, making them aware of their right to participate in the ongoing process of social audit.

c. Making sure that all the forms and documents are in simple, easily understandable, language and structure and available in local languages.

d. Also ensuring that all relevant information is publicly displayed on boards and through posters and is also read out at appropriate times for the convenience of the people, especially those who cannot read.

e. Ensuring that the decision-making process, especially for those decisions that are critical and/or vulnerable to distortions, is transparent and open and carried out, as far as possible, in the presence of the affected persons.

f. Making certain that all decisions, along with reasons, as appropriate, are also communicated as soon as they are made to the affected people, and in manner that makes it easy for them to comprehend.

g. Where there is a need for measuring, inspection or certification, ensuring that randomly selected individuals, from among the affected persons, are involved on a rotational basis.

h. Also ensuring that members of the public and especially those directly affected are facilitated to inspect and verify records, inspect works and generally monitor planning and implementation.

i. Where required, to have a formal public hearing (*jan* audit *manch*) where pertinent information is put before the public and verified in consultation with the affected persons.

j. Ensuring that the findings of the social audit process are acted upon as they become available and that apart from addressing the specific issues, systemic changes are also brought about.

4.15.03 To achieve the critical mass of social audit norms in any piece of legislation some innovations to the substantive as well as procedural part of law should be put in place. Right to participate during the planning stage is a substantive offshoot of the social audit process. Importantly in a Social Audit Process procedural innovations take the center stage as procedure is the most practical and salient unit of legal rules having capacity to undermine the entire process, thereby, Much of work which goes in making a social audit compatible law has its nexus with democratizing the everyday procedures laid down by the law. The experience of the NREGA implementation has taught us that social audit procedures coupled with some substantive underpinning can ensure better delivery of entitlement. It helps people to own up the Act. They guide, monitor and evaluate the administration of the Act.

4.15.04 Also, as mentioned earlier, a social audit has the power to change the dynamics of the power equation existing between the decision maker and the beneficiary. This is because the participation by people to some extent redefines expectations and onus of accountability, thereby diluting the traditional view of decision-maker being at the center of power. The entire focus is not just on uncovering irregularities but on participation and performance. Such participation especially at planning and implementation stages gives rise to constructive delivery of entitlements and fewer cases of corruption.

4.15.05 It is to be noted that a framework for social audit does not envisage a hierarchy structure in terms of creating an additional tier for allotting responsibility and accountability. Rather, the intention is to ensure public participation through easier access within the existing realm of structures. This opening of administrative setting to general populace without exception (and not through committees or elected representatives) and at all times is the crux of social audit process.

4.15.06 As much as the audit process brings with it rights to the people, the same is also accompanied by certain duties on their behalf. This duty is apparent : the duty to remain vigilant and the burden to undertake the social audit. Since the role of the government as a facilitator is well-defined, to that extent the government becomes accountable. But, beyond that there is really no onus of accountability upon the government save the social audit process. Therefore the burden of taking up the social audit process seriously is on people only. Obviously to create such environment where people feel motivated to carry out the role falls within the domain of *facilitator function* of the government. Responsibility corresponding to government's facilitator role should find a statutory cover. NREGA is a pioneering Act in that regard. Social audit demands continuous participation and involvement in vigilance from people. NREGA is the first Act in the history of independent India to have given that kind of space and role to people. But experience with the Act has shown that people's involvement has not really percolated down.

4.15.07 This issue obviously questions the very foundation of social audit process itself. Firstly, we need to identify what triggers public involvement and whether Social Audit Norms will be able to energize people sufficiently. What should be the role of government in this regard? If we envisage government merely as a facilitator and not beyond that will public action necessary to fulfill the role prescribed by the Social Audit Norms happen on its own? More than that, characterization of public action in the context of social audit process is an intriguing question.

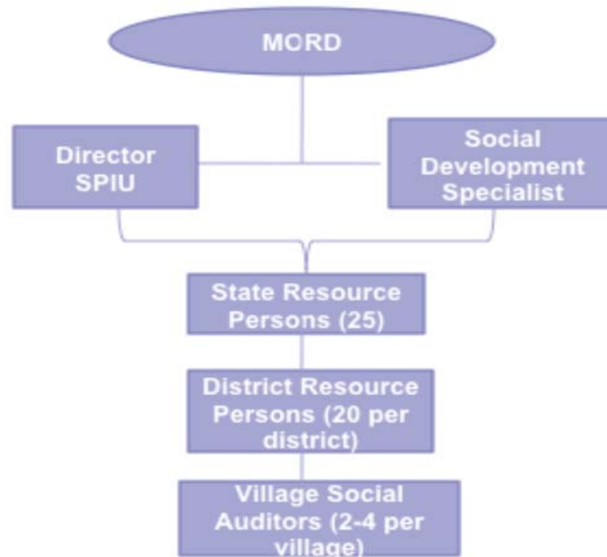
4.15.08 Another issue which limits the development of social audit process as a generic methodology is lack of standardized materials (legal and otherwise) and practical experience to formulate Social Audit compatible legislations. Be that as it may, NREGA in its current form (even with the Guidelines) require further rule making to define the responsibilities of government in context of Social Audit Process (such as adopting people's estimates as units, people friendly formats for Measurement Books, Technical Estimates, Stock Register). This endeavor needs to be crystallized by way of State Rules which has not been the case barring perhaps the case of Andhra Pradesh. Inaction on this front points toward the lack of political will or bureaucratic disposition. Role of civil society (NGOs, movements, collectives) also should be reviewed in terms of ground realities. In the initial years, Social Audit process counts a lot on social movements for mobilization.

4.16 The experience of Andhra Pradesh with Social Audit and NREGA

4.16.01 Andhra Pradesh has been one of the most successful states in implementing NREGA. The accountability and transparency measures enshrined in the NREGA have been utilized by the state of Andhra Pradesh by undertaking social audits for all NREGA works across the state. The Andhra experience is unique because it marks the first time that the government has proactively taken steps to open itself up to scrutiny by citizens. The first step in this direction was to computerize the entire implementation process of NREGA. All the data is public and available for scrutiny. The social audit process is facilitated by the Rural Development Department through the Strategy and Performance Innovation Unit (SPIU) that provides the organizational backbone to the process. The SPIU is headed by a director, who is a drawn from the state civil service cadre. The presence of civil society ensures that there is a high degree of autonomy and objectivity to the exercise. It is one of the most important checks and balances that have been built in to the process. The director SPIU together with the social development specialist is responsible for taking all policy and management decisions related to the conduct of Social Audits on NREGA. The State Resource Persons (SRPs) are responsible for managing the day to day aspects of conducting the social audit. This includes drawing up the social audit schedule, training district level resource persons, liasoning with district level officials and ensuring follow-up to social audit findings. The District Resource Persons (DRPs) are responsible for managing the actual conduct of the social audit. This includes identifying the village social auditors, training the village social auditors along with state resource persons, filing RTI applications for accessing government documents and interacting with the mandal level officials to organize logistics and the public hearings. The social audit itself is conducted by volunteers from the villages.[54]

[54] See Yamini Aiyar and Salimah Samji, 'Transparency and Accountability in NREGA: A Case Study of Andhra Pradesh', available at http://www.accountabilityindia.org/admin/uploads/publicationfiles/31_1244199489.pdf.

The diagram below depicts the management structure:



4.16.02 To ensure the smooth conduct of the audit and the full support and cooperation from local level officials, the government from time-to-time, issues various orders detailing rules and processes related to the audit. These orders are essential as they have given the social auditors easy access to government records as well as made it incumbent of local officials to participate in the public hearings and respond to social audit findings. Aside from unearthing corruption, the social audits also offer a formal setting for senior officials to interact with front line implementers and wage seekers. This allows for real time feedback on the status of the scheme implementation. The real time feedback on progress in NREGA has ensured that some of these problems are tackled.[55]

4.16.03 The World Bank had commissioned a study to understand the impact of social audit in Andhra Pradesh by gauging the perception of labourers. The results showed that before the social audit, only 39 per cent of labourers knew about NREGS in Andhra

[55] Ibid

Pradesh (A.P). After the social audit, 98 per cent of the labourers said they knew about NREGA in A.P. Awareness about the 100 days guarantee rose from 31 per cent before social audit to 99 per cent after social audit. Awareness about the fact that no machinery can be used for getting work done was 30 per cent earlier and this awareness rose to 96 per cent after the social audit. Only 27 per cent of the labourers said they knew that contractors were not allowed under NREGA before the audit. This awareness rose to 99 per cent after the social audit. This was also confirmed when labourers were asked after the six month interval. NREGA is supposed to be a demand driven programme. Earlier only 25 per cent labourers knew about this provision of the Act. Six months after the social audit, this rose to 99 per cent. 60 per cent of the labourers said they were more confident about approaching local officials because they had greater awareness about the provisions of the Act as a result of the social audit. 82 per cent of the labourers felt that social audit was an effective mechanism for grievance redressal. Thus, social audit has a significant and lasting effect on citizens' awareness levels. It improves the implementation process. It enhances citizens' bargaining power and offers them a never before opportunity to address petty grievances.[56]

4.17 Implementation issues with NREGA

4.17.01 Confusion about the operational requirements of the Act: There is a lack of clarity about the various actors' basic responsibilities under the NREGA. The Act directs each State Government to notify an "employment guarantee scheme" to give effect to the work guarantee. The combination of a Central Act with State-specific schemes calls for rigorous coordination between Central and State Government, however, the same does not happen. In this regard, it has been reported that even the basic operational guidelines so issued by the Central Government on guaranteeing minimum entitlements has not yet been fulfilled.[57]

4.17.02 There is a need to strengthen the administrative structure of the Act for implementation of the Act which includes the centre, state, village, block and district levels. There is a need to create awareness of the act and capacity development among the key stakeholders such as rural households, Panchayati Raj Institutions (PRIs), user groups, local communities, NGOs and local government officials. The monitoring and

[56] "Social Audits: From Ignorance to Awareness. The AP Experience", World Bank study coordinated by Atul Pokharel with Yamini Aiyar and Salimah Samji in partnership with Intellecap and SPIU (AP govt),February 1, 2008.

[57] See Jean Dreze and Siddhartha, Flaws in the System, Frontline, January 3-16, 2009

evaluation mechanisms at the Centre, State and District levels would need to be strengthened to ensure effective implementation of the NREGA. Specifically, the division between centre and states in financial, implementation and monitoring processes poses challenges in the present federal structure. For example, a large part of the expenditure of NREGA is covered by the Central Government but the crucial penalising provision of unemployment allowance is burdened on the states. These become crucial in the context of states where the political alignment of governments at central and state level is not on friendly terms to each other. At the same, recent experiences of NREGA also suggest that some of the better doing states are mostly states which are ruled by political parties which are not in alignment with the ruling party at the centre. This has prompted the Prime Minister to say: "We still have miles to go before we achieve the full potential of this unique legislation. The performance of the programme has been uneven across states. Some states have shown good results, some are lagging behind. I urge them to catch up."[58]

4.17.03 Finally, it is only recently that the The Ministry of Rural Development through a Press Release has formulated the guidelines for setting up the District level ombudsman as the redressal mechanism and the formation of an independent monitoring mechanism comprising of prominent citizens. But even now, the State governments are yet to set up the Ombudsman. Kerala has the Ombudsman functioning for the last several years.

4.17.04 The Commission recommends the framing of a central social audit legislation, keeping in mind the lacunae shown in the existing NREGA provisions, and what should essentially constitute the features in such legislation. The experience of Andhra Pradesh in this regard may also be looked into favourably.

4.18 Public-Private Partnerships for Better Delivery of Services

4.18.01 In the context of delivery of public services, Public-Private Partnerships (PPP) have indeed been in the eye of storm in India. For instance, the Delhi Jal Board project has been the most controversial water privatization project that was withdrawn after a massive backlash against the project. The main allegation was that the World Bank had engaged in arm-twisting tactics to pressurize the State Government into awarding the contract for consultation to a particular agency. When an application was filed under the Right to Information Act, 2005 to know the terms of the privatization contract, it was revealed that the terms provided for high profits to the private companies, to whom the management of water would be handed over, that would have pushed up the water

58 Indian Express, 'PM tells states to improve performance in NREGA implementation', September 09, 2009.

bills significantly. Further, each private water company would also have a say in deciding its own annual operating budget and for upward revision. The revelations led to the organization of the NGOs to protest against the contract on grounds of the absence of a dialogue between the government and the citizens when the terms of the contract were negotiated, which subsequently led to the withdrawal of the contract.

4.18.02 Other arguments against PPPs in India have been that preferential selection of private companies and the imposition of onerous terms and conditions in the contract upon the Government threatens sovereignty and leads to corruption. Further, it is alleged that the various regulatory agencies set up by state legislations in different social sectors are unable to work independently, and are captured by private interest. Still, in certain other cases like education and health it is alleged that there is an absence of an overarching legal regulatory framework and a common set of norms to facilitate the government's stewardship of private health and private education sector as a partner. [59] In the recently concluded National Consultation on the Draft Health Bill, 2009 the main critique of the Draft was that the Bill seemed to push the health sector into the hands of private players , and that privatization and outsourcing should be prevented to make health a universal entitlement.[60]

4.18.03 Unfortunately, the entire debate on privatization of essential services misses a single point: PPPs are not the same as privatization. To quote the Government of India:

"PPPs are different from privatization. While PPPs involve private management of public service through a long-term contract between an operator and a public authority, privatization involves outright sale of a public service or facility to the private sector."[61]

[59] See for instance the report by Aarti Dhar in The Hindu dated 29th January, 2010 reporting on the National Consultation of the Draft Health Bill, 2009.
[60] Abhay Shukla of the Support for Advocacy and Training to Health Initiatives. In this context the critique by Colin Gonsalves of the Bill may also be noticed:
"At its core it fails to guarantee genuine free health care for the people of India. The framework is entirely that of globalization where the state is not seeing as being necessary for providing health care services and is relegated to a subordinate role of "regulating" the private sector which is expected to provide the bulk of the services. The poor will go to the private sector and hopefully may get subsidized services because huge funds of the state will be channeled to the private sector in terms of subsidies. Public sector funding will suffer. Public institutions already in a deplorable state will decline further. This is what the bill seeks to legitimize."
[61] See, Workshop report on Facilitating Public–Private Partnership for Accelerated Infrastructure Development in India, December 2006, available at www.pppinindia.com/pdf/FINALPPP10Jan2007.pdf.

