



**PARLIAMENT OF INDIA
RAJYA SABHA**

48

**DEPARTMENT RELATED PARLIAMENTARY STANDING
COMMITTEE ON PERSONNEL PUBLIC GRIEVANCES,
LAW AND JUSTICE**

FORTY EIGHTH REPORT

ON

THE LOKPAL BILL, 2011

(PRESENTED TO THE RAJYA SABHA ON 9TH DECEMBER, 2011)

(LAID ON THE TABLE OF THE LOK SABHA ON 9TH DECEMBER, 2011)



**RAJYA SABHA SECRETARIAT
NEW DELHI
DECEMBER, 2011/.AGRAHAYANA, 1933 (SAKA)**



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- (ii) Shri Ram Jethmalani
- (iii) Shri Ram Vilas Paswan
- (iv) Shri Shailendra Kumar
- (v) Shri Prasanta Kumar Majumdar
- (vi) Shri Pinaki Misra
- (vii) Adv. A. Sampath
- (viii) Shri S. Semmalai

(ix) Smt. Deepa Dasmunshi, Ms. Meenakshi Natrajan and Adv. P. T. Thomas

(x) Shri Vijay Bahadur Singh

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* To be appended at printing stage.

COMPOSITION OF THE COMMITTEE
(31st August, 2010 - 30th August, 2011)

1. Dr. Abhishek Manu Singhvi* — *Chairman*

RAJYA SABHA

2. Shri Balavant *alias* Bal Apte
3. Shri Ram Jethmalani
4. Shri Parimal Nathwani
5. Shri Amar Singh
6. Shri Ram Vilas Paswan
7. Shri O.T. Lepcha
8. Vacant^
9. Vacant@
10. Vacant&

LOK SABHA

11. Shri N.S.V. Chitthan
12. Smt. Deepa Dasmunsi
13. Smt. Jyoti Dhurve
14. Shri D.B. Chandre Gowda
15. Dr. Monazir Hassan
16. Shri Shailendra Kumar
17. Smt. Chandresh Kumari
18. Dr. Kirodi Lal Meena
19. Ms. Meenakshi Natarajan
20. Shri Devji M. Patel
21. Shri Harin Pathak
22. Shri Lalu Prasad
23. Shri S. Semmalai
24. Shri Vijay Bahadur Singh
25. Dr. Prabha Kishor Taviad
26. Shri Manish Tewari
27. Shri R. Thamaraiselvan
28. Adv. P.T. Thomas (Idukki)
29. Vacant#
30. Vacant\$
31. Vacant%

* Nominated as Chairman of the Committee w.e.f. 26th July, 2011.
^ Due to passing away of Shri M. Rajasekara Murthy w.e.f. 7th December, 2010.
@ Due to induction of Smt. Jayanthi Natarajan in the Council of Minister w.e.f. 12th July, 2011.
& Due to retirement of Shri Shantaram Naik w.e.f. 28th July, 2011.
Due to resignation of Shri Arjun Munda from Lok Sabha w.e.f. 26th February, 2011.
\$ Due to passing away of Shri Bhajan Lal w.e.f. 3rd June, 2011.
% Existing since the constitution of the Committee on 31st August, 2010.

COMPOSITION OF THE COMMITTEE
(Constituted on 31st August, 2011)

1. Dr. Abhishek Manu Singhvi — *Chairman*

RAJYA SABHA

2. Shri Shantaram Laxman Naik
3. Dr. Bhalchandra Mungekar
4. Shri Balavant *alias* Bal Apte
5. Shri Ram Jethmalani
6. Shri Sukhendu Sekhar Roy
7. Shri Ram Vilas Paswan
8. Shri O.T. Lepcha
9. Shri Parimal Nathwani
10. Shri Amar Singh

LOK SABHA

11. Shri Kirti Azad
12. Shri N.S.V. Chitthan
13. Smt. Deepa Dasmunsi
14. Shri D.B. Chandre Gowda
15. Shri Shailendra Kumar
16. Smt. Chandresh Kumari
17. Shri Prasanta Kumar Majumdar
18. Shri Arjun Ram Meghwal
19. Shri Pinaki Misra
20. Kumari Meenakshi Natarajan
21. Shri Harin Pathak
22. Shri Lalu Prasad
23. Adv. A. Sampath
24. Shri S. Semmalai
25. Shri Vijay Bahadur Singh
26. Dr. Prabha Kishor Taviad
27. Shri Manish Tewari
28. Adv. P.T. Thomas (Idukki)
29. Shri Arun Subhash Chandra Yadav
30. Shri Madhusudan Yadav
31. Vacant*

SECRETARIAT

Shri Deepak Goyal, Joint Secretary
Shri K.P. Singh, Director
Shri K.N. Earendra Kumar, Joint Director
Smt. Niangkhanem Guite, Assistant Director
Smt. Catherine John L., Committee Officer

* Existing since the constitution of the Committee on 31st August, 2011.

PREFACE BY CHAIRMAN

I consider it a singular privilege and a great pleasure to present the 48th Report of this Committee on the Lokpal Bill, 2011.

It is ironical, and even somewhat paradoxical, that corruption, an issue as old as mankind¹ can generate so much contemporary debate, ignite large volumes of both light and heat. The fact that corruption, which has spread like a virulent epidemic in the very genetic code of society, has been brought to the forefront of our collective consciousness in recent times, is both a compliment to all those who have crusaded for strong anti corruption measures as also a reflection of the public's growing angst, revulsion and disgust at the proportions acquired by this disease.

But no one can afford to, and no one should, ignore the basic truth that no magic wand or special button has been conceived or invented, the activation of which can eliminate or even significantly reduce this scourge within a short time. Nor can anyone be oblivious to the reality that corruption can suffer significant and tangible reduction only by a holistic and multi-pronged approach and that no single initiative in this regard can be even significantly, much less conclusively, efficacious. To ignore the fact that the Lokpal Bill operates only within the limited zone of ex-post facto, punitive or deterrent measures would be to ignore reality itself. Such punitive measures cannot be a substitute for other significant prophylactic initiatives. Corruption flourishes in the interstices of structures, mechanisms, rules, regulations and practices, which not only facilitate it but promote its multiplication like an uncontrollable hydra headed monster. It is those facilitative structures and practices which have to be attacked, if punitive and deterrent measures like the Lokpal Bill are to have any lasting impact. In a nutshell, law has to seek not only to make corruption

¹ In fact, Kautilya in Arthashastra, has given a detailed list, referring to not less than forty ways of embezzlement that the treasury officers in his time were used to practice. The most common of them were pratibandha or obstruction, prayoga or loan, vyavahara or trading, avastara or fabrication of accounts, pariahapana or causing less revenue and thereby affecting the treasury, upabhoga or embezzling funds for self enjoyment, and apahara or defalcation.

painful and hurtful after the event, but to make corruption unnecessary, undesirable and difficult to embark upon at the inception. Indeed many of such prophylactic measures do not need legal changes but intelligent, calibrated and targeted policy changes.

