# Infopack

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Popular Information Centre

In this issue of Infopack, we are providing summary of Consultation Papers released by the controversial National Commission set up by the present government to Review the Working of the Constitution under the Ministry of Law, Justice and Company Affairs. The commission headed by Justice M.N. Venkatachalaiah has been in the headlines ever since its inception as it was viewed by many as an attempt to subvert the basic spirit and structure of the Constitution. These suspicions were based on the professed opposition of the present government's larger fraternity to the basic tenets of the Indian Constitution. Recently, the commission has released seven papers for discussions and has invited criticism from none other than the First Citizen of India, who could not resist the temptation of commenting upon ulterior the design to alter the spirit and substance of the Indian constitution during his address to nation on the Golden Jubilee of Republic Day.

The commission was constituted to examine as to how the Constitution can respond to the changing needs for an efficient, smooth and effective system of governance and socio-economic development of modern India within the framework of parliamentary democracy. It would also recommend changes, if any, that are required in the provisions of the Constitution without interfering with its basic structure or features. The major areas of study of the commission are as follows:

- strengthening of the institutions of parliamentary democracy (working of the legislature, executive and judiciary, their accountability; problems of administrative, social and economic costs of political instability; exploring the possibilities of stability within the framework of parliamentary democracy).
- electoral reforms; standards in political life.
- promoting literacy; generating employment; ensuring social security; alleviation of poverty.
- decentralization and devolution; empowerment and strengthening of Panchayati Raj Institutions.
- effectuation of Fundamental Duties.
- effectuation of Directive Principles and achievement of the Preambular objectives of the Constitution.
- legal control of fiscal and monetary policies; Public Audit mechanism; standards in public life.

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# REVIEW OF THE WORKING OF POLITICAL PARTIES SPECIALLY IN RELATION TO ELECTIONS AND REFORM OPTIONS


## Summary

This Consultation Paper gives us a detailed analysis of working of political parties in the country. The analysis consists of constitutional and legal status, provisions of recognition, recent trends in the growth of parties, problems in the working of parties and reform options. As per the paper, in recent years, India has witnessed a succession of unstable governments, and the reason for such a recurring phenomenon lies in the archaic and chaotic functioning of political parties. Alliances and coalitions are made, broken and changed at whim, and the balance of power seems to be held not by those at the Union level, but by minor parties on the fringes. There is no doubt that Indian political parties have fragmented over the years. Frequent party splits, mergers and counter splits have dramatically increased the number of parties that now contest elections.

Political parties in particular and the party system in general in India have been greatly influenced by cultural diversity, social, ethnic, caste, community and religious pluralism, traditions of the nationalist movement, contrasting style of party leadership, and clashing ideological perspectives.

The first part of the paper gives detailed account of problems in functioning of the parties. Some of the problems that are discussed in the paper are: absence of inner party democracy, less representation of women, lack of training opportunity for the members, and lack of ideology and values in parties.

In the next part of the paper, several reform options suggested by number of academic and research institutions, political observers and individual analysts are given. Some of the reform options suggested by these groups are as follows:

- full five-year term for the legislature.
- independent candidates be barred from contesting elections to the Lok Sabha and Legislative Assembly.
- there should be a law requiring all recognized political parties to keep audited accounts of sources of all income.
- a review of the electoral system by a standing committee of the Parliament and an expert committee.
- any party which receives less than five percent of the total vote in elections to the Lok Sabha and Assemblies "shall not be entitled to any seat".
- restrictions on frequency of no-confidence motions.

The main conclusions of the Consultation Paper are as follows:

- there is a need for a comprehensive legislation which could be termed as Political Parties Regulation Act for the purpose of regulating the functioning of political parties in India.
- only those parties, which are registered under the proposed Act be allowed to contest elections.
- the law should define the criteria of registration and de-registration of political parties.
- the political parties should, in their constitution, provide for establishing some institutional mechanism for planning, thinking and research.
- Indian political parties should seriously consider adopting the leadership convention system that is practised in countries like Canada and the USA.
- criminalisation of politics should be checked.
- checking proliferation of independent candidates.
- in view of the increasing cost of the election campaigns, it is desirable that the existing ceiling on election expenses for the various legislative bodies be suitably raised to a reasonable level reflecting the increasing costs.
- the Election Commission should devise specific format(s) for filing of election returns by the candidates as well as political parties in such a manner that the fudging of accounts becomes difficult.