4.18.04 In fact, as mentioned in the Eleventh Five Year Plan, private sector participation may help in introducing innovative ideas, generating financial resources and introducing corporate management practices and improving service efficiency and accountability to users.

4.18.05 On the question of the increased role being played by the non-state organizations in the delivery of the public services and the means of making them accountable to the directive principles, the discipline of human rights, public good and democratic accountability, the political parties have interesting views on these public-private partnerships, and some of them may be noted herein:

1. "The gap in providing services in the social sector by the government is suitably filled by private players. The essential requirement of these stakeholders in discharging the services is the upliftment of the disadvantaged and the marginalized sections of the society."[62]

2. "All these stakeholders have grown their activities in various spheres which were earlier performed primarily by governments. *The governments should evolve mechanisms through which such organizations can actively participate in formulation of policies and implementation and mobitoring/supervision of projects/programmes. This will ensure utilization of their financial resources, engagement of their human resource expertise and their improved involvement in government policies/projects/ programmes. A comprehensive policy by the Union may be prepared for creating such sustainable partnerships.* Presently, the Union and the State governments are adopting diverse mechanisms to ensure this. The success rates of such experimentations, in the absence of well-defined comprehensive national policy, have been questioned on most occasions. The Union should formulate a national policy for creating sustainable partnerships between governments and such organizations/ institutions."[63] [Emphasis supplied]

3. "a) While selecting a non-state organization for such entrustment, selection-process should be absolutely fair and non-compromising on the antecedents and capabilities of such organization. The Memorandum of Understanding or Biparty Agreement should contain enough checks and safeguards.

   b) Once such non-state organizations are delegated with the state's functions, they are supposed to assume the character of the state for that limited purpose

[62] All India Anna Dravida Munnetra Kazhagam (AIADMK)
[63] Government of Madhya Pradesh, National Congress Party.

and in that case there should not be any difficulty to apply to them or bind them with the discipline of human rights and the philosophy of directive principles, they being the agents of the state. *If necessary, appropriate amendment should be made in part IV to include them in the definition of 'state' for the limited purposes.* [Emphasis supplied]

c) By incorporating befitting clauses in the Memorandum of Understanding/ agreement, or by enacting a common or comprehensive law to facilitate such delivery of public service through any non-state organization in the desired manner, and to ensure strict observance of the principle of democratic accountability in such organizations on the basis that they assume the character of 'state' for such limited purpose.

d) While privatizing more and more sectors/areas of Government functioning by giving rooms for involvements of various stakeholders, the Government should always ensure that services provided are of high quality and are provided at an affordable cost to the common man. For example, within the parameters of constitutional directives, education, health-care, infrastructural creations and management may well be privatized in phases and in a well-coordinated manner."[64]

4. "a) *Non-state players are a heterogeneous group of stakeholders who have the capacity of providing god models of governance by acting as a bridge between the grassroots level and the formal governance structures. In this situation, a self-regulating system could be built up through a partnership between state and non-state actors, subject to periodic monitoring and evaluation in terms of certain process and outcome indicators relating to the regulatory mechanism. In addition, there is a need for increasing the synergy and mutual trust between the non-state actors and the local governance, so as to make the partnership model sustainable and credible.* [Emphasis supplied]

b) Besides a self-regulatory framework subject to periodic reviews, such non-state organizations should be free from undue political interference and influence, so that their accountability and public commitment can be built up through elements of competition, and a broad policy framework for regulation and partnership."[65]

[64] Government of Mizoram and The Ministry of Science and Technology, Deptt. Of Biotechnology.

[65] Communist Party of India, Telegu Desam, Department of Health and Family Welfare, Ministry of Earth Sciences, Ministry of Finnace, Deptt. Of Disinvestment, Ministry of Labour and Employment, Ministry of Heavy Industries & Publc Enterprises, Department of Public Enterprises.

5. "Private organizations/agencies/civil society is proving important agencies in the process of governance. Involvement of these actors narrows the space for public actors to manipulate or continues corruption. But still, important issue which needs to be addressed is monopoly of bureaucracy in power holding. Many PPP systems seem to be failed because ultimately they have no power to work; private actors have to rush around the official in many concerns for clearance the programme and schemes because bureaucrats have ultimate power. So, this issue should be taken care of in priority.

   But in contrary, private organizations/actors should also be evaluated through a mechanism because many such organizations are deeply rooted in manipulation and corruption personally or with public officials."[66]

   6. "a) The new stakeholders need to be given opportunities to deliver in their areas. However, there must be safeguards as many of these players are driven by capitalistic motives where services like health and education are involved. A system should evolve where the weaker sections of society are also given the opportunities to receive the services without which disparity will grow leading to frustration. *These new players can supplement much of the government's effort and allow the government to give adequate attention to its primary responsibility in areas of governance like law and order, taxation and various regulations.*[Emphasis supplied]

      b) These non-state organizations must follow strict rules and if these rules are not followed, they must face severe penalties. Very good incentives can also be given for those who follow regulations and achieve government objectives."[67] [Emphasis supplied]

7. *"Public auditing of non-state organizations is the only viable solution for making non-state organizations accountable. Their source of income and expenditure must be monitored. Suitable legislative measures should be taken making them accountable. It should be mandatory that every non-state entity discharging public duties should be registered. To a limited extent form the citizen's point of view these non state entities should be considered as state making them accountable/responsible."*[68] [Emphasis supplied]

[66] Institute for Social and Economic Change
[67] Government of Meghalaya.
[68] Government of Tamil Nadu

8. a) "There is no doubt that the task of governance has to be shared extensively. In the Health sector we are aware of PPP initiatives which bring in resources, usually manpower and managerial skills, unavailable to the government. The importance of NGOs in delivering health services cannot be underestimated. It is essential to ensure that all such non-governmental actors retain their independence and are not co-opted by the government.

   It would be useful, and NHRM permits this, if health facilities were encouraged to work closely both with PRIs and NGOs. Where such institutions are represented in the Management Committees, there will necessarily be greater involvement and greater credibility in the eyes of the public. It is also true that where an officer is honest and dedicated to his/her work, or where an office is seen to be performing efficiently, credibility is built even without outside participation.

   It would also be a grievous mistake to imagine that *all* NGOs are necessarily better motivated or better equipped to deliver services, or that *all* government offices/hospitals are inefficient or ill motivated. There are outstanding performers in government and extremely well run hospitals. Equally there are NGOs of very poor standard.

   b) A lot of NGOs are now working closely with the Government. They take funds from either the State Government or the Central Government. For such organizations, it is necessary to ensure that they take due account of social responsibility and public good in their functioning. *It is suggested that a system of Accreditation should be set up or assessment and consequent rating of non-government organizations. Democratic accountability through social audit would be a significant tool for rating the work of such organizations*."[69] [Emphasis supplied]

9. "The NGOs have to be selected in a transparent manner and have to be involved at the grass root level in better management of some of the services, where the state is unable to reach the public at large."

[69] Government of Uttarakhand

4.18.06 The above views of the political parties show that there is a consensus for the need of the participation of the private players in the delivery of public services. This is based on the experience of the states regarding poor delivery of public services in education, health, water, etc, corruption, inadequate attention to concentrating on essential services like tax, maintenance of security and order, poor quality of services and incapacity to ensure the percolation of the social sector schemes to the grassroots level. On the other hand, non-state actors, including NGOs are considered to be much closer to the citizens at the local level including the PRIs. Further, they are also considered to be providing much more effective services than the government, with superior quality. Thus, the states are of the opinion that to improve good governance in India, PPPs are inevitable. Taking the instance of health itself, a leading newspaper reported that in India, private spending on health is 4.2 per cent of the GDP. With increasing privatization of the health services, more than 70 per cent of all the health expenditure in India is paid for by people from their own pockets, and this expenditure has been rising, especially for the poorest. Citing the Planning Commission paper of May 2009, the studies conducted in several villages showed that healthcare expense was responsible for over half of all the cases of decline into poverty. It is estimated that in 2004-05, an additional 39 million people were pushed into poverty due to out-of-pocket payments.[70] This definitely reflects upon the irrefutable fact that public confidence in private entities to provide them with these services seem to be more than in public entities. Further, their entry in the public sector has already happened, with or without government approval. It may also be noted herein that the PPP envisioned herein are not the same as outsourcing completely the duties of the government. Rather, it is a partnership where the private and the public players jointly contribute in delivering public services to the citizens.

4.18.07 Nevertheless, this model also poses hard questions to policy makers. Indeed questions of democratic accountability, regulatory mechanism and redressal of grievances confront us. In this regard, the recommendations made by the political parties can be primarily separated into the following:

1. To amend Part IV of the Constitution for making the non-state organizations included in the definition of 'State'.
2. To provide for a National Policy for creating sustainable partnerships between governments and such organizations/institutions. The object herein is to provide for a mechanism whereby the private entities can participate in the designing, implementation and monitoring of the public programmes.

[70] Time of India, January 10, 2010, Rema Nagarajan, Healthcare at Private Sector's Mercy

3. To have a regulatory mechanism in place for the purpose of monitoring and evaluating the private agencies.
4. Further, public auditing for monitoring their financial resources and drafting of legislation for penalizing the defaulting private entities is also suggested.
5. Social audit for making the entities accountable to the citizens.
6. Providing for checks and balances within the Memorandum of Understanding signed between the government and the private entities.

4.18.08 The Commission is of the view that these suggestions provided by the political parties are worthy of consideration by the Union and State Governments. This report has already spoken at length about how to formulate effective national public policy which would also apply to these entities. Further, social audit as elaborated elsewhere in this report would also be a good measure to make the private entities accountable to the public. However, regarding public audits, wherein the citizens only participate, then there is dissatisfaction among them regarding the manner in which the social or the institutional audit has been conducted. In this manner, firstly, there is no obligation upon the citizenry to participate, and secondly the findings of such an audit may not be accepted by both the government and the private players since they are not intrinsically involved in such an audit process.

4.18.09 On the other recommendations regarding creating a regulatory mechanism, amending the constitution, drafting penalizing legislations and having specific clauses in contracts, the Commission has the following views:

i) On Regulation: Regulation may be broadly understood as an effort by the state 'to address social risk, market failure or equity concerns through rule-based direction of social and individual action.'[71] The Planning Commission has emphasized upon the need for having an independent regulator as the facilitator between the market/private player on one hand, and the three branches of the state on the other.[72] With the entry of private players in social sectors, India is yet to see the setting up of a common independent regulator overseeing the entire PPP. The need for such an independent regulator cannot be overemphasized. It is for the purpose of preventing overlapping of regulations, creating a simple regulatory regime, and ensuring accountability to the people through supervision of the state and the private sectors.

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[71] See the paper by the Planning Commission of India on Approach to Regulation of Infrastructure dated 15 th September, 2008 available at infrastructure.gov.in/event_Regulation_Law_and_Policy_final.pdf

.[72] Supra note 37.

A regulatory regime if properly structured would result in the transparency and accountability in the negotiation of PPP contracts. If the regulatory agency is allowed to participate through comments on the proposed contractual terms prior to negotiations, the mode of enforcement of contract and their monitoring will be much easier. The same can enhance regulatory efficiency and mitigate the democracy deficit. For this, it would be meaningful to study the means of achieving an independent regulator, by investigating the constitutional and the legal framework within which the regulatory reform would have to take place in India. The regulator should incorporate processes and systems whereby the stakeholders would have access to information, would be able to make representations and have full participatory and process rights. This would also be an effective safeguard against capture of regulatory system by the special interest groups. The important aspects in the institutional framework for regulatory commissions would be their role and functions, their relationships with the executive and legislature, and their interface with the markets and the people.

To recommend such a participatory regulatory regime, the provisions of the Administrative Procedure Act, 1946(APA) to public participation in the contracting out process could be extended to the regulatory regime so set up in India. The work of Alfred Aman draws upon exploring how administrative law that provides for publicity, opportunities for participation, and the inclusion of the dissenting community groups , can further regulatory efficiency and mitigate the democracy deficit, especially when it is the direct delivery of services to vulnerable populations that has been privatized. He thus advocates allowing the broader public to play the role in the design of the contract themselves.[73] The reason underlying the same is that unlike the agencies, the private actors at present are not bound by the provisions of the Administrative Procedure Act. Thus, they do not face judicial review of their policy decisions, even though under government contracts they make discretionary decisions affecting the course of public action and allocation of public resources.

Agency contracting should be open to the public by means of informal notice and comment proceedings and that the contracts should be published for comment on the policy-making of the privatization project. This would indeed ensure minority participation and bring about transparency and accountability in the contracting process.

[73] Alfred C. Aman, Jr., Privatization and Democracy, Resources in Administrative Law in Government by Contract 262 (Freeman & Minow trans., Harvard University Press, 2009).

Thus, the Commission recommends the setting up of a regulatory mechanism as provided herein above. It also recommends the incorporation of the specific duties and obligations of the private players and the process of holding them accountable to the citizenry by providing for certain penalties and or compensation to the affected beneficiaries in the contract itself in case of its breach. The manner of co-operation between the government and the private entity in delivering the services, the extent of government's intervention should be other clauses that need to be negotiated while formulating the contract.

ii) **Strengthening the PRIs:** The recommendation of some of the political parties for strengthening the PRIs with the objective of coordinating the relation and functions of the private entities with the panchayat is indeed sound. Since PPPs are to be implemented in every state in different fields like water, infrastructure, education and health, which fall under the State list, participation at the grass root level through decentralization would enhance accountability of the local government and result in participation of the disadvantaged in the decision-making process. This would be possible only by the effective implementation of the 73rd Constitutional Amendment. Further, decentralization would also enable to deal with any attempt to capture the state regulatory authority by special interest groups, thereby minimizing corruption in the privatization process.

The "People's Campaign for Decentralized Planning" as developed in Kerala indeed resulted in the decentralization of administration, fiscal powers and political powers to the local self-governing institutions. This in turn led to enhanced economic development and increased public participation that involved the minority groups in the decision-making process.[74]

iii) **Amending the definition of 'State':** As regards incorporating the discipline of human rights and the philosophy of Directive Principles into the scheme of such organizations, the courts will have a big role to play. If the thrust of privatization in India is to transfer the government prerogatives of the management, operation and maintenance

[74] See generally, Thomas F. McInerney, LAW AND DEVELOPMENT AS DEMOCRATIC PRACTICE , 38 Vand. J. Transnat'l L. 109.
The author also notes that , "Given the scale of citizen involvement that has occurred in Kerala, citizen involvement has effectively become an important check on the power of elites.", pp. 140.

of public functions to the private actors, then the same would warrant redefining the term "other authorities" under the definition of state[75] Already consistent with the blurring of the public-private divide, the Supreme Court of India is adjudicating on such issues.[76] In such cases, the issue before the court is whether the term "*other authorities*" can be expanded to include the private entities. At present, the definition of the state does not include private entities performing public functions. Thus, the citizens would have no right to claim against such an entity, performing public function, for breach of its obligations.