Similarly, even within the punitive and deterrent zone where the Lokpal initiative largely operates, support structures, ancillary provisions and related initiatives are as much, if not more important, than the Lokpal itself. Some are discussed in Chapter 15. Many other vital ones, like initiatives necessary in respect of reducing black money (both domestic and foreign), alteration of rules and practices in the realm of realty transactions, elimination of discretionary powers department-wise, focusing upon and targeting state largesse in areas like mines, contracts and so on and so forth, are not the subject matter of this Report and hence not discussed here. In the ultimate analysis, it is only a synergical and cumulative aggregation of these diverse legal and policy initiatives which can effectively attack and reduce this malignant disease.

Though there are many creative initiatives and "firsts" in this Report, it is not possible to exhaustively list them. They include a specific recommendation to categorically have a statutory provision imparting genuine independence to the CBI by declaring, for the first time, that it shall not be subject, on the merits of any investigation, to either the administrative Ministry or the Lokpal. Secondly, it separates, for the first time, investigation from prosecution, thereby strengthening each and making each more professional and objective, apart from initiating for the first time, the creation of a premier prosecution department under the Lokpal. Thirdly, the Selection Committee, for the first time, includes a joint nominee of the three major constitutional post holders. Fourthly, Lokayuktas and the Lokpal are, for the first time, sought to be subsumed under a common enactment. Fifthly, constitutional status is sought to be conferred, again for the first time, not only upon the Lokpal institution but also upon the proposed Grievances Redressal body. Sixthly, the Report recommends abolition of all sanctions, by whatever name called. Finally, the CVC is,

for the first time , made responsible for the large chunk of class C employees, with a supra added reporting requirement to the Lokpal.

The journey of this Committee has been most exciting and enjoyable, irrespective of the destination, as reflected in the sense of the Committee in this Report or the dissents or the eventual outcome in Parliament. The Committee held fifteen meetings over less than two and a half months between the real commencement of its proceedings on September 23, 2011 and the submission of the actual report in the second week of December, 2011. In individual terms, it interacted with 140 witnesses and its deliberations spanned approximately 40 hours.

Given the contemporary context in which this Bill was referred to the Committee, as also the diverse and extremely large canvas involved, there is an understandable sense of satisfaction in having expeditiously reached the stage of submitting the Committee's report. On an issue like this, which inevitably involves a somewhat uneasy melting pot of law, technicalities, the scrutiny of the nation, pressing exigencies of speed and time, an inevitable dose of politics and an overarching desire to be true to ones' individual and collective consciousness, there is bound to be disagreement and dissension, sometimes even heated. But, personally, I am impressed, indeed astonished, at the high degree of convergence on a diverse number of issues which are addressed in this report and which aggregate over 25. Some may see the glass half full, in the sense of looking at the dissenting notes, but I see the glass well above half full, based on the significant and laudatory degree of convergence on diverse and contentious issues. Even where there were disagreements, only in the last couple of meetings prior to adoption (none before), they did not vitiate the extremely cordial, dignified and principled level of exchanges which have prevailed right from the inception through to the conclusion of the proceedings of this Committee.

I do not think that I am guilty of any error or exaggeration when I say that the members of this Committee started this journey as relative strangers, but finished as friends. Equally, I have no doubt that each member individually, and the Committee

collectively, exemplified and symbolised the Voltairian spirit that wherever they disagreed, they nevertheless upheld the right of the other person to disagree with them, even vehemently.

In the end, all I can say is that we have not tried to please anyone or everyone. We have tried to be true, individually to our respective consciences and collectively to Parliament and the nation. The Report is liable to be judged kindly or harshly by some or, indeed, to be ignored by others. All one can hope for is that the detailed collection and aggregation, not only of each conclusion but of every reason and argument in support of that conclusion, summarised in one chapter (Chapter 17) will be carefully perused before judgment, casual or considered, interim or final, is passed.

I would be failing in my duty if I did not express gratitude for the constructive cooperation which I have received from each member of the Committee, irrespective of convergence or chasm. The witnesses, many of them experts and very eminent, gave willingly and uncomplainingly of their time and effort and all of it, gratis. The response from the public was overwhelming as reflected in the written memoranda received. The Administrative Ministry (Ministry of Personnel) was most helpful and cooperative. Perhaps no Chairman has driven the Secretariat staff harder and longer. Both Saturdays and Sundays, especially when I dictated the Report, with long hours at the Annexe, were par for the course. Mr Deepak Goyal, the head of my team, provided very able leadership to his entire team, and toiled ceaselessly whenever I entrusted anything to him. He was ably supported by Sh KP Singh, Sh K. N. Earendra Kumar, Ms Niangkhanem Guite, Ms. Catherine John, Sh. D.D. Kukreti, Sh. Yogendra Singh and Ms Madhu Rajput and a whole relay chain of stenographers who willingly took eight hour dictations from me on more than three weekends. In a lighter vein, I had expressed the certainty of my belief that the Secretariat were praying and waiting for the day when I would demit office as Chairperson of this august Committee, since they had no other hope of getting respite! I would also like to place on record my deep appreciation for all the assistance and support received from every one, not necessarily named herein, to complete this endeavour expeditiously.

In the ultimate analysis, the responsibility for all the errors rests with me, and, to a lesser extent, with the Committee which adopts the Report as reflective of the broad consensus in the Committee. The reasons for the conclusions flowing from the memoranda, depositions and internal deliberations have formed the Committee's recommendations and are set out in detail at the end of each Chapter. This last section of each Chapter tries to argue and states the persuasive details behind each conclusion. All these end sections from each Chapter have been aggregated and reproduced in the last Chapter, Chapter 17, providing a useful and elaborate summary. All dissent notes have been appended.

(DR. ABHISHEK MANU SINGHVI)

*CHAIRMAN,
COMMITTEE ON PERSONNEL, PUBLIC
GRIEVANCES, LAW AND JUSTICE*

December 7 , 2011.
New Delhi.