# REVIEW OF ELECTION LAW, PROCESSES AND REFORM OPTIONS


## Summary

The first part of the paper gives an overview of the electoral laws and the magnitude of the electoral exercise in India. The second part attempts to sketch an outline of the actual functioning of the electoral system and deals with issues such as booth capturing and rigging, President's rule during elections, communal and caste hatred, criminalisation of electoral process, election expenditure, compulsory/negative voting, defections and the Tenth Schedule, delimitation of constituencies and problems of instability.

The paper emphasizes that the basics of an electoral system i.e., the preparation and maintenance of electoral rolls and a foolproof voter ID needs resolute attention. The system by itself

has the potential to help take care of some of the serious problems such as impersonation and rigging. Also, the paper addresses the divisive nature of our electoral campaigns and criminalisation of the process, and attempts to find ways that would help contain these.

The paper raises the fundamental question of the high cost of elections and legitimate source of funding political activity and election campaigns. In this connection, the need for drastically bringing down the costs and the Gandhian model of decentralization and a bottom-up instead of the present top down approach are also mentioned.

The commission feels that it would be necessary to impart effective political education in democracy and in citizenship responsibilities. Panel working on this felt the need for sensitive legislators of good quality who in turn can give a good, development oriented governance as well as a citizen-friendly administration.

The paper reflects on some of the more important electoral reform options and treats them in a way that should help the readers form their own informed views. The purpose, basically, is to generate a national debate and elicit reactions, and not to advocate any particular course of action or reform agenda.

Towards the end of the paper, a summary of the suggestions and options offered are given.

Some of the recommendations are as follows:

- the Prime Minister/Chief Minister may be elected by the House and could be removed only by a constructive vote of no-confidence.
- electoral roll should be updated at the lowest constituency level with a clear link from the higher constituency levels to the parliamentary constituency.
- the designing of Electoral Rolls and voter ID should be coordinated with a view to the future.
- Electronic Voting Machines should be introduced in all constituencies as soon as possible. All sensitive constituencies should use them straightaway.
- CEC's suggestion to impose President's rule over all the States during elections may not be logical or feasible.
- election expenditure, especially the high cost of elections and abuse of unaccounted money power should be checked.

- corporate donations within prescribed limits should be permitted.
- there should be restrictions on wall writings, display of cutouts, hoardings and banners, hoisting of flags (except at party offices, public meetings and other specified places), and use of more than a specified number of vehicles for election campaign and for processions.
- electoral offences during the elections should have a higher punishment prescribed punishment.
- defections should not be permitted whether by an individual or by a group.
- Independent candidates should be discouraged. Only those who have a track record of having won any local elections should be permitted.
- there must be a limit of two terms for any political position. Thus, a person may be a member of the panchayat for two terms, of state assembly only for two terms even if non continuous, and MP for two terms.

## Immunity of Legislators: What do the words "In respect of any thing said or any vote given by him" in Article 105(2) Signify?


### Summary

In this paper, the power, privileges and immunities enjoyed by each house of Parliament and members of the committee of each house under article 105 of the Constitution has been discussed. Article 105 has been examined clause by clause. The Amendments, which were incorporated in this article, have also been looked into. As far as state legislatures are concerned, they are governed by Article 194 whose provisions are identical to Article 105 and therefore the committee decided to discuss only article 105.

Some of the landmark judgements of the Supreme Court concerning immunity of Legislators have also been sketched out. The Supreme Court judgement regarding the charges of bribery during the no-confidence motion moved against P V Narasimha Rao government, the then Prime Minister , have been discussed in the light of immunity of Members of Parliament . The document also examines the position obtaining in other democracies on this question. In the light of these discussions the committee has made a set of recommendations, and a questionnaire for further discussion has been included in the Consultation Paper.

# All India Judicial Service

## Summary

The paper involves discussions on clauses 3 and 4 of Article 312 ogf the 42nd Amendment Act (1976), which had endorsed the creation of an All India Judicial Services (AIJS) " for the selection and appointment of district judges".

As it stands today, Article 312 reads as; "Notwithstanding anything in Chapter VI of part VI or part XI , if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest to do so, Parliament may by law provide for the creation of one or more all-India services, including an All-India Judicial Service, common to the Union and the States, and , subject to the other provisions of this chapter, regulate the recruitment, and the conditions of service of persons appointed, to any such service…

The law made by parliament providing for creation of AIJS as contemplated by clause (1) of Article 312 may contain such provisions for the amendment of chapter VI of part VI, as may be necessary to give effect to the provisions of that clause but no such law shall be deemed to be an amendment of the Constitution within the meaning of Art. 368."