Thus, it is desirable to examine the means of conferring a constitutional law remedy upon the citizens for breach by the private actor to provide efficient and low cost services to the public by extending the scope of the minority decision (S.B. Sinha, J) of the Supreme Court in *Zee Telefilms Ltd. and Anr. V. Union of India (UOI) and Ors.*[77] to the private companies by expanding the scope of "public functions".[78]

The Commission therefore is in broad agreement with the view of the political parties that apart from the regulatory mechanism, social audits, national policy and contract clauses to make the private entities democratically accountable, amending the definition of the state in Part IV of the Constitution and the right to a constitutional remedy against the private organizations would make the arrangement citizen-friendly and promotive of efficiency in delivery of public services.

4.19 Conclusions and Recommendations

(1) Social Justice is the signature tune of the Indian Constitution

4.19.01 Improving the lot of the poorest of the poor and providing equal opportunities for all is to be the priority of all levels of government for which the

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[75] Under Article 12 of the constitution, a state includes the Government of India, Parliament of India, Government of the State, Legislatures of the States, local authorities as also "other authorities".

[76] The High Court of a state had issued a direction to Pepsi Company and Coca-Cola to disclose the composition and contents of the product including the presence of the pesticides and chemicals on the bottle, package or container, as the case may be, on the ground that the multinationals were under a 'constitutional obligation' arising from Right to life and personal liberty. The same was referred to the Supreme Court, which gave the parties the liberty to refer the matter to a larger bench since it involved a substantial question of law.

[77] (2005) 4 SCC 649.

[78] The minority held that when essential governmental functions were placed or allowed to be performed by the private body; they must be held to have undertaken public duty or public functions.In S.B. Sinha, J, words, "Performance of a public function in the context of the Constitution of India would be to allow an entity to perform the function as an authority within the meaning of Article 12 which makes it subject to the constitutional discipline of fundamental rights."

Constitution has provided the agenda in Parts III and IV consisting of Fundamental Rights and Directive Principles of State Policy respectively. It is the general impression that successive Governments both at the Centre and in the States have not been successful in the implementation of the Directives which form the core obligations of the State vis-à-vis social justice and welfare. It is time to recognize it as the joint and separate responsibility of all three levels of government and demand time-bound implementation of the obligations thereunder. Let the State and Central Governments acknowledge the obligations and introduce it in Annual Budget Statements.

(2) Need for assessment of state performance in respect of Directive Principles

4.19.02 There has not been any independent assessment of the performance of State and Central Governments in respect of implementation of Directive Principles which are fundamental for governance. The Plan implementation assessment is inadequate for the purpose. The Human Development Reports being brought out by some states tend to give an incomplete picture of the situation and the UNDP report on the subject is equally not reflective of the total picture. As such, Government should itself develop acceptable parameters to measure progress on education, health, housing, nutrition and related matters particularly in States where the situation continued to be of concern for long periods. Media reports are often alarming and sometimes misleading. In the circumstances, objective and authoritative collection and dissemination of information on performance in relation to control of extreme poverty is imperative need for responsive and responsible governance. It is also part of the obligation under the Millennium Development Goals of U.N. to which India is a signatory.

(3) Directive Principles may be reviewed and enriched periodically

4.19.03 Given the growth of knowledge and technology in recent times, it has become necessary to review the Directive Principles of State Policy for its further development. New responsibilities need to be undertaken by the State. Climate change is an illustrative example in this context. The Commission would recommend review and revision of the Principles contained in Part IV of the Constitution to keep with the changing times.

(4) Shared Responsibility and State Accountability

4.19.04 It is a vexed issue to fix responsibility when powers and functions are

shared among different levels of government. Based on the practice in federal systems, commentators have identified different models of governance depending upon the nature and scope of shared responsibilities and decision making powers. They are often described as (a) unilateral federalism in which the federal government directs provincial policy usually through conditional funding; (b) collaborative federalism in which both governments work collaboratively to attain policy goals and is characterized by the absence of coercion from the federal government; and (c) co-operative federalism where roles and responsibilities of different tiers of government are well defined which necessitates co-operation from all levels of government. India needs to move towards collaborative federalism model.

4.19.05 If one were to categorize the institutional design under the recently adopted Right of Children to Free and Compulsory Education Act, 2009 it tends to be a model of co-operative federalism where the Central Government sets policies and standards and extends technical and financial assistance. The State and local governments are to implement the provisions for which the legislation defines the roles and responsibilities. The institutional design envisages co-operation though it is not directed by the Centre under threat of sanctions. The Commission is inclined to endorse the model for implementation of Directive Principles which largely contain subjects in the States' domain under the Seventh Schedule.

4.19.06 Regarding steps towards the attainment of universal elementary education, it is the view of the Commission that the suggestions of the states and political parties regarding having an universal accreditation system and standard setting body with participation from the centre, state and private bodies be favourably considered as the same would go a long way in laying down the National Indicators and performance standards. Further, the Commission recommends the Union Government to consider the U.S. experience and examine whether something like a "Charter Option" will be an appropriate mechanism to adopt for effective implementation of the right of every child to free and compulsory education under the Act of 2008.

4.19.07 By increasing the participation of Civil Society and non-government organizations in the implementation process and by providing for social audit of welfare legislation, the Commission believes that State accountability can be ensured. The framework employed in the National Rural Employment Guarantee Act in this regard is to be particularly commended and deserves to be emulated in social welfare programmes. The Commission would recommend a central legislation incorporating minimum standards

in the conduct of social audit processes so that the delivery system of public services may be further strengthened while administration is democratized to the advantage of the people.

4.19.08 In this regard, the policy of the NREGA guidelines regarding incorporating provisions relating to Transparency, Participation, Consultation, Accountability and Redressal while drafting such a Central Social Audit Legislation in particular may be noted. Finally, it would be worthwhile to study the positive experience of Andhra Pradesh in conducting Social Audit in NREGA to understand the means of making the government the facilitator and the people vigilant in undertaking the social audit process.

(5) Public-Private Partnerships for better Delivery of Services

4.19.09 In the delivery of public services private sector participation may help in introducing innovative ideas, generating additional financial resources and introducing corporate management practices for improving efficiency and accountability to users.

4.19.10 In this regard, the Commission would also like to point out that the entire criticism on PPPs is based upon a misunderstanding of the very term. The Commission would like to reiterate the definition of PPP and distinguish it from privatization. The Planning Commission defines PPP to be 'involving private management of public service through a long-term contract between an operator and a public authority, whereas privatization involves outright transfer of a public service or facility to the private sector.'

4.19.11 However, to ensure democratic accountability the regulatory mechanisms in PPP projects has to be properly structured and organized based on fair contractual terms. Special interest groups should not have opportunity to capture the regulatory system. The People's Campaign for Decentralised Planning introduced in Kerala sometime ago is an interesting example of how self-governing institutions involving people can help delivery of public services better.

4.19.12 In the context of ensuring the application of the principles of good governance and directive principles of state policy to the private players, introducing the discipline of human rights into the working of the non-state organization and making the entities democratically accountable, the Commission endorses the views of the states in this regard. The Commission thus believes that the following suggestions received from the States may be looked into favourably:

i) Drafting a National Policy for creating a mechanism whereby the private players can actively participate in formulation of policies and implementation and monitoring/supervision of projects/programmes. This will ensure utilization of their financial resources, engagement of their human resource expertise and their improved involvement in government policies/projects/programmes. Further, this will also enable the building of harmonious public-private partnerships.

ii) The Memorandum of Understanding between the private entity and the government should contain specific clauses after due negotiations that provide for adequate checks and balances to ensure that the entity operates within the framework of the rule of law, spelling out its obligations and duties towards the citizens as also the extent of its liability for breach of duty. In this regard the extent of obligation of the government authority may also be provided and the antecedents of the entity should be duly incorporated.

iii) Drafting of a National legislation that provides for the penalties to be levied against the private entities for breach of their duties and for other defaults made in this regard.

iv) Holding a Social Audit by the Citizens on such PPPs on the same lines as recommended by the Commission for the creation of a Central Social Audit Legislation according to the Guidelines of the NREGA. In this regard, the Commission recommends that the regulatory agency should incorporate processes and systems whereby the stakeholders would have access to information, would be able to make representations and have full participatory and process rights. In this regard, the Commission recommends that the provisions of the Administrative Procedure Act, 1946(APA) to public participation in the contracting out process could be extended to the regulatory regime so set up in India.

v) Amending the definition of "state" under Article 12 of the Constitution to the extent of making the private entities constitutionally liable under the Directive Principles of State Policy to the citizens of India with respect to the performance under the PPPs.

vi) Structuring a regulatory mechanism consisting of an independent regulator who would have the authority to oversee all the state regulatory agencies set up in various states for the public delivery of social services in different areas

such as education, health, water, employment etc. Further, the building of a self-regulating system through a partnership between state and non-state actors, subject to periodic monitoring and evaluation in terms of certain process and outcome indicators relating to the regulatory mechanism. The Commission is also of the view that if the regulatory agency is allowed to participate through comments on the proposed contractual terms, then the mode of enforcement of contract and their monitoring will be much easier.

vii) Setting a system of Accreditation for ensuring the credibility of such non-state organization.

viii) The Commission also recommends the strengthening of the Panchayati Raj Institutions so that there can be effective co-ordination and consultation between the Panchayats and the Private Players while designing, implementing and monitoring the PPPs at the grassroots level.

(6) Public Policy Dispute Resolution Mechanism System

4.19.13 In India, in the context of policy making, while this Commission suggests 'consultation' before the making of a public policy, at the same time the Commission also recommends providing a public policy dispute resolution mechanism. The Commission is of the view that the collaborative governance model would be an innovative way of ensuring that public policy dispute resolutions are carried on with the inclusive participation of the citizenry, thereby enhancing the democratic process.

CHAPTER 5

CENTRALLY-SPONSORED DEVELOPMENTAL SCHEMES AND FEDERAL RELATIONS

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CENTRALLY-SPONSORED DEVELOPMENTAL SCHEMES AND FEDERAL RELATIONS

5.1 Introduction

5.1.01 This Section considers the widespread phenomenon of centrally-sponsored schemes in the States, in the realm of social and economic planning. It deals with the benefits and drawbacks of such schemes, and makes a critical analysis of their impact on Centre-State relations.

5.1.02 The somewhat skewed nature of financial relations between the Centre and the States has been analyzed elsewhere. It is well-known that States are, by-and-large, in a much more financially difficult situation than the Union Government. In this context, there has been a general trend of the Central Government allocating and disbursing to States, huge amounts of money for various schemes relating to socio-economic development. Prominent examples would include the *Sarva Shiksha Abhiyaan* and the National Rural Employment Guarantee Scheme. In view of the disparity in financial resources between the Centre and States, this trend is very welcome.

5.2 Fiscal Transfers under CSS are Problematic

5.2.01 Nonetheless, many States have expressed significant concerns about the manner in which such centrally-sponsored schemes are implemented in practice. One State has observed as follows:

> "The criticism faced by the central sector and the centrally sponsored schemes is that they tend to make uniform prescription for all situations without adequate regard to regional and local specificities and suffer from lack of flexibility. These schemes are very straight jacketed without any flexibility or scope for innovations left for the State governments. These could be easily made more attuned to local needs by converting them into untied funds for each sector for each State for specified and need-based action plans prepared

by the State and sanctioned by the Centre if they fall within the parameters of guidelines issued by the Centre. This will allow States to formulate projects in its action plan which fulfill the aspirations of the people and complete the gaps in that particular sector in the State."

5.2.02 A particular political party has given a very detailed response in this regard. In view of the importance of the topic, it is considered appropriate to reproduce the relevant portion of its response here. It states as follows:

> Not only have the earlier transfer of State subjects, such as education, to the Concurrent List been left unreversed, but further intrusions have also been made into the State List in terms of proliferation of the so-called CSSs. The resources for CSS are acquired through taxes which should be a part of the common pool and not left to the sole discretion and use by the Centre. A decision to transfer all CSS with funds to the States if they were in areas under the State list was already taken in 1996 at the Conference of Chief Ministers convened by the Prime Minister on May 4, 1996. Although several exercises have been carried out in this regard from time to time, there has been no effective resolution of this issue. In fact, more and more CSSs, are being introduced by the Central Government.
>
> While over the years Central transfer to the States as a proportion of the Centre's revenue receipt has fallen, the proportion of transfer of funds with conditionalities in the form of Grants-in-Aid has increased from 40.9 per cent in 1980-81 to nearly 49.3 per cent in 2005-06 (RE). The Budget documents of 2007-08 show total resource flow from the Centre to the states as 7.26 per cent of GDP. Compared to this, the quantum of resources going directly to districts and other implementing agencies is very high at 1.22 per cent of GDP, more than any other head of grants or transfers, amounting to 37.5 per cent of tax devolution to the states in 2006-07.
>
> The existing practice of CSSs has diluted the fiscal transfer system, to the extent that normal assistance for state plans, which is devolved according to the Gadgil formula, is less than 48 per cent of the total state plan size. Under the present regime, grants have become primarily purpose-specific or tied with a host of conditionalities imposed by different central ministries, reducing the States and Panchayats to mere agencies of the central ministries.

In some of the CSSs, the share of the States' financial burden is also being unilaterally increased. For instance, despite repeated objections by all the Chief Ministers, the Centre has taken a decision to increase the share of the States in the Sarva Shiksha Abhiyan Programme from 25 per cent steadily to 50 per cent under the Eleventh Five-year Plan. Many States are frequently unable to provide the matching shares and consequently forego attendant central transfers which are subsequently reallocated to relatively better-off States as additional allocation, worsening horizontal imbalances.

The State Governments are not consulted at the stage of conception, design and rule making. States are therefore compelled to commit resources for straight-jacketed schemes that do not reflect their priorities or can be effectively implemented, as they are rigid and out of sync with local realities. Such specific-purpose transfers have tended to reduce the states to mere implementing agencies with rigid guidelines that deny location-specificity and local initiative.