REPORT OF
THE
COMMITTEE

CHAPTER - 1

INTRODUCTION

- 1.1 The Lokpal Bill, 2011 was introduced* in the Lok Sabha on 4th August, 2011. It was referred^{§§} by the Hon'ble Chairman, Rajya Sabha to the Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice on the 8th August, 2011 for examination and report
- 1.2 The Bill (Annexure-A) seeks to provide for the establishment of the institution of Lokpal to inquire into allegations of corruption against certain public functionaries and for matters connected therewith or incidental thereon.
- 1.3. The Statement of Objects and Reasons, appended to the Bill reads as under:-

"The need to have a strong and effective institution of Lokpal has been felt for quite sometime. The Administrative Reforms Commission, in its interim report on the 'problems of Redressal of Citizens' Grievances submitted in 1966, inter alia recommended the setting up of an institution of Lokpal at the Centre in this regard. To give effect to this recommendation of the Administrative Reforms Commission, eight Bills on Lokpal were introduced in the Lok Sabha in the past, namely in the years 1968, 1971, 1977, 1985, 1989, 1996, 1998 and 2001. However, these Bills had lapsed consequent upon the dissolution of the respective Lok Sabha except in the case of 1985 Bill which was withdrawn after its introduction.

A need has been felt to constitute a mechanism for dealing with complaints on corruption against public functionaries in high places. In this regard, the Central Government constituted a Joint Drafting Committee (JDC) on 8th April, 2011 to draft a Lokpal Bill.

Based on the deliberation and having regard to the need for establishing a strong and effective institution of Lokpal to inquire into allegation of corruption against certain public functionaries, it has been decided to enact a stand alone legislation, inter alia to provide for the following matters, namely :-

- (i) to establish an Institution of Lokpal with a Chairperson and eight Members of which fifty per cent shall be Judicial Members;*
- (ii) to set up Lokpal's own Investigation Wing and Prosecution Wing with such officers and employees as felt by it to be necessary;*
- (iii) the category of public functionaries against whom allegation of corruption are to be inquired into, namely :-*
 - a. a Prime Minister, after he has demitted office;*
 - b. a Minister of the Union;*
 - c. a Member of Parliament;*

* Published in Gazette of India (Extraordinary) Part-II Section 2 dated 4th August, 2011. Rajya Sabha Parliamentary Bulletin Part-II (No.1937) dated 9th August, 2011.

- d. *any Group "A" officer or equivalent;*
 - e. *a Chairperson or member or officer equivalent to Group "A" in any body, Board, corporation, authority, company, society, trust, autonomous body established by an Act of Parliament or wholly or partly financed or controlled by the Central Government;*
 - f. *any director, manager, secretary or other officer of a society or association of persons or trust wholly or partly financed or aided by the Government or in receipt of any donations from the public and whose annual income exceeds such amount as the Central Government may be notification specify but the organizations created for religious purposes and receiving public donations would be outside the purview of the Lokpal.*
- (iv) *To provide for a mechanism to ensure that no sanction or approval under section 197 of the Code of Criminal Procedure, 1973 or section 19 of the Prevention of Corruption Act, 1988, will be required in cases here prosecution is proposed by the Lokpal.*
 - (v) *to confer on the Lokpal the power of search and seizures and certain powers of a Civil Court;*
 - (vi) *To empower the Lokpal or any investigation officer authorized by it in this behalf to attach property which, prima facie, has been acquired by corrupt means;*
 - (vii) *To lay down a period of limitation of seven years from the date of commission of alleged offence for filing the complaints before the Lokpal;*
 - (viii) *To confer powers of police upon Lokpal which the police officers have in connection with investigation;*
 - (ix) *To charge the expenses of Lokpal on the Consolidated Fund of India;*
 - (x) *to utilize services of officers of Central or State Government with the consent of the State Government for the purpose of conducting inquiry;*
 - (xi) *To recommend transfer or suspension of public servants connected with allegation of corruption;*
 - (xii) *To constitute sufficient number of Special Courts as may be recommended by the Lokpal to hear and decide the cases arising out of the Prevention of Corruption Act, 1988 under the proposed enactment;*
 - (xiii) *To make every public servant to declare his assets and liabilities, and in case of default or furnishing misleading information, to presume that the public servant has acquired such assets by corrupt means;*
 - (xiv) *To provide for prosecution of persons who make false or frivolous or vexatious complaints.*

The notes on clauses explain in detail the various provisions contained in the Bill.

The Bill seeks to achieve the above objects.”

- 1.4. In slight deviation from the normal procedure followed by Standing Committees for examination of Bills, there was a detailed discussion on the statement of the Minister of Finance on the issues relating to the setting up of the Lokpal in both the Houses of

Parliament on the 27th August, 2011. These proceedings were also transmitted to the Committee. The Rajya Sabha Secretariat communication dated the 30th August, 2011 in this behalf addressed to the Chairman, Standing Committee, reads as follows:-

“I am directed to inform you that the Chairman, Rajya Sabha, has desired that the proceedings of the Rajya Sabha and Lok Sabha dated the 27th August, 2011 pertaining to the discussion on the statement made by the Minister of Finance on issues relating to setting up of Lok Pal may be transmitted to the Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law & Justice for its perusal while formulating its recommendations on the Lok Pal Bill, 2011.

Accordingly, a copy each of the relevant proceedings of the Rajya Sabha and Lok Sabha is enclosed for your kind perusal.”

1.5. The discussion in the two Houses of Parliament was in the backdrop of divergent views in the Joint Drafting Committee constituted by the Government for preparing a draft on the Lokpal Bill. The Committee consisted of five nominees of the Civil Society (led by Shri Anna Hazare) and five nominees of the Government. Initiating discussion in both the Houses, Hon’ble Finance Minister gave a background of the matter leading to holding of discussion in Parliament on the setting up of Lokpal. He enumerated the following six major areas of divergent views in the Joint Drafting Committee:-

- i. Should one single Act be provided for both the Lokpal in the Centre and Lokayukt in the State? Would the State Governments be willing to accept a draft provision for the Lokayukt on the same lines as that of the Lokpal?
- ii. Should the Prime Minister be brought within the purview of the Lokpal? If the answer is in affirmative, should there be a qualified inclusion?
- iii. Should Judges of the Supreme Court and High Courts be brought within the purview of the Lokpal?
- iv. Should the conduct of Members of Parliament inside Parliament, their right to speak and right to vote in the House, be brought within the purview of the Lokpal? Presently such actions of the Members of Parliament are covered by article 105(2) of the Constitution?
- v. Whether Articles 311 and 320 (3) (c) of the Constitution notwithstanding members of a civil service of the Union or an All India Service or a Civil Service of a State or a person holding a civil post under the Union or State, be subject to

enquiry and disciplinary action including dismissal and removal by the Lokpal and Lokayukta, as the case may be?