So far AIJS has not been constituted but the matter has been receiving attention from several concerned bodies and organisations for the last few decades. Thus, the first Law Commission recommended (in its 14th report Vol-1, chapter IX, para 59, page 184) the creation of an AIJS, which was considered in the Law Ministers Conference held in 1960. But there was no unanimity over the matter. Similarly, it got endorsement in the Chief Justices Conferences held in 1961, 63 and 65 but more than half of the States and High Courts opposed the proposal. The Chief Justice of India (in August 1969 and March 1972) suggested re-examination of the question on the creation of AIJS.

The 8th Law Commission (77th Report, Chapter IX, para 9.6, page 32) seeing the problems of arrears in trial court was in favour of the AIJS.

The Law Commission again considered this matter in its 116th report (November 1986) in which the Commission not only rejected the objections raised against the creation of AIJS but also made suggestions related to recruitment, promotion, pay scale, seniority and so on. The Law Commission report was examined and reiterated by the first National Judicial Pay Commission in 1999.

The National Commission to Review the Working of the Constitution suggests that while examining the recommendations for the creation of an AIJS, the following factors may also be kept in view, which may emerge after the creation of the AIJS:

- erosion of powers of the states.
- whether the age of recruitment should be 24 to 30 age group or 35 to 45 age group.
- most importantly, it is necessary to assess, whether such a course would really mean an improvement over the existing situation or it would be merely a reincarnation of the existing system.

# The constitution paper called "Treaty Making Power under our constitution"

## Summary

The paper very explicitly but briefly expresses the need to review the treaty-making power and its impact on the national socio-economic scenario. It is an established fact that no state can insulate itself from the rest of the world in the matter of foreign relations, trade, environment, communications, ecology or finance. At the same time, it is equally important to watch and check the actions of the government in regard to treaty-making. This is proved by the previous experiences of a few multinational treaties signed by our government without consultations or without taking into confidence either the parliament or the institutions likely to be affected adversely. Therefore, it questions the authority and constitutional powers of those getting into negotiations. Second, it argues in favour of the responsibility of parliament to control or supervise such activities.

The paper clearly states that the founding fathers of the Indian Constitution consciously provided space in two respects: firstly, they expressly included the treaty-making power within the legislative competence of the parliament and secondly, they incorporated Article 253 in part XI of the Constitution. While explaining the provisions, the document reads, " This article empowers the parliament to make any law for the whole or any part of the territory of India for implementing "any treaty" agreement or convention with any other country or countries or any decision made at any international conference, association or other body".

The verdicts given by various judges and their panels are included highlighting certain portions to emphasise the topic under discussion. One petition, which proved to be the turning point and was filed by certain public-spirited individuals in order to seek the issuance of a Writ of Mandamus restraining the Union of India from entering into final treaty relating to Dunkel proposals has also been discussed.

The second part of the paper dwells upon types of treaties, their emergence followed by various aspects of treaties including the impact on national and international scenario. It cannot be denied that these treaties are eating into power of the nation/states to manage their own affairs and are correspondingly enhancing the power of the market and multinational corporations.

Another very interesting part of the paper is brief outlines of practices and procedures adopted by other countries in

the world. The countries included are Australia, France, United States of America, Switzerland, Canada and United Kingdom. Among all these countries, Australia seems to practice the most elaborate and democratic process in signing any bilateral or multilateral treaty.

Finally, the paper deals in detail about the absence of consultation with the Parliament in the matter of treaty making in the context of Indian experience. In order to correct the procedure, a few attempts have also been made from time to time which were either neglected or elicited negative response, for example in 1993, Shri George Fernandes's notice of intention to introduce the Constitution (Amendment) Bill, 1993, for amending article 253. In the end, the paper gives some very valuable suggestions in order to ensure the stake of parliament in treaty making by making a law and thus ensuring the accountability of the government towards people since it is a matter within the competence of the parliament, and it should exercise that power in the interest of the state and its citizens. In a democracy like ours, there is no room for non-accountability.