What is more, the conditionalities frequently encroach upon the legislative autonomy of the States. A case in point is the JNNURM, which requires the State to reduce Stamp Duty rates to at most 5 per cent, a rate which can only be prescribed by the Legislative Assembly. This represents the intrusion of the executive into the space of the legislature, which is as problematic as centralization. In the past two decades, the legislature is repeatedly receiving diktats on legislation from the Judiciary, the Executive, semi-judicial bodies like the [sic] and multi-lateral and bilateral agencies like the ADB, the World Bank etc.

Since 2002-03, a considerable percentage of such transfers are sent directly to autonomous agencies bypassing the States, despite the fact that in many CSSs the states too are required to make matching contributions. Local officials tend to ignore the State Government on these Schemes since they have to co-ordinate directly with New Delhi.

As important is the imperative to conduit transfers to autonomous agencies (local bodies, parastatals, DRDA etc) strictly through the States. The Centre and states can work out an accountable and speedy mechanism for fund transfer to district, PRI and other agencies, the federal character of our fiscal and political economy should not be undermined. The states have to intermediate between agencies at lower levels and the Centre.

Thus, this sizable funding of CSS to the tune of about 60 per cent of the Central Assistance is resulting in an expanding role of the Centre in the State sector, by sidestepping the States and placing district functionaries directly under the control of the concerned central ministries and giving over half the Central Assistance as Additional Central Assistance, which is not within the purview of the Gadgil formula (or FC criteria) with a great deal of discretion with the concerned central ministries in allocations and disbursement.

To the extent that Central expenditure on CSS is a unilateral withdrawal from the shareable pool, thereby reducing the sizes of the pie, these should be transferred, with funds, to the States. There can be broad guidelines worked out for Central Schemes on the basis of discussions between the Centre and the States, allowing for flexibility in design and implementation. An appropriate periodic joint Centre-State review may be worked out. (The only exception to this could be Schemes backed by Central legislation for which the Centre contributes over 80 per cent, as in the case of the National Rural Employment Guarantee Act.) This will not only promote decentralization and uphold federalism, but would also be more cost-efficient and goal fulfilling since it allows location-specificity in design and are better suited to meet their socio-economic objectives."

5.2.03 While these views are couched in rather stringent language, it is important to note that a large number of States have expressed substantial agreement with these views. Further, this Commission also feels that there is a great deal of force in the criticism raised above. The mere fact that the Union Government is in a position to supply a greater share of funds for projects pertaining to social and economic development ought not to give it a right to dictate terms to States on matters that otherwise fall within the constitutional domain of States. It is felt that the Union Government may restrict itself, at the most, to outlining broad guidelines with respect to the ultimate objective of the programme. To take an example, a particular amount of money could be transferred to States which are particularly backward in the realm of primary education, and the purpose of the transfer could be appropriately indicated to the State Government. Nevertheless, the design and implementation of the specific programmes within the State must be left to the executive machinery of the concerned State.

5.2.04 A concern is sometimes voiced to the effect that such "*untied*" funds might often be misused by States, and that conditionalities are an effective safeguard against such misuse. There can be little doubt that there is often some amount of corruption and misuse of government funds allocated for the purposes of socio-economic development. However, the assumption which is more problematic is that State governments are more likely to be afflicted by this malaise, and that the Central Government is insulated from the same. It is not clear what the basis for this assumption is. Rather, the true state of affairs would appear to be that inefficiencies, leakages and corruption affect, at least to some degree, all branches of government at all levels. Furthermore, it is also assumed that the Central Government can effectively monitor and detect the extent of such failings in various States.

5.2.05 It is suggested, therefore, that funds earmarked for States should not be tied to rigid conditionalities or extremely high performance targets. The better approach might well be to make available these funds to the States, and trust that the democratic process will ultimately penalize those States which fail to utilize the funds for the purposes of meaningful development.

5.3 Conclusions and Recommendations

(1) Fiscal Transfers under Centrally-Sponsored Schemes are Problematic

5.3.01 It is the perception of States to which the Commission is by and large in agreement that CSS has tended to erode state powers and resulted in skewed fiscal relations between the Centre and States. While appreciating the good intentions and importance of CSS in selected areas, it is desired that the States should have control on the design and execution of the schemes. States' priorities and local initiatives are more often ignored in specific purpose transfers ordinarily made under rigid guidelines. The States complain that their financial burden under the CSS are sometime unilaterally increased. The conditionalities tend to encroach legislative autonomy of States; more so when transfers are made to local bodies and parastatals.

5.3.02 The need is not to sacrifice CSS, but to devise a system under which the federal balance is strictly maintained and accountability established. Some of the schemes can be totally transferred to States; in others enough flexibility be built in to let the States control the design and implementation. Periodic review jointly by the Centre and the States will ensure the co-ordination and the direction necessary to achieve the national

purpose, while correcting inefficiencies, leakages and corruption. The mere fact that the Centre is in a position to provide a greater share of funds for projects pertaining to social and economic development ought not to give it a right to dictate terms to States on matters that otherwise fall within the Constitutional domain of States.

(2) Need to provide more "untied funds"

5.3.03 Funds earmarked for States, as far as possible, should not be tied to rigid conditionalities prejudicial to good Centre-State relations. In setting performance targets some flexibility has to be provided to accommodate location specific problems and challenges. In the circumstances, the Commission is of the view that the Centre should bestow greater authority and trust on states in centrally-sponsored schemes and allow the democratic and Constitutional processes to ensure greater accountability on money spent in the name of development.

CHAPTER 6

MIGRATION, HUMAN DEVELOPMENT AND CHALLENGES TO CONSTITUTIONAL GOVERNANCE

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6

MIGRATION, HUMAN DEVELOPMENT AND CHALLENGES TO CONSTITUTIONAL GOVERNANCE

6.1 Issues Arising Out of Migration

6.1.01 One of the problem that is increasingly assuming social and political proportions is that of large scale migration of people from one state to another and from rural areas to cities. According to the data of National Sample Survey, as enumerated in the 1999-2000 on net immigration and/or out-migration in the main Indian states, the greatest out-migration is from Bihar, but only 3.1 per cent of the population. Uttar Pradesh has out-migration of only 0.8 per cent. In no other state is out-migration even 1 per cent of the population. Orissa actually has a net in-migration of 0.6 per cent. This is explained by the influx of Bengalis and Bangladeshis in the north and Telugu speakers in the south. Land scarcity has driven outsiders to encroach into forests, and this is one reason for net immigration in poor states like Orissa and Madhya Pradesh. Assam is listed as having net out-migration of 0.5 per cent. This is, however, questionable given the influx of large Bengalis/Bangladeshis into Assam and making the same a serious political issue. West Bengal, another poor state, has 2.7 per cent immigration. This represents an inflow from even poorer Bangladesh.

6.1.02 At the outset, it should be noted that the present Report is being written in a context where significant controversies have arisen regarding large-scale migration, in different parts of the country. Prominently, certain political entities in States like Maharashtra, Madhya Pradesh etc have expressed alarm at the large number of migrants entering their cities in a quest of economic opportunities. States have sometimes sought to adopt legal regimes which give preference to "local" citizens in employment, or access to other government benefits. More alarmingly, there are a small but growing number of instances where violence is inflicted upon migrants, as a consequence of the tensions adverted to above. Additionally, it must be noted that such large-scale migration often inflicts a severe burden on the physical infrastructure in the larger metropolitan cities. A

large percentage of the populace in Delhi and Bombay, for example, live in slums both on account of extreme poverty and due to a crippling shortage of land.

6.1.03 It is required to be highlighted at this juncture that the right to move freely within the territory of India, and the right to reside in any part thereof, are fundamental rights accorded to all citizens of India by the Constitution. Article 19(1)(d) of the Constitution confers on all citizens the right "*to move freely throughout the territory of India*". Article 19(1)(e) further states that all citizens have the right "*to reside and settle in any part of the territory of India*". These rights are paramount, and any solution to the difficulties posed by large-scale migration must be in consonance with these constitutional rights.

6.1.04 It is worth reminding ourselves at this juncture that the reason these rights must be respected at all costs is not merely because they are fundamental in a technical legal sense, but also because they are vital for the securing of important national goals. One of these goals is national integration. While an excess of migration might have created short-term tension in certain areas of the country, the much more dominant phenomenon has been a growing awareness about the culture and traditions of other Indians, and an emerging cosmopolitanism. This is one laudable result of free movement for citizens to all parts of the country. Indeed, if citizens were not granted the right to move freely throughout the country, then India could hardly be said to be one nation in any real and meaningful sense.

6.1.05 Secondly, the right to move freely within the territory of the country, and to reside in any part of the country, is a *sine quo non* for the effective economic integration of the country. Throughout its post-Independence history, India has adopted a policy of the co-existence of private industry and the public sector. In recent years, for reasons that are well known, there has been a trend towards liberalization and privatization within India. Hence, just as it is important for goods to be allowed to move freely within the territory of the country to foster efficiency and healthy competition in the private sector; it is equally important for workers to be free to take their skills to places where they are most in demand.

6.1.06 For both these reasons, the fundamental right to move freely within the territory of India must be considered paramount. However, as discussed earlier, it is certainly true that the vast disparities in development between different regions of the country have created a situation in which certain metropolitan cities are being crowded

beyond their capacities. Steps are certainly necessary to cope with this difficult situation. What is sought to be stressed in the present section is the fact that such steps must focus on the underlying malaise, being the extreme disparities in development in diverse regions of the country, rather than on penalizing migrant populations, who are merely victims of such uneven development.

6.1.07 It is heartening to note that almost all States, as well as other stake-holders, have concurred with the above views. Many States, as well as certain political parties and academic institutions, have forcefully echoed the viewpoint that migrants to any State must be provided the full protection of the law. Furthermore, the only genuine solution to the endemic problem of the over-crowding of metropolitan cities is a process of development that is more equitable and broad-based than has taken place so far.

6.2 Issues of Equity and Inclusiveness in Human Development and Governance

6.2.01 The Indian Constitution, when it was adopted in 1950, was considered by most political scientists as a quasi-federal set-up with strong unitary features. For almost thirty years it remained so and it was possible for the Government at the Centre to initiate measures with some success, in various areas such as public policy, social equity and governance to bring about some uniform standards, in order that public administration would be more and more responsive to citizen's needs. However, the efficacy in the response systems required much to be desired, due also to regional economic diversities, political complexities and the resultant risks. Views are often expressed that lack of built-in flexibilities, necessitated by the area diversities, among the regions and states, led to the failure of "One Policy Fit All" approach. Ad-hoc amendments and modifications and sometimes such modifications which tended to the loss of sight of the original objectives itself, often rendered credence to the belief that given the socio-political diversities of the regions, 'top-down' approaches and "bureaucracy-crafted" social growth measures are far from attaining the implementation success as they are often at odds with ground realities besides being deficient in functional sight-specificities.

6.2.02 On the other hand, public administration, world over, during the past two decades started increasingly moving on the reform track under which 'State Response System' has been undergoing adaptations from 'responsiveness' to 'collaboration'. Such collaboration is meant for higher levels of partnerships, in policy making and public administration, with various social players such as private sector and the citizenry. It is increasingly believed that the ethos of "collaborative response system" having linkages

with bureaucratic-driven, private sector-driven and citizen-driven participative approaches would have to, gradually and in the long run, replace the "state response system". It would be reasonable to believe that the "collaborative response system" is expected to provide durable responses in the direction of centre-state, inter-State and intra-State/ regional, political, economic, social and cultural relations.

6.2.03 If inclusive growth is the ultimate objective, the Citizen's participation would have to be at the core of the identification of the policy and implementation process. The primacy of improving the "Human Development Indices" - health, education, and communication for achieving the above needs no emphasis.

6.2.04 In the area of health, while the primary responsibility rests with the 'State' augmentation of private intervention including that by voluntary systems, it is believed, would ably supplement the State's effort. Giving due deference to the mortality rates, the 'state support' and other support would have to be need-based and not population-based. At the front-end of the rural health mission, the 'safe drinking water' and 'sanitation coverage' require serious stress under both the 'Bharat Nirman' and the 'Total Sanitation Campaign' programmes.

6.2.05 As in the case of health, in the area of education also, while the primary responsibility, particularly that of primary education rests with the 'State', augmentation of support, in both secondary and university education, from private intervention, including that by voluntary systems, would ably supplement the State's effort. While the infrastructure for the same in the private sector exists, augmentation of the same and also establishment of pre-education training centers, by NGOs, Trusts and Registered Societies need to be incentivized.

6.2.06 Inclusive governance implies that people should be principal participants in the planning and implementation processes for their development. But obviously this has not happened and the planning processes in this country have become exercises conducted by bureaucracy who are far removed from the needs and aspirations of people. Hence the stress has to be to correct the anomalies and to stress on local self governance as a remedy. Local self-government, as elaborated in our Constitution is a convergence between accelerated growth and inclusive growth. Securing inclusive growth without inclusive governance would, obviously, be an unacceptable proposition and self governance provides the platform for the same. The overarching components of governance include (a) policy formulation (b) implementation (c) monitoring and evaluation. In all these

three processes, people are at the heart of them all. If the three components adopt the guiding principles, chances of the success would be greatly enhanced. Policies formulated by the Centre and superimposed on states are often at odds with the ground realities. They do not reflect the aspirations of the people and defy the very logic of governance which is meant to be participatory in nature and where people are at the core of policy making. While the groundwork for the same (grass-root governance) has been laid by the 73rd Amendment to the Constitution, devolution of powers to local bodies did not flow, at the desired pace and therefore, grass-root planning did not materialize effectively.

6.2.07 Panchayati Raj, therefore, needs to be revisited and must become the principal governance reform to reinforce economic reform in a manner that secures inclusive growth.

6.2.08 Activating and strengthening institutions of local self-government calls for conformity to certain broad and generally well-accepted principles of institutional design. These include:

- Holding of regular elections to local bodies;
- Clarity in the functional assignments to different levels of local bodies in rural and urban areas;
- Matching the devolution of functions with the concomitant devolution of funds and functionaries so that the devolved functions might be effectively performed;
- Ensuring that elected representatives of local bodies effectively wield their powers;
- Building capacity in local bodies to undertake planning;
- Ensuring a healthy, constructive and mutually fruitful relationship between officials appointed by the State Government and elected local bodies; and
- Providing for collective decision-making through Gram and Ward Sabhas and holding the local body to account for their performance, are some of the features of a good design for local self-government.