- vi. What should be the definition of the Lokpal, and should it itself exercise quasi-judicial powers also or delegate these powers to its subordinate officers?"

1.6. Apart from other issues, the following three issues were discussed in both the Houses:-

- i. Whether the jurisdiction of the Lokpal should cover all employees of the Central Government?
- ii. Whether it will be applicable through the institution of the Lokayukt in all States?
- iii. Whether the Lokpal should have the power to punish all those who violate the 'grievance redressal mechanism' to be put in place?

1.7. During the discussion in Parliament, Members demonstrated serious commitment to evolve an effective mechanism to deal with the menace of corruption. The discussion covered several related issues as well, besides the three specific issues referred to above. Members discussed the need to bring all classes of bureaucracy within the fold of the Lokpal while expressing apprehensions about the overburdening of the institution. Similarly, Members were concerned about preservation of the federal spirit of our Constitution. The issue of bringing the grievance redressal mechanism under the Lokpal or having a separate law for this purpose was also discussed.

(A gist of the debate in both the Houses is placed as **Annexure B**).

1.8. In his reply to the debate, the Minister of Finance concluded in both the Houses in these words:-

“ This House agrees in principle on the Citizens Charter, Lower Bureaucracy to be brought under Lokpal through appropriate mechanism and Establishment of Lok Ayuktas in the States. I will request you to transmit the proceedings to the Department-related Standing Committee for its perusal while formulating its recommendations for a Lokpal Bill.”

1.9. The deliberations in the two Houses of Parliament gave guidance to the Committee in the accomplishment of the task assigned to it. The Committee, however, also had before it vast inputs on the subject from various sources. Recommending an appropriate legislative architecture for the purpose was a complex task for the Committee as it was to propose a solution which harmonized and married the concerns of constitutional validity, operational efficacy and consensus amongst the

diverse views reflected in the Committee's deliberations. The Members of the Committee, however, have put in their best possible efforts to deal with the essence of the opinions expressed by the House collectively. The diverse pool of knowledge of the Members, opinions of eminent experts and the suggestions received from a comprehensive and diverse cross-section of society helped the Committee to formulate solutions taking into account the aspects of functional feasibility and constitutional validity in addition to political consensus.

- 1.10. In order to have a broader view on the Bill, the Committee decided to invite views/suggestions on the issue from desirous individuals/organizations. Accordingly, a press release was issued inviting views/suggestions. In response to the press release published in major English and Hindi dailies all over India on the 20th August, 2011, a number of representations/ memoranda were received. The Committee received approximately 10,000 responses from different sections of society.
- 1.11. The Committee also forwarded 216 select memoranda from out of the ones received from the individuals/organizations to the Department of Personnel and Training for their comments thereon. A list of such memoranda along with the gist of views/suggestions contained therein and the comments of the Department of Personnel and Training thereon is placed at **Annexure- C**.

CHAPTER - 2

COMMITTEE PROCEEDINGS AND TIMELINES

- 2.1 Though the Lokpal Bill, 2011 was referred to the Committee on August 8, 2011, it was followed immediately by a demonstration by Team Anna, a large gathering at Ramlila Maidan and a fast by Shri Anna Hazare. These events occupied the space from 16th to 28th August, 2011.
- 2.2 On August 27, 2011 both the Houses of Parliament discussed the issue and the proceedings were directed to be transmitted to the Standing Committee. This has been summarized in the preceding chapters read with the gist of debates annexed at Annexure B.
- 2.3 Barely four days thereafter, before any work could start, the Standing Committee's term lapsed. In effect, in law and in fact, no Standing Committee of Parliament existed from August 31, 2011 till September 16, 2011. The present Committee could, therefore, become operational only after re-constitution w.e.f. September 23, 2011 when it held its second meeting. Hence, though the Committee had with great alacrity held its first meeting with Team Anna for over two hours on August 10, 2011, a day after the Bill was referred to it, it could, in effect, commence its deliberations on the Lokpal Bill, 2011 only w.e.f. September 23, 2011. The fact that the re-constitution of the Committee is always deemed to be retrospective w.e.f. the date of lapsing (August 31, 2011), does not, however, permit the actual meeting of the Committee during the period between the lapse and its actual reconstitution.
- 2.4 From September 23, 2011 till November 24, 2011, the Committee held 11 sittings spread over approximately 30 hours. During this period, 38 persons / organizations came before the Committee as witnesses to present their views. These included virtually every segment of society, including, lawyers and jurists, former Chief Justices of India, representative organizations like the Bar Council of India, the heads and office bearers of diverse chambers of commerce, the heads and office bearers of diverse print and visual media organizations, NGOs, members of Team Anna (on three occasions spread over approximately 8 hours), religious organizations, representative institutions from small and medium size towns across India, CBI, CVC, eminent writers, think tanks and so on and so forth. In almost all cases the

witnesses were accompanied by several associates and the Committee, therefore, in all, had the presence of 140 witnesses.

- 2.5 The Committee held the first of its internal meetings and deliberations on November 14, 2011. It went on to meet on November 15, 24, 25, 30 and December 1 and finally met on December 7, 2011 to finalise recommendations and to adopt the Report. The Committee is thus privileged to present this Report on December, 9, 2011. A Statement showing the business transacted by the Committee in its different sittings is annexed as ANNEXURE 'D'.
- 2.6. In a nut shell, therefore, this Committee could become legally operational only w.e.f. September 23, 2011 and has completed hearing witnesses on 4th November, 2011. It had its total deliberations including Report adoption spread over 14 meetings, together aggregating 40 hours within the space of ten weeks commencing from September 23, 2011 and ending December 7, 2011.
- 2.7. Though not specific to this Committee, it is an established practice that all 24 Parliamentary Standing Committees automatically lapse on completion of their one year tenure and are freshly constituted thereafter. This results in a legal vacuum, each year, of approximately two to three weeks and occasionally, as in the present case, directly affects the urgent and ongoing business of the Committee. The Committee would respectfully request Parliament to reconsider the system of automatic lapsing. Instead, continuity in Committees but replacement of Members on party-wise basis would save time.