# EFFICACY OF PUBLIC AUDIT SYSTEM IN INDIA: C & AG

## -Reforming the Institution


### Summary

This paper deals with the efficacy of public audit system in India, especially the Comptroller and Auditor General of India. In fact, public-audit institutions were developed so that the parliament could control the executive and enforce public accountability. These institutions control the grant of money as well as the supervision of the expenditure. The structure of the present day Indian Audit and Accounts Department (IAAD) of which the Comptroller and the Auditor general (C&AG) is the head, is the legacy of British Raj and is more or less patterned on the British model.

There is, however, a need for drastic reforms in the present day structure of public audit systems in India. The report deals with the evaluation of audit since independence, and exposes the weaknesses of the existing system. It argues that the C&AG has no power to enforce audit findings, which has been proved by the Bihar fodder scam. The report argues for the need to confer legal powers on C&AG on similar lines as other countries such as Japan, South Korea and Thailand. Moreover, it questions the very provision of the act through which public sector undertakings (PSUs) have been kept outside the ambit of C&AGs audit. Also, the report looks into the change in the pattern of public expenditure due to the policy of devolution.

of administrative functions and parcelling out of certain activities to the non-government organisations (NGOs).

In this context, there is a need that C&AG should have means of assessing the utilisation of the funds of NGOs. Also, though bulk of finance for panchayats/municipalities comes from the government, there is no satisfactory arrangement for audit.

The paper further states that most of the problems of the Indian audit and accounts department arises from the fact that the organisational structure of C&AG is not in Consonance with the federal arrangements as envisaged in the constitution. Hence, there is a need for a separate auditor general in each state, which invariably should have a legal status.

Since, in our country there is no system of finalisation of audit report through a formal committee system, it results in a neglect of audit as well as poor quality of audit reports. There is therefore a need for collegiate decisions by setting up of an audit commission. The report also deals with the crucial aspect of interface between C&AG and the Parliament.

Presently, the C&AG audits the accounts and submits its report to parliament /state legislature which are automatically remitted to the Public Accounts Committee (PAC)/Committee on Public Undertakings (COPU). The report, therefore recommends that in order to strengthen the parliamentary control over the executive, it is necessary that PAC examine all the reports submitted by C&AG and submit its recommendations to legislature within a time limit of 18 months. Also, C&AG should be made an officer of the Lok Sabha so that s/he could work in greater cooperation with Parliament and its finance committees with a view to make parliamentary financial control more effective.

The report suggests that in India, it is necessary that the apoointment of C&AG is kept outside the exclusive perview of the executive. Recommendations regarding his appointment should be made by an independent committee. There is also a need to prescribe qualifications for appointment to the post of C&AG and that a person who has substantive experience of public sector accounting and auditing system should only be appointed.

A last but very important recommendation of this paper is that their should be an external audit of the C&AGs outfit so that its own operations stand the test of professional soundness, efficiency and effectiveness.

# Liability of State in Tort


## Summary

The paper examines the existing 'Tort Law'. By definition, tort is a civil wrong, for which the remedy is unliquidated damages. The paper contains certain historical aspects and examines the position prior to the adoption of the Constitution. This includes study of a few important pre-Constitution decisions. As per the paper, the ultimate objective of this debate has been to evolve a solution that can pave the way towards the drafting of a satisfactory statute on the subject.

The paper broadly discusses Article 300 of the present constituion, Act of 1833, Act of 1915 and Act of 1935. Few important judicial decisions dealing with the liability of the state in tort that were pronounced in India in the period before the adoption of the Constitution are also referred. Some of the clauses that have been discussed are as follows:

- The Calcutta view: P & O Case.
- The Madras and Allahabad view: Immunity confined to acts of state.
- The Bombay view: Immunity available only for acts of state.

Further, it examines important rulings during the post-Constitution period on the subject under consideration. The representative decisions illustrating the principal conflicting approaches have been discussed in depth. Examples of many cases where the Supreme Court dismissed appeals against the High Court have also been discussed.

The paper also tries to defines and analyses differences between sovereign and non-sovereign functions of the state. To illustrate the point, case study of N. Nagendra Rao vs State of A.P is discussed in length. Court decisions in this context are quoted and towards the end, obscurity in application of sovereign and non-sovereign functions are discussed.

The paper further advocates the need for legislation on the subject. The present state of law is also dealt in brief and Article 300 is presented as an weak link in the present law. In the end, the report analyses the present position of liability of the state in tort.

The protection clauses have also been discussed, that is to say, statutory provisions which, for example, provide that a suit cannot be maintained lie against the government for anything which is done or intended to be done under a particular enactment.

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