6.2.09 In addition, it is important to create systems and institutions for planning and delivery of public services, including the creation of information systems, and for monitoring evaluation and ensuring accountability. These issues are discussed in detail in

the volume on Decentralized Governance of this Report (Volume IV).

6.2.10 Systems of decentralized governance in the North-East Region show a wide diversity, unparalleled in any other region of the country. While the Panchayati Raj system fully covers two of the eight States of the Region – Sikkim and Arunachal Pradesh, three other States (Mizoram, Meghalaya and Nagaland) are entirely exempted and have their own local systems. The remaining three States – Assam, Tripura and Manipur – have both Panchayati Raj and non-Panchayati Raj areas existing side by side. While such diversity is expected in a region that is itself very diverse it also makes local governance complex, since it is based on the immense ethnic, linguistic and religious diversity, seen in the region. However, a common feature of these diverse systems of self-governance is that all of them need strengthening in structure and administration. This is true of North-Eastern Region, as it is of most parts of the country. The special focus needed in decentralized governance of the North-East region is emphasized elsewhere in the Report (Volume IV).

6.2.11 Institutionalising participative planning is a key factor in strengthening governance. The District Plan must reflect the priorities of the people as brought out in the deliberations of village Panchayats and Gram Sabhas. These bodies would also identify beneficiaries of socio-economic development programmes, as well as location of works and projects. Prominence needs to be given to the requirements of historically discriminated and marginalized sections including women. On its part the State Governments must clearly inform the DPC about fund availability and schemes proposed to be transferred or implemented through the local bodies. Done in this manner the District Plan can become the most potent instrument of people's empowerment.

6.2.12 There is an imperative need for ensuring convergence of centrally funded institutions in the North-Eastern Region. North-East India has a plethora of centrally funded institutions such as the Indian Council for Agriculture Research (ICAR), the North East Space Application Centre (NESAC), Central Agricultural University, Geological Survey of India, Archeological Survey of India, Botanical Survey of India, amongst others. Each of these institutions has functioned independently with no significant contributions to the knowledge pool of the states. This has happened primarily because of lack of convergence and the absence of an institution for bringing about that convergence. It is important to identify and link such institutions so that the North-Eastern States can tap into the rich resources and knowledge bank that each of these centrally funded institutions has created or is in the process of creating. A proposal for a North-Eastern Unit of the

Planning Commission is advanced elsewhere in the Report (Volume IV) which requires the immediate attention of Union Government.

6.3 Promotions of Academic Disciplines related to Culture, Philosophy, History and Constitutional Values

6.3.01 Academic disciplines relating to certain social science and humanities subjects are getting marginalized in School and University education partly because of non-availability of funds and inadequate enrolment of students. This has had an impact not only on education but also on social development and national integration. In multi-cultural societies this has serious implications in the long run. As such, Central and State governments should impress upon Universities the need for incorporating knowledge of history, philosophy and culture in the interest of promoting social harmony and national integration.

6.4 Conclusions and Recommendations

(1) Migrants vs. Locals threatening Social Harmony and Development

6.4.01 An emerging challenge to Constitutional governance and national integrity is the situation arising out of large scale migration of people from one State to another often in search of better economic opportunities. Some political parties tend to create disaffection between the locals and migrants with a view to consolidate vote banks resulting in piquant situations of law and order and social harmony. The fundamental right to free movement is sometimes threatened. It is a challenge to the State and Central Governments and requires careful handling by the governments concerned. The Centre has a duty to evolve guidelines in consultation with States to deal with crisis situations and get support of all political parties to follow the norms. Extreme disparities in the quality of life and continued backwardness of certain regions are responsible for migration which calls for a review of development policies and administrative arrangements. Penalising the migrant population will be counter-productive. (Para 6.1)

(2) Governance has to be responsive to needs of Human Development:

6.4.02 Equity and inclusiveness is fundamental to unity and development in multi-cultural societies. This is a function of decentralized governance and social justice which is part of the Constitutional Scheme. The bureaucracy and political leadership will have to change their traditional mindsets and develop responsiveness at all levels of the

administration. The recommendations of the Second Administrative Reforms Commission (2009) in this regard require the Central Government's consideration on a priority basis. People's participation is inevitable in inclusive governance and the bureaucracy has to learn new ways of working with the people. Institutionalising participative planning from the grassroots level upwards is a key factor in strengthening democratic governance and inclusive development particularly in a market oriented economy.

6.4.03 There is need for ensuring convergence of Centrally-funded institutions in the North-Eastern Region so that the North-Eastern States can tap the knowledge and resources that each of these institutions has created or is in the process of creating. The North-East Council and a regional unit of the Planning Commission can help the process of all round development of the region which is of prime importance to streamline Centre-State relations in this regard.

(3) Promotions of Academic Disciplines related to Culture, Philosophy, History and Constitutional Values:

6.4.04 Academic disciplines relating to certain social science and humanities subjects are getting marginalized in School and University education partly because of non-availability of funds and inadequate enrolment of students. This has had an impact not only on education but also on social development and national integration. In multi-cultural societies this has serious implications in the long run. As such, Central and State governments should impress upon Universities the need for incorporating knowledge of history, philosophy and culture in the interest of promoting social harmony and national integration.

CHAPTER 7

GOOD GOVERNANCE AND DELIVERY OF PUBLIC SERVICES

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7

GOOD GOVERNANCE AND DELIVERY OF PUBLIC SERVICES

7.1 Introduction

7.1.01 Ensuring good governance and achieving social and economic justice are amongst the most important constitutional goals of our time. Three methodological and doctrinal approaches among others, are suggested here, to enable the achievement of these goals: (1) empowering citizens with a corruption-free constitutional right; (2) greater decentralization; and (3) the preparation of a periodic social audit.

7.1.02 Governance has been defined in terms of exercising power for economic and social development. It is not easy to outline an exhaustive list of ingredients for the term 'good governance', but it is acknowledged that at the very least good governance is a term that relates to a government that is, 'among other things, democratic, responsive, accountable and transparent, and which respects and fosters human rights and the rule of law'. The relevance of good governance cannot be overemphasized. As the United Nations Development Program rightly noted, it is only through good governance that we can 'find solutions to poverty, inequity and insecurity'.

7.2 Corruption Retards the Movement towards Good Governance

7.2.01 In focusing on the achievement of good governance, one important issue that must be addressed is that of corruption. Transparency International has ranked India 71st out of 102 countries in the world in the Corruption Perception Index, 2005. In India, it has been seen and acknowledged that corruption seriously impacts the rule of law. It also has dramatic negative consequences for development. This is because development is directly linked to economic and social policies the development and administration of which is impacted by the level of corruption in public administration. It affects economic growth by discouraging foreign investment, diverting resources for infrastructure, health, education and other public services. In essence, corruption poses serious challenges for

governance, as states cannot achieve the goals of development without ensuring corruption-free governance. The development process ought to be based upon principles of transparency in governance and accountability of the administration. However, due to corruption, there is inefficiency and inequity in resource allocation. The state will not be able to fulfil its mandate responsibly; nor is there any scope for achieving social and economic development.[79]

7.2.02 It has been suggested that one strategy for combating corruption is empowering citizens with a right to corruption-free government.[80] It is important to include the issue of corruption within the human rights discourse. It is crucial to highlight that 'corruption dilutes human rights in a significant way, although it is rarely observed and understood from this perspective. The institutionalized form of corruption creates mass victimization, which threatens the rule of law, democratic governance and the social fabric of any society. Human rights discourse offers powerful resistance to violations of various rights, and the problem of corruption can be addressed by framing it as a human rights violation. The benefit of regarding corruption as a human rights issue will enhance efforts to contain corruption, due to the development of international human rights law as an important aspect of international law, as well as national developments in constitutional, legal, and judicially recognized rights. The corruption problem, when framed as a human rights issue, can empower the judiciary to enforce certain rights for the citizenry, demand a transparent, accountable and corruption-free system of governance in India, and help establish a basis to monitor this process'. The inclusion of a fundamental right to a corruption-free public services will enable citizens to directly challenge cases of corruption, and it will elevate cases of corruption to be 'constitutional violations'. The use of public interest litigation coupled with such a right may enable the judiciary to effectively respond to the problem of corruption. The Commission is inclined to endorse this view to make corruption free governance as part of human rights jurisprudence.

7.3 Decentralisation as a strategy to improve delivery of Public Services

7.3.01 The next issue to focus, especially with respect to Centre-State relations, is the concept of power-sharing. It has been acknowledged that decentralization has the power to act as a counter to the tendency towards central absolutism by enabling power sharing and thereby providing for long-term stability. The dispersion of authority both vertically (across levels of government) and horizontally (over multiple institutions, agencies, or decision makers) will enable more careful decision making, control of abuses

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[79] C. Raj. Kumar, CORRUPTION, HUMAN RIGHTS, AND DEVELOPMENT: SOVEREIGNTY AND STATE CAPITY TO PROMOTE GOOD GOVERNANCE, 99 Am. Soc'y Int'l L. Proc. 416 at 419.

[80] Id.

of power, and institutionalization or a system of policy making cross-checks. One methodology through which social and economic justice can be sought to be achieved is greater decentralization on related subject matters. The nature of coordination between the local governments and the Centre and State Governments will have to be evaluated, but certainly furthering power sharing can ensure greater accountability and hold the promise of achieving results.

7.4 Greater Attention needed on Timely Implementation of Directive Principles

7.4.01 The effective enforcement of the Directive Principles of State Policy is the Constitutional strategy for promoting good governance and for delivery of public services. There appears to be no methodology now in place to extract accountability in this regard. One methodology that could be proposed is that States (with the assistance of the Centre) must be required to frame periodic guidelines on what steps they will be undertaking to perform their role for the achievement of the Directive Principles of State Policy. Certain obligations will necessarily require more Central involvement and others will require less, but the framing of periodic guidelines will ensure that the issue of Directive Principles is not ignored simply because these are not enforceable in a court of law.

7.4.02 In order to follow-up on periodic guidelines, there could be a periodic 'social audit' that is conducted in each State to examine the degree to which the State is performing to its obligations under the Directive Principles chapter and the guidelines that have been framed. This could be framed along the same lines as the financial audit that is presently conducted by the Comptroller & Auditor General of India. Just as the Constitution creates the position of a Comptroller & Auditor General of India to perform a certain role with respect to financial accountability, the Central and State Governments may create a Social Auditor with independent status for studying social accountability of implementation of Directives on agreed parameters.

7.5 Public-Private Partnership in Delivery of Public Services

7.5.01 The question that is often posed for this Commission is whether the present public institutions and federal framework explicitly spell out the grammar of good governance from the perspective of constitutional design?

7.5.02 What measures should be taken for the participation of the emerging private stakeholders in the scheme of governance for promoting the welfare of the people? This is essentially a public governance and accountability question, set in the background of the manner of designing a public institution. As Yale Law School professor Jeremy Mashaw argues, public governance accountability regimes tend to present themselves as epistemically complete.[81] Criteria for judgement are established and exposed to public view. Actions are judged in accordance with the preexisting norms. At the other end of the spectrum, lie those accountability regimes normatively open social systems. Thus, given these differences, a shift in accountability is bound to create anxieties.[82]

7.5.03 India also echoes a similar sentiment as it struggles simultaneously for a legal political accountability regime, structured by a host of doctrines, norms and rules defining who has the standing to complain, who is a public authority subject to public law norms, what sort of claims qualify as 'justiciable', through what procedures administrative or judicial consideration can be obtained, and the limits on the reviewing body's competence. On the other hand, is the larger even more graver accountability question of the private actors in the sphere of public services. Should the non-governmental activities also be subject to similar accountability mechanism? Is there a set of rules and doctrines in place that structure the accountability regime of our public institutions and provide the standard against which performance is to be measured? Should the content of the relationship between "who" and "whom" be hierarchical, asymmetrical? These are essentially the questions that have to be addressed while one visits public-private partnerships. The focus has to be on the institutional design.

7.5.04 On the political development front, the challenge really is that of finding the appropriate federal framework for assuring harmonious Centre-State relations and national unity and integrity. This is because a comparative study of other federal regimes has shown that the countries have modified their political structures for adjusting to the changing political configurations. However, before one can embark on such an exercise, it may be necessary to provide a concrete ground for federalism as a political choice for a federal republic like India to find the nature and motivation of Indian federalism.

7.5.05 Below par performance of centrally sponsored schemes, and the continuous allegations of bureaucratic corruption, lack of funds, non-cooperation by the states in implementation have created much tension between Centre-State relations. Similarly, in

[81] Accountability and Institutional Design: Some Thoughts on the Grammer of Governance.Public Accountability: Design, Dilemmas and Experiences, Chapter 5, pp. 115-156, Michael Dowdle, ed., Cambridge University Press, 2006.
[82] Ibid

the case of delivering basic amenities, absence of national measurement standards has been alleged to be the main culprit behind not giving the citizenry their basic human rights. Furthering this crisis is the state of education in our country. This is despite making of the same a fundamental right today, and having enacted a legislation to implement it. In each of these concerns, runs a common thread - the impact of federalism on public provision in social policy. Does federalism inhibit public provision and retard the development of the welfare state in the first instance? How does federalism shape the policy design of social policies, once such policies have been adopted? Does federalism create obstacles to restructuring and retrenchment, just as it might have originally inhibited social policy construction? Once social programs have been established, does federalism create obstacles to the restructuring of such programs and, as such, render the system impervious to certain types of policy change? These are the questions that come up again and again in the discourse on good governance.

7.5.06 In this debate, whether it is for establishment of national standards or customization of the Centrally Sponsored Schemes, the question is ultimately one about the structure of cooperative federalism, that, raises three important questions: (1) What are the respective state and national interests in particular policy domains, putting aside any potential constitutional impediments to organizing state and federal activities either separately or jointly? (2) What types of funding arrangements promote responsible and accountable public spending? (3) What sort of regime of legal rights and responsibilities is likely to support the programmatic purposes established either by state or federal legislation?

7.5.07 Looking at the way public services are organized in other federal countries will be of help to design the policy and programme appropriate to the Indian Constitutional Scheme. Even at the cost of repetition, some ideas in this regard are reproduced here in relation to the manner health care services are organized in Canada, another federal country. This may be of particular interest at the present juncture when the Government of India is contemplating the adoption of a National Health Bill involving all three tiers of government.