CHAPTER - 3
THE CONCEPT OF LOKPAL :
EVOLUTION AND PARLIAMENTARY HISTORY

- 3.1. There can be no denial of the fact that corruption has always remained a significant and highly relevant issue to be dealt with in our country. This stands corroborated from the findings of various international bodies like the World Bank, Transparency International and other organizations, which have consistently rated India quite low on this facet. Concerns have repeatedly arisen, in and out of Parliament, for putting in place appropriate mechanisms to curb corruption. But the Lokpal concept has had an interesting and chequered history in India.
- 3.2. The initial years following independence witnessed legislators conveying the people's concerns to the Government over the issue of corruption through raising of questions and debates in Parliament. At that time, the scope of the debates was contextually confined to seeking information from the Government about its anti-corruption measures and to discussions regarding the formation of anti-corruption committees/agencies and vigilance bodies to put a check on corruption, but it clearly reflected the seriousness on the issue of corruption in the minds of Members. Acknowledging the need for a thorough consideration of the issue, the Government set-up a Committee under the Chairmanship of Shri K. Santhanam to review the existing instruments for checking corruption in Central Government. The Committee inter alia recommended the creation of an apex body for exercising superintendence and control over the vigilance administration. In pursuance of the recommendations of the Santhanam Committee, the Government established the Central Vigilance Commission through a Resolution on 11.02.1964. The Commission was concerned with alleged bureaucratic corruption and did not cover alleged ministerial corruption or grievances of citizens against maladministration. While laying the report on the creation of the CVC on the table of the House, the then Deputy Home Minister¹, interestingly, recognized that the Commission would be overburdened if the responsibility to redress the citizens' grievances against corruption were to be placed

¹ Statement made by the then Deputy Minister in the Ministry of Home Affairs, Smt. Maragatham Chandrasekhar in the Rajya Sabha on 16th December, 1963, Rajya Sabha Debates, Vol. XLV, No. 21, P.3572.

upon it and the Commission might, as a result, be less effective in dealing with the core problem of corruption.

- 3.3. While the country had been grappling with the problem of corruption at different levels including at the level of Parliament, there emerged globally, and especially in the Scandinavian countries, the concept of Ombudsman to tackle corruption and/or to redress public grievances. A proposal in this regard was first initiated in the Lok Sabha on April 3, 1963 by the Late Dr. LM Singhvi, MP². While replying to it, the then Law Minister observed that though the institution seemed full of possibilities, since it involved a matter of policy, it was for the Prime Minister to decide in that regard³. Dr. LM Singhvi then personally communicated this idea to the then Prime Minister, Pandit Jawahar Lal Nehru who in turn, with some initial hesitation, acknowledged that it was a valuable idea which could be incorporated in our institutional framework. On 3rd November, 1963, Hon'ble Prime Minister made a statement in respect of the possibilities of this institution and said that the system of Ombudsman fascinated him as the Ombudsman had an overall authority to deal with the charges of corruption, even against the Prime Minister, and commanded the respect and confidence of all⁴. Resolutions, in this behalf in April 1964 and April 1965 were again brought in the Lower House and on both occasions, during the course of discussions, the House witnessed near unanimous agreement about the viability, utility and desirability of such an institution⁵. However, in his resolution, the Member of Parliament (Dr. L.M. Singhvi) did not elaborate upon the functions/ powers of the institution, but instead asked for the appointment of a Committee of Members of Parliament who would consider all the complex factors relating to this institution and would come forward with an acceptable and consensual solution. While making a statement in the House on 23rd April, 1965, Dr. L.M. Singhvi elucidated the rationale of the institution as:

² Lok Sabha Debates dated 3rd April, 1963, vol. XVI, P.7556-7558

³ *ibid.*, P.7590-92

⁴ His initial hesitation to this idea was probably due to the Scandinavian origin of the nomenclature of the institution. In a lighter vein, he happened to ask Dr. L.M. Singhvi "To what zoo does this animal belong" and asked Shri Singhvi to indigenize the nomenclature of the institution. Dr. L.M. Singhvi then coined the term Lokpal / Lokayukta to modify the institution of Ombudsman to the Indian context (as related by Dr. L.M. Singhvi to the Chairman of this Committee). Also referred to by Mr. Arun Jaitley M.P. during the Parliament Debate on 27th August 2011. He started the debate in the Upper House thus:-*"Now, 'Ombudsman' was a Scandinavian concept and, coincidentally, on 3rd April, 1963, then an Independent young Member of the Lok Sabha, Dr. L.M. Singhvi, in the course of his participation in a debate for having an Ombudsman in India, attempted to find out what the Indian equivalent could be, and this word 'Lokpal' was added to our vocabulary, the Hindi vocabulary, by Dr. L.M. Singhvi who translated this word."*

⁵ Lok Sabha Debates dated 23rd April, 1965 P. 10839 - 40.

“.....an institution such as the Ombudsman must be brought into existence in our country. It is for the sake of securing justice and for cleansing the public life of the Augean stable of corruption, real and imaginary, that such an institution must be brought into existence. It is in order to protect those in public life and those in administration itself that such an institution must be brought into existence. It is to provide an alternative to the cold and protracted formality of procedure in course of law that such an institution should be brought into existence. There is every conceivable reason today which impels to the consideration that such an institution is now overdue in our country....⁶”

- 3.3A. The word Lokpal etymologically, means the "protector of the people". Adopting the famous Lincolnian phrase, it can also be seen as a protection/protector "of the people, by the people, for the people". The word 'Ombudsman', on the other hand, is rooted in the Old Norse language, essentially meaning "representative", i.e. an official charged with representing the interests of the public by investigating and addressing complaints reported by individual citizens. Roman Law has also had a similar counterpart viz. the "tribunition role "of a person/institution, whose role was to intercede in the political process on behalf of common citizens and in Roman times was fulfilled by elected officials.
- 3.4. These efforts set the stage for evolving an institution like Ombudsman in India and consequently, the idea of Lokpal surfaced in the national legislative agenda. Later, the Government appointed an Administrative Reforms Commission which in its recommendation suggested a scheme of appointing Lokpal at Centre and Lokayuktas in each State⁷.
- 3.5. Thereafter, to give effect to the recommendations of the First Administrative Reforms Commission, eight Bills were introduced in the Lok Sabha from time to time. However, all these Bills lapsed consequent upon the dissolution of the respective Lok Sabhas, except in the case of the 1985 Bill which was subsequently withdrawn after its introduction. A close analysis of the Bills reflects that there have been varying approaches and shifting foci in scope and jurisdiction in all these proposed legislations. The first two Bills viz. of 1968 and of 1971 sought to cover the entire universe of bureaucrats, Ministers, public sector undertakings, Government controlled societies for acts and omissions relating to corruption, abuse of position, improper motives and mal-administration. The 1971 Bill, however, sought to exclude the Prime

⁶ Lok Sabha Debates dated 23rd April, 1965, P. 10844. It is ironic that something described as "overdue" in 1965 by the MP is being enacted in 2011!

⁷ *Problems of Redress of Citizen and Grievances*, Interim Report of the First Administrative Reforms Commission, 1966.

Minister from its coverage. The 1977 Bill broadly retained the same coverage except that corruption was subsequently sought to be defined in terms of IPC and Prevention of Corruption Act. Additionally, the 1977 Bill did not cover maladministration as a separate category, as also the definition of “public man” against whom complaints could be filed did not include bureaucrats in general. Thus, while the first two Bills sought to cover grievance redressal in respect of maladministration in addition to corruption, the 1977 version did not seek to cover the former and restricted itself to abuse of office and corruption by Ministers and Members of Parliament. The 1977 Bill covered the Council of Ministers without specific exclusion of the Prime Minister.

The 1985 Bill was purely focused on corruption as defined in IPC and POCA and neither sought to subsume mal-administration or mis-conduct generally nor bureaucrats within its ambit. Moreover, the 1985 Bill impliedly included the Prime Minister since it referred to the office of a Minister in its definition of “public functionary”.

The 1989 Bill restricted itself only to corruption, but corruption only as specified in the POCA and did not mention IPC. It specifically sought to include the Prime Minister, both former and incumbent.

Lastly, the last three versions of the Bill in 1996, 1998 and 2001, all largely;

- (a) focused only on corruption;
- (b) defined corruption only in terms of POCA;
- (c) defined “public functionaries” to include Prime Minister, Ministers and MPs;
- (d) did not include bureaucrats within their ambit.

3.6. The Lokpal Bill, 2011 enables the Lokpal to inquire into allegations made in a complaint against a ‘public servant’. With the coining of this new term, the current Lokpal Bill, as proposed and as sent to this Committee, is distinct from the previous Bills mainly on the following counts:-

- Its jurisdiction is comparatively wider as it has widened the scope of ‘public servant’ by including the bureaucracy as also institutions and associations, wholly or partly financed or controlled by the Central Government or those who are in receipt of public money.
- It provides for separate investigation and prosecution wings of Lokpal
- It makes the declaration of assets by all ‘public servants’ mandatory and failure to do so liable to the presumption that such assets have been acquired by corrupt means.
- It is far more detailed and more inclusive than earlier versions, with a large number of principal and ancillary provisions not found in earlier versions.

- 3.7. It is thus clear that the concept of the institution of Lokpal has undergone vital and important changes over time keeping in view the changing socio-economic conditions and varying nature, level and pervasiveness of corruption in society.
- 3.8. Though the institution of Lokpal is yet to become a reality at the Central level, similar institutions of Lokayuktas have in fact been setup and are functioning for many years in several States. In some of the States, the institution of Lokayuktas was set up as early as in 1970s, the first being Maharashtra in 1972. Thereafter, State enactments were enacted in the years 1981 (M.P.), 1983 (Andhra Pradesh and Himachal Pradesh), 1984 (Karnataka), 1985 (Assam), 1986 (Gujarat), 1995 (Delhi), 1999 (Kerala), 2001 (Jharkhand), 2002 (Chhatisgarh) and 2003 (Haryana). At present, Lokayuktas are in place in 17 States and one Union Territory. However, due to the difference in structure, scope and jurisdiction, the effectiveness of the State Lokayuktas vary from State to State. It is noteworthy that some States like Gujarat, Karnataka, Bihar, Rajasthan and Andhra Pradesh have made provisions in their respective State Lokayuktas Act for suo motu investigation by the Lokpal. In the State Lokayukta Acts of some States, the Lokayukta has been given the power for prosecution and also power to ensure compliance of its recommendations. However, there is a significant difference in the nature of provisions of State Acts and in powers from State to State. Approximately nine States in India have no Lokayukta at present. Of the States which have an enactment, four States have no actual appointee in place for periods varying from two months to eight years.

CHAPTER - 4

CITIZENS' CHARTER AND GRIEVANCE REDRESSAL MECHANISM

I INTRODUCTION AND BACKGROUND

4.1. There has been a consistent, universal and widespread demand for creating a Public Grievances Redressal Mechanism and mandating a Citizens Charter for all government departments and public services in the country. This is to address grievances of the public in their dealing with public offices for issues not related to corruption but including vital issues like procrastination, inactivity, unresponsiveness etc. on the part of public functionaries. Since the Lokpal Bill 2011 drafted by the government restricted itself to issues relating to corruption, the issue of Grievance Redressal was not included. The draft Jan Lokpal Bill presented by the team headed by Shri Anna Hazare includes the issue of grievances redressal/citizens charter to be also addressed by the institution of Lokpal.

During the debate in Parliament on 27th August 2011 on the issue of setting up of Lokpal the Citizens Charter issue was one of the key items of the agenda. The Hon'ble Minister of Finance while summing up the deliberations stated that the House agreed in principle on, inter alia, the Citizens Charter to be brought under Lokpal through appropriate mechanism. Notably the United Nations Convention on Action Against Corruption (UNCAC) does not directly mention that each signatory State should have a Citizens Charter¹.

II SUMMARY OF SUGGESTIONS/OBSERVATIONS RECEIVED THROUGH WRITTEN MEMORANDA

4.1A. The memoranda received by the Committee carried the following suggestions/ observations:-

- The concept of Citizens' Charter was first mooted in a White Paper entitled "The Citizens' Charter: raising the standard" presented before the British Parliament in July, 1991.

¹ UNCAC was adopted by the United Nations General Assembly by Resolution 58/4 of 31st October, 2003 and opened up for signature at the high level political signing conference in Merida, Mexico from 9 – 11 December, 2003. The Convention entered into force on 14th December, 2005.