7.6 Some Comparative Ideas on Organizing Health Care Services in Canada

7.6.01 Two types of considerations are relevant to knowing where on the independence/interdependence continuum a program or policy may be. One is the extent to which there is joint federal-provincial decision-making, implementation or funding.

The other is the extent to which, despite the absence of joint federal-provincial activity, the actions of one order of government may impact the other and influence its choices. Where that influence requires the second order of government to make modest adjustments only to its program, the relationship is more independent than interdependent. Where the influence effectively "forces" important changes in the priorities or structures of the second order of government, the relationship is more interdependent.[83]

1. **DISENTANGLED FEDERALISM:** In scenarios in which there is no interdependence and no hierarchy, the relationship is described as **disentangled federalism**.[84] Neither jurisdiction is *de facto* subordinate to the other. In a disentangled model of federalism there is very little interdependence between the two levels of government. Each level has a clearly defined constitutional role, and each operates within "watertight" compartments.

   Disentangled federalism was the original form of federalism that operated in health care in Canada, because health care was, constitutionally, a provincial domain with little federal involvement. Under the Constitution, the provincial level of government is granted the majority of legislative power in the area of health care. Section 92(7) of the *Constitution Act, 1867* grants the provinces exclusive authority over the "establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals" (Department of Justice Canada, Constitution Acts 1867 to 1982). In other words, only the provinces, not the federal government, may pass laws regarding the creation and administration of hospitals and mental health facilities. Canada's modern health care system, however, involves much more than simply the establishment and operation of hospitals. In response to this, the courts have interpreted the provincial power over hospitals in a very broad manner, extending provincial legislative authority to almost all areas of health care delivery. This includes areas such as health care insurance regulation, the distribution of prescription drugs, and the training, licencing and terms of employment for health care professionals, such as dentists, doctors, and nurses. This judicial interpretation has resulted in provincial dominance in the area of health care, at least with respect to the power to create laws concerning how health care is delivered to the majority of Canadians.[85]

   The strengths of this model are that it gives jurisdictional autonomy and scope for provincial experimentation without interference from the federal

[83] Supra foot note 32, pp. 6
[84] Ibid
[85] Supra note 34.

government, as each works independently with little interaction. On the other hand, this model makes it difficult to establish national programs and national standards since there is no interdependence between the provincial and the federal governments.[86]

2. **UNILATERAL FEDERALISM:** In scenarios in which there is interdependence and the relationship is hierarchical, the relationship is described as **unilateral federalism**. The federal government directs provincial policy, usually through conditional funding.[87]

   An instance of this model is the *Canada Health Act*, 1984 that included a penalty regime, under which the federal government would hold back funding to those provinces that failed to meet any of the Act's criteria. Immediately following the Act's introduction in 1984, the federal government announced it would be applying penalties to those provinces that permitted user fees and extra-billing (the federal government later released the money it had held back, but only once the provinces had eliminated these practices). In the 1990s, the federal government applied the penalties on several occasions, mostly when provinces permitted the application of user fees in private medical clinics.[88]

   From the perspective of the federal government, the introduction of the *Canada Health Act* was an important instrument to maintaining certain national standards in public health care. The experience of this model in Canada has been that from the perspective of the provinces, the federal action was viewed as an encroachment on provincial authority and jurisdiction. This concern was magnified, moreover, by the fact that the federal government had significantly, and unilaterally, reduced its financial commitment to provincial public health care plans.[89]

   Thus, the model's major weakness is that it infringes upon jurisdictional autonomy.

   On the other hand, the model is considered the most effective for national programs and associated benefits due to minimum overlap between policies, and economies of scale. This is demonstrated well by the national medical and hospital care in Canada.[90]

[86] Supra note 33.
[87] Supra note 32
[88] Supra note 34
[89] Ibid
[90] Supra note 33.

3. **COLLABORATIVE FEDERALISM:** In scenarios in which there is interdependence and the relationship is non-hierarchical, the relationship is described as **collaborative federalism**. Here, the federal and provincial governments work collaboratively to attain policy goals, and there is no coercion on part of the federal government.[91]

Collaborative governance has been defined in several ways. According to Chris Ansell and Alison Gash, collaborative governance is: "A governing arrangement where one or more public agencies directly engage non-state stakeholders in a collective decision-making process that is formal, consensus-oriented, and deliberative and that aims to make or implement public policy or manage public programs or assets."[92] A somewhat broader definition is offered by Mark T. Imperial who suggests that: "Governance refers to the means of achieving direction, control, and coordination of individuals and organizations with varying degrees of autonomy to advance joint objectives."[93] In general, what characterizes this phenomenon is a co-ordinated yet non-hierarchical, non-authoritarian form of decision-making involving governmental and non-governmental participants working toward a common objective.

In the case of Canada, a national collaborative governance that is meant to have an impact "on the ground" often needs to involve, not only the federal and provincial/territorial governments, and local governments, but also needs to include non-governmental structures – voluntary sector organizations, professional associations and the like - that are themselves sub-divided in national, provincial and local chapters. In other words, the multiple levels of government are paralleled by multiple levels in the non-governmental sector. Since this is an area in which both the federal government and provincial/ territorial governments have a legitimate role, and where the involvement of civil society is needed to ensure "traction" at ground level, collaborative initiatives have become a way of "doing business." The key questions that need to be asked in such a model are: How a number of diverse organizations, each independent within its own sphere, can manage to co-ordinate their actions in pursuit of a common goal. What is the initial impetus that brings them together, and the common bond that keeps them together? What structures, collaborative practices and leadership competencies do they use to achieve co-ordination and achieve meaningful results?

[91] Supra note 32.

[92] Ansell, Chris and Alison Gash, 2007. "Collaborative Governance in Theory and Practice." Journal of Public Administration Research 18, p. 544.

[93] Imperial, Mark T. 2005. "Using Collaboration as a Governance Strategy:Lessons from Six Watershed Management Programs."Administration and Society 37 (3), p. 282.

An example is the Canadian Social Union Framework Agreement. The main features were the commitment to obtain provincial agreement before introducing new programs and the agreement on a collaborative mechanism for settling disputes. The provinces and territories agreed to eliminate residency-based policies that constrained access to social programs for migrants, and to use funds transferred from the federal government for agreed upon purposes – which included health care policy. In return, the federal government agreed to limit the use of its spending powers by, for example, consulting with provincial and territorial governments prior to renewing or altering existing social transfers; not introducing new social programs funded through intergovernmental transfers without the agreement of a majority of provincial governments; and providing prior notification before introducing new Canada-wide social programs funded through direct transfers to individuals.[94]

The major strength of this model is that it allows for national programs while protecting jurisdictional autonomy. On the other hand, its weaknesses are that the model has the potential for excluding the public, requires an effective dispute resolution mechanism and blurs accountability.[95]

As a corollary to the evolution of best practices in public-private partnership in the delivery of public services, it is necessary to adopt national measurement standards on performance. Looking at the way public services are organized in other federal countries, the Commission strongly recommends the model of "collaborative federalism" in which there is inter-dependence but no hierarchy. The process from policy making to performance assessment is more collaborative without any coercion on the units from the federal government. The collaboration extends to non-State stakeholders and through the collective, transparent, rule-based decision-making processes public assets and services are managed with maximum efficiency and accountability. The key element in collaborative federalism is non-hierarchical, non-authoritarian form of decision-making involving governmental and non-governmental participants working toward a common objective within a legal framework. This Commission would recommend such a model for the promotion of good governance.

[94] Supra note 34.
[95] Supra note 33

7.6.02 The Commission would recommend a National Standards Organization for working out the standards for social sectors on the lines of the Bureau of Indian Standards for manufacturing sector.

7.7 Conclusions and Recommendations

(1) Ensuring Efficiency and Accountability in Delivery of Public Services

7.7.01 Among the many strategies for ensuring efficiency and accountability in the delivery of public services are two Constitutionally mandated. They are empowering citizens and decentralizing administration. Though much ground is covered in these directions, there are many possibilities for greater innovation and experimentation. Volume IV of the Report has made detailed recommendations on decentralized governance. [Para 7.3]

7.7.02 The need for citizen empowerment is increasingly being acknowledged by legislations like the Right to Information Act, the National Rural Employment Guarantee Act, the Lok Ayukta Act etc. However, good governance is a far cry because of the wide prevalence of corruption and the poor administration of criminal justice. Corruption retards economic growth and imposes heavy burden on the poorer sections of the people. States cannot achieve the goals of development and social justice without ensuring corruption-free governance. A rights-based approach is the Constitutional way to fight corruption. The corruption problem, when framed as a human rights issue, can enable the judiciary to enforce certain rights for the citizenry, demand a transparent and accountable system of governance and help establish a basis to monitor the process. The inclusion of a fundamental right to corruption-free delivery of public services will enable citizens to directly challenge cases of corruption as Constitutional violations and to seek Constitutional remedies. The Commission is inclined to recommend such an approach as the problem has assumed serious proportions warranting drastic remedies.

(2) Time-bound implementation of Directive Principles through Decentralised Governance:

7.7.03 The effective implementation of all the policies enumerated in the Constitution and declared fundamental in governance within an agreed time-frame is another strategy to deliver good governance and ensure human development. There is no effective method to ensure compliance of governments in this regard and therefore

publicly announced Guidelines are required to be developed by the Centre in consultation with states. This will demand effective devolution of powers and functions to the local governments as well. Coupled with social audit of implementation of Guidelines through an appropriate mechanism, decentralized system of governance can bring about the reform needed for effective delivery of essential public services.

(3) Public-Private Partnership in Delivery of Public Services:

7.7.04 Private participation in public administration is being increasingly solicited in a variety of fields like education, health etc. for a variety of reasons. However, an appropriate regulatory framework to ensure standards and accountability in the delivery of public services is still not available. The extension of the concept of 'State' to private entities is not always a viable option though it is being used by Courts to extract accountability. The Commission would recommend an institutional design to be developed keeping in view the demands of rule of law, human rights and good governance. There are stray examples of State initiatives which seem to be delivering results in certain sectors. These are to be collected, studied and put on the public domain for adoption elsewhere.

7.7.05 As a corollary to the evolution of best practices in public-private partnership in the delivery of public services, it is necessary to adopt national measurement standards on performance. Looking at the way public services are organized in other federal countries, the Commission strongly recommends the model of "collaborative federalism" in which there is inter-dependence but no hierarchy. The process from policy making to performance assessment is more collaborative without any coercion on the units from the federal government. The collaboration extends to non-State stakeholders and through the collective, transparent, rule-based decision making processes public assets and services are managed with maximum efficiency and accountability. The key element in collaborative federalism is non-hierarchical, non-authoritarian form of decision-making involving governmental and non-governmental participants working toward a common objective within a legal framework. This Commission would recommend such a model for the promotion of good governance.

7.7.06 The Commission would recommend a National Standards Organization for working out the standards for social sectors on the lines of the Bureau of Indian Standards for manufacturing sector.

CHAPTER 8

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

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8

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

8.1 Introduction

8.1.01 This final volume of the Report is of primary concern to the citizens and the governments alike as it suggests a roadmap for good governance in the country within the federal framework of the Constitution. Empowering the citizen, decentralizing the administration, taking the Directive Principles more seriously and increasing the space for private participation in governance are the key principles emphasized in the roadmap. Inclusiveness and equity in approaches, transparency and consultativeness in style are twin strategies which seem to deliver results in the long run. The challenge is to bring about such an administrative culture at all three levels of government.

8.1.02 No doubt, the situation is getting complicated by large-scale migration of population, political mobilization around sectarian and regional interests, wide-spread militancy and violence by terrorist groups, and pervasive corruption in public life. The positive element in this otherwise depressing scenario is a steady growth in the economy, deep penetration of human rights and rule of law in the popular culture and an abiding faith in democracy and pluralism among all sections of people. These are strong foundations of constitutionalism which keeps the country united on the path of democracy and development. A few changes as suggested here in the style of governance will hopefully bring about the desired directional reforms to keep the momentum towards the evolution of a just social order that the Indian Constitution envisages.

8.1.03 This Chapter therefore has reproduced the various recommendations in previous chapters with a view to focus attention of the Central and State Governments on their respective roles and responsibilities in a federal framework towards promoting socio-economic development, public policy and good governance.

8.2 Policy making to be more inclusive and Consultative

8.2.01 In a large, complex and diverse country like India, policy making on major

issues affecting the lives and livelihoods of people to be acceptable and practical need to be not just consultative but perceived to be so. It is therefore recommended that in sector-specific subjects, mechanisms like public hearings may be statutorily employed involving Panchayats and Municipalities. This should be done through holding of 'mandatory consultation' wherein the governments, both at the Centre and in the States, should clearly respond to the views expressed and concerns raised at these public hearings before finalizing the policies for adoption. The Commission also recommends that the policies themselves should clearly identify the different categories of stakeholders who would be affected, in one way or other by the policy. Further, the policies should contain clear Guidelines on implementation and monitoring with reference to identified parameters and milestones.

(para 2.10)

8.2.02 The Commission emphasizes the need to have flexibility in the policies with the object of catering to the diversity. The Commission strongly suggests stopping the "one policy fit all" approach.

(para 2.1.04)

8.2.03 As a corollary to the above approach, the Commission also recommends constitutional empowerment of the people to petition the appropriate government for making or amending policies wherever needed. Today this is happening through the intervention of the Court in public interest petitions. Article 350 does envisage such a procedure for redressal of grievance in respect of delivery of public services. This approach would have a two-fold purpose: first, would help to preserve the separation of powers, and second, would enable the policies to be citizen-centric.

(para 2.1.05 & 2.3.01)

8.3 Need to improve Vigilance Systems in Public Administration:

8.3.01 Civil Society involvement in public policy and administration is the best strategy for good governance. What is important therefore is to maximize opportunities therefor while making policies and programmes. In this regard, the Commission recommends, *inter alia*, the following steps:

a. Let "good governance" be introduced as a Directive Principle of State Policy.

(para 2.2.02)

b. To increase the efficiency from civil servants, the rules of recruitment, remuneration and career progression need to be completely revamped on the lines recommended by the Second Administrative Reforms Commission (2008). The civil servants need also to be insulated from political pressures to be able to perform their functions objectively and fairly.

(Para 2.2.04)

c. The citizen's right to have a corruption-free government be acknowledged as part of administrative law.

(Para 2.2.03)

d. There is a need for the All India Services to be politically neutral and professionally independent. Vigilance structures and Lok Ayuktas need to be strengthened to constantly monitor and improve the quality of public services.

(Para 2.2.05)

e. It will be desirable to disseminate the achievements and good practices of better performing States through publicity campaigns and conferences to make citizens realize what their fellow citizens in some other States have been able to achieve with same or less resources.

(Para 2.2.05)

f. All service providers, government or private, be asked to prepare and publish the entitlements of citizens in relevant sectors through "Citizens' Charters".

(Para 2.3.01 & 2.3.02)

g. Social audit of the major policy initiatives of government at periodic intervals be made a mandatory practice and reports be placed on the table of the Legislature every two years with comments from appropriate governments.

(Para 2.3.03)

8.4 Need to develop a positive approach to Sectarian Mobilisation

8.4.01 Given the multiple identities and diversities of people, it is natural to expect political mobilization around sectarian and regional interests, sometimes appearing to jeopardize national purpose. There is a need to take a balanced and mature approach towards such developments particularly by parties ruling the Central Government.

(Para 3.1.03)

8.4.02 The Indian Constitution allows enough flexibility to accommodate regional identities and sectarian and even separatist movements as long as they abide by the Constitutional parameters. Unity in diversity is a beautiful concept difficult to practice in a federal arrangement; nevertheless the experience of 60 years of the Republic is proof of strong foundations and sound understanding of the idea that is INDIA.

(Para 3.1.04)

8.4.03 Thus, the Commission is of the view that movements within States that demand additional accommodation for regional identities, while otherwise desiring to remain within the fold of the Constitution, ought to be treated with respect and consideration, even in situations where the Central Government might not entirely share the sentiments and perceptions of that movement. This issue is discussed in detail in Internal Security Volume V of the Report.

(Para 3.1.08)

8.5 Coalition politics is a game to be played within the Constitutional Framework

8.5.01 Coalition politics need not be inherently problematic as long as the parties follow the rules of the game and respect the authority of the law and the Constitution. It may slow-down the pace of development occasionally; but the practice of evolving the 'Dharma' of common minimum programme did help to overcome difficulties while controlling the excesses of the dominant coalition partners. Coalition government can be looked at as a sign of genuine accountability of the uniquely Indian polity and its system of governance.

(Para 3.1.06)

8.5.02 What is important is to ensure that the Constitutional status of State Governments is given due recognition by the Central Government while taking decisions particularly in relation to local governments. The culture of shared governance is to be carefully nurtured if good governance is to be offered to the people.

(Para 3.1.18)

8.6 On Local Self-Government and Centre-State Relations

8.6.01 The Commission is of the view that the Central Government should be

cautious about bypassing the machinery of States while allocating funds to the local bodies, primarily for two reasons. First, keeping States out of the process leads to an anomalous situation where the entity with the constitutional powers with regard to certain facets of social and economic policy, are deprived of the power to function effectively. Second, it may so happen that the Central Government allocates funds for a certain period of time, but it afterwards unable or unwilling to continue disbursing funds, thereby resulting in languishing of certain welfare programmes with grave consequences for general public interest.

(Para 3.2.02)

8.6.02 In view of the Centre's generally more robust financial position, it is inevitable (and desirable) that it would be allocating funds for the purposes of economic and social development in the States. However, the Commission is of the view that such funds should invariably be allocated through the machinery of the State governments.

(Para 3.2.03)

8.7 Social Justice is the signature tune of the Indian Constitution

8.7.01 Improving the lot of the poorest of the poor and providing equal opportunities for all is to be the priority of all levels of government for which the Constitution has provided the agenda in Parts III and IV consisting of Fundamental Rights and Directive Principles of State Policy respectively. It is the general impression that successive Governments both at the Centre and in the States have not been successful in the implementation of the Directives which form the core obligations of the State vis-à-vis social justice and welfare. It is time to recognize it as the joint and separate responsibility of all three levels of government and demand time-bound implementation of the obligations thereunder. Let the State and Central Governments acknowledge the obligations and introduce it in Annual Budget Statements.

(Para 4.2.06)

8.8 Need for assessment of state performance in respect of Directive Principles

8.8.01 There has not been any independent assessment of the performance of State and Central Governments in respect of implementation of Directive Principles which are fundamental for governance. The existing system of Plan implementation

assessment reports do not fully take care of implementation of Directive Principles of State Policy. The Human Development Reports being brought out by some states tend to give an incomplete picture of the situation and the UNDP report on the subject is equally not reflective of the total picture. As such, Government should itself develop acceptable parameters to measure progress on education, health, housing, nutrition and related matters, particularly in States where the situation continued to be of concern for long periods. Media reports are often alarming and sometimes misleading. In the circumstances, objective and authoritative collection and dissemination of information on performance in relation to control of extreme poverty is imperative need for responsive and responsible governance. It is also part of the obligation under the Millennium Development Goals of U.N. to which India is a signatory.

(Para 4.2.01)

8.9 Directive Principles may be reviewed and enriched periodically

8.9.01 Given the growth of knowledge and technology in recent times, it has become necessary to review the Directive Principles of State Policy for its further development. New responsibilities need to be undertaken by the State. Climate change is an illustrative example in this context. The Commission would recommend review and revision of the Principles contained in Part IV of the Constitution to keep with the changing times.

(Para 4.2.12)

8.10 Shared Responsibility and State Accountability

8.10.01 It is a vexed issue to fix responsibility when powers and functions are shared among different levels of government. Based on the practice in federal systems, commentators have identified different models of governance depending upon the nature and scope of shared responsibilities and decision-making powers. They are often described as (a) unilateral federalism in which the federal government directs provincial policy usually through conditional funding; (b) collaborative federalism in which both governments work collaboratively to attain policy goals and is characterized by the absence of coercion from the federal government; and (c) co-operative federalism where roles and responsibilities of different tiers of government are well defined which necessitates co-operation from all levels of government. India needs to move towards collaborative federalism model.

(Para 4.11.03.1, 4.11.03.2, 4.11.03.3 & 4.12.12)

8.10.02 If one were to categorize the institutional design under the recently adopted Right of Children to Free and Compulsory Education Act, 2009 it tends to be a model of co-operative federalism where the Central Government sets policies and standards and extends technical and financial assistance. The State and local governments are to implement the provisions for which the legislation defines the roles and responsibilities. The institutional design envisages co-operation though it is not directed by the Centre under threat of sanctions. The Commission is inclined to endorse the model for implementation of Directive Principles which largely contain subjects in the States' domain under the Seventh Schedule.

(Para 4.3.01, 4.3.02 & 4.11.01)

8.10.03 Regarding steps towards the attainment of universal elementary education, it is the view of the Commission that the suggestions of the states and political parties regarding having an universal accreditation system and standard setting body with participation from the centre, state and private bodies be favourably considered as the same would go a long way in laying down the National Indicators and performance standards. Further, the Commission recommends the Union Government to consider the U.S. experience and examine whether something like a "Charter Option" will be an appropriate mechanism to adopt for effective implementation of the right of every child to free and compulsory education under the Act of 2008.

(Para 4.6.06 & 4.8.09)

8.10.04 By increasing the participation of Civil Society and non-government organizations in the implementation process and by providing for social audit of welfare legislation, the Commission believes that State accountability can be ensured. The framework employed in the National Rural Employment Guarantee Act in this regard is to be particularly commended and deserves to be emulated in social welfare programmes. The Commission would recommend a central legislation incorporating minimum standards in the conduct of social audit processes so that the delivery system of public services may be further strengthened while administration is democratized to the advantage of the people.

(Para 4.6.05 & 4.6.06)

8.10.05 In this regard, the policy of the NREGA guidelines regarding incorporating

provisions relating to Transparency, Participation, Consultation and Consent, Accountability and Redressal while drafting such a Central Social Audit Legislation in particular may be noted. Finally, it would be worthwhile to study the positive experience of Andhra Pradesh in conducting Social Audit in NREGA to understand the means of making the government the facilitator and the people vigilant in undertaking the social audit process.

(Para 4.13, 4.14, 4.15 & 4.16.02)

8.11 Public-Private Partnerships for better Delivery of Services:

8.11.01 In the delivery of public services private sector participation may help in introducing innovative ideas, generating additional financial resources and introducing corporate management practices for improving efficiency and accountability to users.

(Para 4.17.05)

8.11.02 In this regard, the Commission would also like to point out that the entire criticism on PPPs is based upon a misunderstanding of the very term. The Commission would like to reiterate the definition of PPP and distinguish it from privatization. The Planning Commission defines PPP to be 'involving private management of public service through a long-term contract between an operator and a public authority, whereas privatization involves outright transfer of a public service or facility to the private sector.'

(Para 4.17.03)

8.11.03 However, to ensure democratic accountability the regulatory mechanisms in PPP projects has to be properly structured and organized based on fair contractual terms. Special interest groups should not have opportunity to capture the regulatory system. The People's Campaign for Decentralised Planning introduced in Kerala sometime ago is an interesting example of how self-governing institutions involving people can help delivery of public services better.

(Para 4.18.02)

8.11.04 In the context of ensuring the application of the principles of good governance and directive principles of state policy to the private players, introducing the discipline of human rights into the working of the non-state organization and making the entities democratically accountable, the Commission endorses the views of the states in

this regard. The Commission thus believes that the following suggestions received from the States may be looked into favourably:

i) Drafting a National Policy for creating a mechanism whereby the private players can actively participate in formulation of policies and implementation and monitoring/supervision of projects/programmes. This will ensure utilization of their financial resources, engagement of their human resource expertise and their improved involvement in government policies/projects/ programmes. Further, this will also enable the building of harmonious public-private partnerships.

(Para 4.17.07 & 4.17.08)

ii) The Memorandum of Understanding between the private entity and the government should contain specific clauses after due negotiations that provide for adequate checks and balances to ensure that the entity operates within the framework of the rule of law, spelling out its obligations and duties towards the citizens as also the extent of its liability for breach of duty. In this regard the extent of obligation of the government authority may also be provided and the antecedents of the entity should be duly incorporated.

(Para 4.17.05, 4.17.07 & 4.17.08)

iii) Drafting of a National legislation that provides for the penalties to be levied against the private entities for breach of their duties and for other defaults made in this regard.

(Para 4.7.07)

iv) Holding a Social Audit by the Citizens on such PPPs on the same lines as recommended by the Commission for the creation of a Central Social Audit Legislation according to the Guidelines of the NREGA. In this regard, the Commission recommends that the regulatory agency should incorporate processes and systems whereby the stakeholders would have access to information, would be able to make representations and have full participatory and process rights. In this regard, the Commission recommends that the provisions of the Administrative Procedure Act, 1946(APA) to public participation in the contracting out process could be extended to the regulatory regime so set up in India.

(Para 4.18.03)

v) Amending the definition of "state" under Article 12 of the Constitution to the extent of making the private entities constitutionally liable under the Directive Principles of State Policy to the citizens of India with respect to the performance under the PPPs.

(Para 4.18.03)

vi) Structuring a regulatory mechanism consisting of an independent regulator who would have the authority to oversee all the state regulatory agencies set up in various states for the public delivery of social services in different areas such as education, health, water, employment etc. Further, the building of a self-regulating system through a partnership between state and non-state actors, subject to periodic monitoring and evaluation in terms of certain process and outcome indicators relating to the regulatory mechanism. The Commission is also of the view that if the regulatory agency is allowed to participate through comments on the proposed contractual terms, then the mode of enforcement of contract and their monitoring will be much easier.

(Para 4.18.01)

vii) Setting a system of Accreditation for ensuring the credibility of such non-state organization.

(Para 4.7.07)

viii) The Commission also recommends the strengthening of the Panchayat Raj Institutions so that there can be effective co-ordination and consultation between the Panchayats and the Private Players while designing, implementing and monitoring the PPPs at the grassroots level.

(Para 4.18.02)

8.12 Public Policy Dispute Resolution Mechanism System

8.12.01 In India, in the context of policy making, while this Commission suggests 'consultation' before the making of a public policy, at the same time the Commission also recommends providing a public policy dispute resolution mechanism. The Commission is of the view that the collaborative governance model would be an innovative way of ensuring that public policy dispute resolutions are carried on with the inclusive participation of the citizenry, thereby enhancing the democratic process.

(Para 4.12)

8.13 Fiscal Transfers under Centrally-Sponsored Schemes are Problematic

8.13.01 It is the perception of States to which the Commission is by and large in agreement that CSS has tended to erode state powers and resulted in skewed fiscal relations between the Centre and States. While appreciating the good intentions and importance of CSS in selected areas, it is desired that the States should have control on the design and execution of the schemes. States' priorities and local initiatives are more often ignored in specific purpose transfers ordinarily made under rigid guidelines. The States complain that their financial burdens under the CSS are sometime unilaterally increased. The conditionalities tend to encroach legislative autonomy of States; more so when transfers are made to local bodies and para-statals.

(Para 5.2)

8.13.02 The need is not to sacrifice CSS, but to devise a system under which the federal balance is strictly maintained and accountability established. Some of the schemes can be totally transferred to States; in others enough flexibility be built in to let the States control the design and implementation. Periodic review jointly by the Centre and the States will ensure the co-ordination and the direction necessary to achieve the national purpose, while correcting inefficiencies, leakages and corruption. The mere fact that the Centre is in a position to provide a greater share of funds for projects pertaining to social and economic development ought not to give it a right to dictate terms to States on matters that otherwise fall within the Constitutional domain of States.

(Para 5.2.03)

8.14 Need to provide more "untied funds"

8.14.01 Funds earmarked for States, as far as possible, should not be tied to rigid conditionalities prejudicial to good Centre-State relations. In setting performance targets some flexibility has to be provided to accommodate location specific problems and challenges. In the circumstances, the Commission is of the view that the Centre should bestow greater authority and trust on states in centrally-sponsored schemes and allow the democratic and Constitutional processes to ensure greater accountability on money spent in the name of development.