- Basic elements of Citizens' Charter are: (i) transparency (ii) accountability (iii) availability of information (iv) declared standards of service, with a promise to improve upon it and (v) an effective and efficient Grievance Redressal machinery.
- Include Citizens' Charter, Public Grievances, and Whistleblowers also in the Bill.
- Citizens Charter indicating time frame for each work should be introduced and responsibility of Govt. officer to be fixed; should have provisions for penalties, for failure to do so.
- Blue Print of the proposed mechanism
 - (i) Every citizen's letter should be acknowledged within a week.
 - (ii) Every citizen's letter should be replied within a month.
 - (iii) Every official who has public contact must wear a name badge.
- Grievance Redressal Mechanism must be separated from Lokpal / Lokayuktas and be modeled on RTI Act, 2005.
- Slow progress of any citizen's work to be deemed as "corruption".
- A comprehensive legal frame work should be provided under the Central Law by bringing in a separate legislation under Entry 8 of List-III of Seventh Schedule of the Constitution, for the purpose of putting in place an effective Grievance Redressal Mechanism, simultaneously with the Lokpal Bill.
- Needed, but in separate Bill for Central institutions and schemes, and separately for each of the States.
- Statutory back up is needed to provide a time limit; service and penalty as imposed by an appellate authority with Civil Court power; and a second appellate to reviewing authority be provided. The CVC should be the monitoring agency for citizens' charters.
- Enact public service delivery law and strong grievance redressal mechanism to effectively address petty corruption in delivery of services.
- United Nations Convention on Action Against Corruption (UNCAC) doesn't directly mention that each State party should have a "citizens' charter".
- There are many countries which included the principles of service orientation in their legislation in one or the other way.

- UNCAC does not mention about who the independent body or bodies should report to.

III. SUMMARY OF DEPOSITIONS GIVEN BY WITNESSES

4.2 The Ministry of Personnel (DoPT) have, in their comments, observed as follows:-

".....For redressal of public grievances, the Government proposes to bring a separate legislation before the Parliament".

4.3 Dr. Jayaprakash Narayan, President, Loksatta, while tendering oral evidence before the Committee, stated thus:

".....There is a case for Citizens' Charter and laws governing that. But, it must be applicable only to the notified agencies where there are no supply constraints. This is a very important consideration because an omnibus legislation saying that there will be a Citizens' Charter for every service is, simply, not practicable.....".

4.4 He further stated:

".....Then, as far as grievances are concerned, Mr. Chairman, as I mentioned before, there will be hundreds and thousands of grievances everyday. They must not come under Lokpal and Lokayukta. They must come under a separate grievance redressal authority....."

4.5 Speaking on this issue, Shri Ashok Kumar Parija (Chairman, Bar Council of India) said:-

".....The third issue is regarding citizen charter and grievances redressal. The Anna Hazare Lokpal Bill provides that each Government Department will have a citizen charter. We are of the view that we could have a different law for citizen charter and not mix it with the Lokpal....."

4.6. Shri Shekhar Singh (NCPRI) deposed before the Committee as under:-

".....We are not in favour of the grievance redress or citizen's charter being under the Lokpal. But we have suggested that there ought to be a parallel institution like grievance redress commissions both at the Centre and State levels. My colleagues will give you more details on that....."

4.7. Smt. Anjali Bhardwaj (NCPRI), while placing their views before the Committee, stated:-

".....there should be a separate legislation which deals with grievance redressal, and that legislation should focus on setting up an appropriate decentralized structure for dealing with issues of grievances. We feel that grievances और corruption के केसेज एक साथ में एक बाँड़ी न देखे। हमारे देश में 1.2 बिलियन लोग हैं और सभी के कुछ न कुछ grievances हैं। अगर एक साल में किसी बाँड़ी के पास एक बिलियन से ज्यादा

grievances आ जायेंगे, it will collapse under its own weight, and it will not be effective. Therefore, we feel that a separate body needs to be set up to look into the issue of grievance redress. It needs to be a decentralized body because people often have very immediate nature of grievances....."

- 4.8. Shri Harish Salve, Sr. Advocate, Supreme Court of India, while clarifying his view on the topic, opined thus:-

".....I do not see, Sir, in my respectful submission to you, any specific Entry of the State which would apply to the framing of a Citizens' Charter and which would then put it squarely within the power of the Union Parliament. If you do frame a Citizens' Charter, Sir, then certainly as an incidental power, the Union Parliament can appoint an agency to enforce that Charter. And if that incidentally encroaches on the State's field, that is permitted by our Constitution"

- 4.9. He further opined :

".....What I suggest is, taking a leaf from the current Electricity Act, which we have, a structure should be created under the Union law in which States will appoint grievance redressal authorities. So, that also respects the principle of federalism. We have it already in the Electricity Act where State Commissions are appointed. So, under the Union law, you can always leave it to the State Governments to appoint their own grievance redressal authorities. You can prescribe what the collegium will be and you can prescribe as to how that collegium will appoint the grievance redressal authority but it must be left to the States....."

IV. ANALYSIS AND DISCUSSION

- 4.10. At this juncture, the Committee also takes note of its earlier recommendations as contained in its 29th Report on the subject "Public Grievances Redressal Mechanism" wherein the Committee had observed :-

" In support of its foregoing recommendations/observations, the Committee, strongly recommends that the Public Grievance Redressal Mechanism should be envisaged in a statutory form on the line of the Right to Information Act, 2005 which would make it mandatory on all State Governments/ UTs/ Ministries/ Departments /Organisations to pursue the grievance till their final disposal. The Committee also reiterates that like Right to Information Act in the PGRM system there should be a time limit of 30 days and provision of fine on delay should be there".

- 4.11 The wide cross-section of opinion available to the Committee through memoranda and depositions overwhelmingly suggested that there was a dire need for enacting a Public Service Delivery law. Opinion was divided on whether it should be separate and distinct from the Lokpal, i.e., be resident in a separate legislation or be part of the Lokpal, though the preponderant view inclined towards the former.

- 4.12 One of the prime reasons for this separation, as cited by various witnesses, was that the institution of Lokpal would be severely burdened and become unworkable if it also included the jurisdiction of handling public grievances. Public Grievances Redressal, fortified through a Citizens Charter, would necessarily invite millions of complaints on a daily basis and it was, therefore, critical that a separate mechanism was set up more akin to the Right to Information structure.
- 4.13 The other major reason for keeping the Grievance Redressal Mechanism separate is that these are qualitatively different and easily severable from the issue of corruption in political and bureaucratic circles.
- 4.14 Citizens' Charter would involve not only framing, but monitoring of a list of DOs and DON'Ts for the Central Government (and corresponding State Government departments) which may not at all be feasible for a single Lokpal or a single Lokayukta to handle.