(Para 5.2.04& 5.2.05)

8.15 Migrants Vs. Locals threatening Social Harmony and Development

8.15.01 An emerging challenge to Constitutional governance and National integrity is the situation arising out of large scale migration of people from one State to another often in search of better economic opportunities. Some political parties tend to create disaffection between the locals and migrants with a view to consolidate vote banks resulting in piquant situations of law and order and social harmony. The fundamental right to free movement is sometimes threatened. It is a challenge to the State and Central Governments and requires careful handling by the governments concerned. The Centre has a duty to evolve guidelines in consultation with States to deal with crisis situations and get support of all political parties to follow the norms. Extreme disparities in the quality of life and continued backwardness of certain regions are responsible for migration which calls for a review of development policies and administrative arrangements. Penalising the migrant population will be counter-productive.

(Para 6.1)

8.16 Governance has to be responsive to needs of Human Development

8.16.01 Equity and inclusiveness is fundamental to unity and development in multi-cultural societies. This is a function of decentralized governance and social justice which is part of the Constitutional Scheme. The bureaucracy and political leadership will have to change their traditional mindsets and develop responsiveness at all levels of the administration. The recommendations of the Second Administrative Reforms Commission (2009) in this regard require the Central Government's consideration on a priority basis. People's participation is inevitable in inclusive governance and the bureaucracy has to learn new ways of working with the people. Institutionalising participative planning from the grassroots level upwards is a key factor in strengthening democratic governance and inclusive development particularly in a market oriented economy. In this regard, the Commission is of the view that District Planning Committees (DPCs) and the Panchayati Raj Institutions as mandated by the Constitution for effective grass roots participation must be strengthened.

(Para 6.2.06 to 6.2.11)

8.16.02 There is need for ensuring convergence of Centrally-funded institutions in the North-Eastern Region so that the North-Eastern States can tap the knowledge and resources that each of these institutions has created or is in the process of creating. This

would also bring in a measure of accountability in these institutions which hitherto have been functioning as independent entities.

8.16.03 The primacy of improving the "Human Development Indices" - health, education, and communication for achieving good governance needs no emphasis. In the area of health and education, it is the view of the Commission that the voluntary systems have to supplement the ability of the state to deliver in these crucial areas.

(Para 6.2.10 & 6.2.12)

8.17 Promotions of Academic Disciplines related to Culture, Philosophy, History and Constitutional Values

8.17.01 Academic disciplines relating to certain social science and humanities subjects are getting marginalized in School and University education partly because of non-availability of funds and inadequate enrolment of students. This has had an impact not only on education but also on social development and national integration. In multi-cultural societies this has serious implications in the long run. As such, Central and State governments should impress upon Universities the need for incorporating knowledge of history, philosophy and culture in the interest of promoting social harmony and national integration.

(Para 6.3)

8.18 Ensuring Efficiency and Accountability in Delivery of Public Services

8.18.01 Among the many strategies for ensuring efficiency and accountability in the delivery of public services, two are constitutionally mandated. They are empowering citizens and decentralizing administration. Though much ground is covered in these directions, there are many possibilities for greater innovation and experimentation. Another volume of the Report has made detailed recommendations on decentralized governance.

(Para 7.3)

8.18.02 The need for citizen empowerment is increasingly being acknowledged by legislations like the Right to Information Act, the National Rural Employment Guarantee Act, the Lok Ayukta Act etc. However, good governance is a far cry because of the wide prevalence of corruption and the poor administration of criminal justice. Corruption

retards economic growth and imposes heavy burden on the poorer sections of the people. States cannot achieve the goals of development and social justice without ensuring corruption-free governance. The corrpution problem, when frmed as a human rights issue, can enable the judiciary to enforce certain rights for the citizenry, demand a transparent and accountable system of governance and help establish a basis to monitor the process. The inclusion of a fundamental right to corrpution-free delivery of public services will enable citizens to directly challenge cases of corrpution as constitutional violations and to seek constitutional remedies. The commission is inclined to recommend such an approach as the problem has assumed serious proportions warranting drastic remedies.

(Para 7.2)

8.19 Time-bound implementation of Directive Principles through Decentralised Governance

8.19.01 The effective implementation of all the policies enumerated in the Constitution and declared fundamental in governance within an agreed time-frame is another strategy to deliver good governance and ensure human development. There is no effective method to ensure compliance of governments in this regard and therefore publicly announced Guidelines are required to be developed by the Centre in consultation with states. This will demand effective devolution of powers and functions to the local governments as well. Coupled with social audit of implementation of Guidelines through an appropriate mechanism, decentralized system of governance can bring about the reform needed for effective delivery of essential public services.

(Para 7.4)

8.20 Public-Private Partnership in Delivery of Public Services

8.20.01 Private participation in public administration is being increasingly solicited in a variety of fields like education, health etc. for a variety of reasons. However, an appropriate regulatory framework to ensure standards and accountability in the delivery of public services is still not available. The extension of the concept of 'State' to private entities is not always a viable option though it is being used by Courts to extract accountability. The Commission would recommend an institutional design to be developed keeping in view the demands of rule of law, human rights and good governance. There are stray examples of State initiatives which seem to be delivering results in certain sectors. These are to be collected, studied and put on the public domain for adoption elsewhere.

(Para 7.5.01 to 7.5.03)

8.20.02 As a corollary to the evolution of best practices in public-private partnership in the delivery of public services, it is necessary to adopt national measurement standards on performance. Looking at the way public services are organized in other federal countries, the Commission strongly recommends the model of "collaborative federalism" in which there is interdependence but no hierarchy. The process from policy making to performance assessment is more collaborative without any coercion on the units from the federal government. The collaboration extends to non-State stakeholders and through the collective, transparent, rule-based decision making processes public assets and services are managed with maximum efficiency and accountability. The key element in collaborative federalism is non-hierarchical, non-authoritarian form of decision-making involving governmental and non-governmental participants working toward a common objective within a legal framework. This Commission would recommend such a model for the promotion of good governance.

(Para 7.6.01(3))

8.20.03 The Commission would recommend a National Standards Organization for working out the standards for social sectors on the lines of the Bureau of Indian Standards for manufacturing sector

(Para 7.6.02)

CHAPTER 9

LOOKING TO THE FUTURE

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LOOKING TO THE FUTURE

Strong Centre with Strong StateCo-exist under Collaborative Federalism envisaged by the Constitution

9.1 It is now well understood that there is no single pure model of a federation and that each federal constitution needs to be described by studying the legal text as well as the prevailing political system. Our founding fathers realizing the imperatives of the times sought to create a centralized federation, but powerful forces of linguistic and regional identities and development of political forces around these identities, as well as a desire for more participative governance has led to strong States and the coming into their own of local bodies both rural and urban, all of whom are attempting to alter the dynamics of power play in the organization and management of governance. The structure of our Constitution has stood the test of time and has provided for a robust legal regime. The political system too has shown dynamism, complying with the dictates of the Constitution but also adapting it to meet the requirements of changing times. Terminological characterization tends to colour peoples' perception regarding the nature of the Constitution. We prefer that the debate moves away from such characterization to the actual working of the Constitution.

9.2 We have not sought to rearrange the basic systems legal or political. The legal text of the Constitution by its very nature needs to be clear, precise and unambiguous, so that each tier knows what is expected of it. However we do believe that the elements of governance cannot be clinically segregated and would sometimes complement, sometimes supplement and in some cases overlap. The principle of subsidiarity can be stated in simple terms but it requires great skills of accommodation to make it work. Each tier of Government must therefore strive to achieve synergy through cooperation and understanding. Our stress therefore on the Constitutional arrangements on Centre-State relations has been on bringing about changes in the institutional arrangements which would nurture a meaningful and constructive dialogue rather than on trying to minimize

conflicts, by attempting exclusivity in the division of powers, an exercise we deem as futile. The institutional arrangements would provide platforms for exchange of ideas and for synergizing thoughts and action. Our recommendations pertaining to the role and composition of the Rajya Sabha; a strong pro-active Inter-State Council; a similar Council at the State level with local body membership; empowered Group of Ministers for specific issues; progressive constitution of Inter-State River Basins with wide membership, statutory authorities for determination of royalty rates for minerals; Committees to recommend compensation packages for forest and resource rich States; coordination committees for infrastructure projects etc. have been made to provide various fora at appropriate levels to strengthen the dialogue process. In this process, if the Centre has to be strengthened for certain specific purposes or if the States and local bodies would need to perform certain additional roles, decisions would be taken jointly after appreciation of various viewpoints but always keeping the objectives of the exercise in mind.

9.3 The character of the polity has undergone significant changes. There is growing demand to increase the stakeholder base as social and economic equality which was to have come soon after political independence still remains a dream for many. India needs to build an inclusive society where equity and inclusiveness will permeate all manner of activity. Our recommendations provide for a greater role to elements of civil society by enabling them to perform Constitutional and statutory roles. For similar considerations we have recommended that special consideration be accorded to the needs of the disabled and economically and educationally disadvantaged sections of society especially in local body governance issues. We have called for harmonization of existing laws with the special laws for tribal areas so that customary rights and community enterprise which characterize the tribal peoples are not only safeguarded but become vehicles for their advancement. The Centre, States and local bodies need to recognize these important forces which significantly influence lives of ordinary people in their communities.

9.4 Inspite of serious attempts made in sixty years of planned development large numbers of people remain below the poverty line, no matter which parameters are chosen to arrive at the figures; the tribal areas remain neglected and budgetary allocations for them remain unspent. There is a general perception and not without reason, that sums earmarked for vulnerable sections of society and neglected areas (even in better off States) do not reach the beneficiaries, so much so that a serious call has now been made for direct disbursement of funds to the poor through coupons. The economy is characterized by declining contribution of agriculture in the GDP; increasing unplanned urbanization

and migration of people from the backward areas in search of livelihood. On the other hand a resurgent nation has demonstrated that it can achieve rates of growth which only a decade ago appeared unattainable; that it has the capacity to harness the latent talent in many cutting edge technologies and that it has a reservoir of entrepreneurial talent in many financial, service and manufacturing sectors. There is a growing realization that the demographic profile of a young population can be made to deliver dividends only if it could be given the necessary skills, education and imbued with the right attitudes and sensitivities. Our recommendations on time bound devolution of powers to local bodies; providing the proper emphasis to district and metropolitan planning; giving a distinct role to public-private partnerships especially in infrastructure development; proper understanding of migration issues; redistribution of wealth and investment in favour of backward areas; focused attention to areas in the North-East; introduction of GST and need to usher in a unified market; providing education to all and emphasis on humanities and which builds a proper attitude towards society especially towards the disadvantaged have been made against this background. We have also called for shifts of focus in the functioning of the Finance and Planning Commissions keeping these considerations in mind. We have also recommended a new approach towards implementing the Directive Principles and the success or otherwise of the Nation's endeavours will mainly be judged against this yardstick.

9.5 There are resources especially natural resources which each generation nurtures as trustees on behalf of those yet to come. This is national wealth which does not recognize political boundaries and to preserve and protect our natural resources a national vision is required. Their utilization must be done with great care and caution to achieve optimal benefits, but not at the cost of destruction of the environment and ecology. Keeping this ideal in view we have made our recommendations on maintenance of the environment and ecology giving predominance to the Union. However for proper use of the water and mineral resources and compensatory mechanisms for forest and mineral rich States, we are of the opinion that the Centre and States must work together.

9.6 Smooth functioning of Centre-State relations; bringing about social and economic progress; taking care of vulnerable sections of society and backward areas; preserving the environment and ecology and yet taking care of the livelihood concerns of people are formidable tasks. All cry out for good governance at all three levels. The task has become more difficult as there is growing political mobilization around sectarian and regional interests; the people are disillusioned with the lack of integrity amongst the bureaucracy

and growing incidence of waste of public funds, delays and inefficiency. We have accordingly called for a more 'consultative' structure at all levels, making it mandatory wherever large sums of public money is expended and on completion of projects we have stressed upon the need to institute social audits. We have observed that a one 'policy fit all' approach needs to be given up and powers be delegated on the principle of subsidiarity. Vigilance systems in public administration need to be improved. Based on these considerations we strongly feel that it is time that "good governance" is given due prominence by including it in Part IV of the Constitution as a Directive Principle of State Policy.

9.7 Nation's progress within systems where the rule of law prevails and where there is peace and tranquility. Socio-economic progress and good governance provide the firm basis for the prevalence of peace. We have been fortunate, that we have well codified laws and an independent and vibrant judiciary to enforce the laws and preserve civil liberties. However, the burden on the justice system is increasing and its weaknesses need to be removed. The policing systems need to be reinvigorated, made accountable and credible in the eyes of the common man. Our recommendations on sharing of the burden of expenditure on Courts by the Centre, and measures to bring about reforms in the police are with this objective. However, there are times when the system is put to its severest test. These are when national security is threatened by external aggression or grave internal disturbance. The primary responsibility for preserving the life, liberty and life of the citizens of India is that of the State. Without security there can be no progress of any kind. The prevailing security scenario is a matter of grave concern. The resolve of the Indian State is being put to a severe test both by attempts made by outside powers as well as by internal forces, quite often aided and abetted by the outside powers. The nature of terrorism has altered over the years. It has also established links with transnational organized crime involving drug smuggling, human trafficking, the illegal arms trade, extortions etc. Safe havens in failed and failing States are provided to terrorists. Networks are spread over the entire country with masterminds operating the levers from outside our shores. Whereas a clear divide in criminal jurisprudence is required to fix responsibility for prevention, investigation and prosecution for violations of ordinary laws, and this must be the responsibility of the States which are most proximate to the scenes of crime, the position changes dramatically when public order is disturbed for prolonged periods and covers large areas or is likely to influence peace and tranquility elsewhere or where acts of terrorism are perpetrated and proxy wars fought threatening the security of the entire Nation itself. In such cases the Nation must come together putting all its resources

to use. Cooperation and synergy are put to their stiffest test. For too long we have allowed the debate to continue, unable to unambiguously delineate the legal and investigative domain of the Centre and States to combat terrorism and organized crime, many a times coming close to taking the hard decisions required but shying away at the last moment. Steps have been taken but only when spurred by events such as those of November 26, 2008. Knowing this weakness of our system the enemies of the State have taken advantage and have made deep inroads. It is not enough to hold the ground now, the Indian State must become proactive.

9.8 Both the Centre and the States must work together, but the legal regime and investigative authority needs to be set in clear terms. Our recommendations on prevention of communal violence; definitions of inter-State and transnational crime and methods of tackling them as well as acts of terror, as also use of Article 355 in limited areas have been made with this spirit in mind. We should not wait for events to dictate our actions. Rather by our actions we need to reorder events for the good of the Nation. This is true not only for security, peace and tranquility but for all other Nation building activities.