V. REASONS AND RECOMMENDATIONS

- 4.15 The Committee believes that while providing for a comprehensive Grievance Redressal Mechanism is absolutely critical, it is equally imperative that this mechanism be placed in a separate framework which ensures speed, efficiency and focus in dealing with citizens' grievances as per a specified Citizens' Charter. The humongous number of administrative complaints and grievance redressal requests would critically and possibly fatally jeopardize the very existence of a Lokpal supposed to battle corruption. At the least, it would severally impair its functioning and efficiency. Qualitatively, corruption and mal-administration fall into reasonably distinct watertight and largely non-overlapping, mutually exclusive compartments. The approach to tackling such two essentially distinct issues must necessarily vary in content, manpower, logistics and structure. The fact that this Committee recommends that there must be a separate efficacious mechanism to deal with Grievance Redressal and Citizens' Charter in a comprehensive legislation other than the Lokpal Bill does not devalue or undermine the vital importance of that subject.**

4.16 Consequently the Committee strongly recommends the creation of a separate comprehensive enactment on this subject and such a Bill, if moved through the Personnel/Law Ministry and if referred to this Standing Committee, would receive the urgent attention of this Committee. Indeed, this Committee, in its 29th Report on “Public Grievance Redressal Mechanism”, presented to Parliament in October, 2008 had specifically recommended the enactment of such a mechanism.

4.17. To emphasize the importance of the subject of Citizens' Charter and to impart it the necessary weight and momentum, the Committee is of the considered opinion that any proposed legislation on the subject:

- (i)** should be urgently undertaken and be comprehensive and all inclusive;
- (ii)** such enactment should, subject to Constitutional validity, also be applicable for all States as well in one uniform legislation;
- (iii)** must provide for adequate facilities for proper guidance of the citizens on the procedural and other requirements while making requests.
- (iv)** must provide for acknowledgement of citizen’s communications within a fixed time frame;
- (v)** must provide for response within stipulated time frame;
- (vi)** must provide for prevention of spurious or lame queries from the department concerned to illegally/unjustifiably prolong/extend the time limit for response;
- (vii)** must provide for clearly identifiable name tags for each employee of different Government departments;
- (viii)** must provide for all pending grievances to be categorized subject-wise and notified on a continually updated website for each department;
- (ix)** must provide for a facilitative set of procedures and formats, both for complaints and for appeals on this subject - along the lines of the Information Commissioners system set up under the RTI;

- (x) must, in the event that the proposed Central law does not cover states, make strong recommendations to have similar enactments for grievance redressal/citizen charter at each State level;**
- (xi) may provide for exclusionary or limited clauses in the legislation to the effect that Citizen Charter should not include services involving constraints of supply e.g. power, water, etc. but should include subjects where there is no constraint involved e.g. birth certificates, decisions, assessment orders. These two are qualitatively different categories and reflect an important and reasonable distinction deserving recognition without which Government departments will be burdened with the legal obligation to perform and provide services or products in areas beyond their control and suffering from scarcity of supply.**

4.18. The Committee strongly feels that the harmonious synchronization of the RTI Act and of the Citizens' Charter and Public Grievances Redressal Mechanism will ensure greater transparency and accountability in governance and enhance the responsiveness of the system to the citizens' needs/expectations/grievances.

4.19. Lastly, the Committee wishes to clarify that the conclusion of the Hon'ble Union Minister for Finance on the Floor of the House quoted in Para 1.8 above of the Report does not intend to direct or mandate or bind or oblige this Committee to provide for a Citizen's Charter within the present Lokpal Bill alone. The Committee reads the quoted portion in para 1.8 above to mean and agree in principle to provide for a Citizen's Charter/Grievance Redressal system but not necessarily and inexorably in the same Lokpal Bill. Secondly, the reference to 'appropriate mechanism' in para 1.8 above further makes it clear that there must be a mechanism dealing with the subject but does not require it to be in the same Lokpal Bill alone. Thirdly, the reference in para 1.8 above to the phrase 'under Lokpal' is not read by the Committee to mean that such a mechanism must exist only within the present Lokpal Bill. The Committee reads this to mean that there should be an appropriate institution to deal with the subject of Citizen's Charter/Grievance redressal which would be akin to the Lokpal and have its features of independence and efficacy, but not that it need not be the very same institution i.e. present Lokpal. Lastly, the Committee also takes note of the detailed debate and divergent views of those who spoke on the Floor of

both Lok Sabha and Rajya Sabha on this issue and concludes that no binding consensus or resolution to the effect that the Grievances Redressal/Citizen's Charter mechanism must be provided in the same institution in the present Lokpal Bill, has emerged.

- 4.20. Contextually, the issues and some of the suggestions in this Chapter may overlap with and should, therefore, be read in conjunction with Chapter 13 of this report. Though the Committee has already opined that the issue of grievance redressal should be dealt with in a separate legislation, the Committee hereby also strongly recommends that there should be a similar declaration either in the same Chapter of the Lokpal or in a separate Chapter proposed to be added in the Indian Constitution, giving the same constitutional status to the citizens grievances and redressal machinery.
- 4.21. This recommendation to provide the proposed Citizen Charter and Grievances Redressal Machinery the same Constitutional status as the Lokpal also reflects the genuine and deep concern of this Committee about the need, urgency, status and importance of a citizen's charter/grievance machinery. The Committee believes that the giving of the aforesaid constitutional status to this machinery would go a long way in enhancing its efficacy and in providing a healing touch to the common man. Conclusions and recommendations in this regard made in para 13.12 (j) and (k) should be read in conjunction herein.
- 4.22. Furthermore, the Committee believes that this recommendation herein is also fully consistent with the letter and spirit of para 1.8 above viz. the conclusions of the Minister of Finance in the Lower House recorded in para 1.8 above.

CHAPTER - 5
THE PRIME MINISTER: FULL EXCLUSION VERSUS
DEGREES OF INCLUSION

I. INTRODUCTION AND BACKGROUND

5.1 The issue of inclusion or otherwise of PM has received disproportionate media attention. The Committee received diverse written and oral suggestions varying from complete exclusion to deferred inclusion to partial inclusion (with subject matter exclusion) to inclusion subject to significant safeguards/ caveats and finally to total inclusion simpliciter. There was, however, one fascinating feature in the internal deliberations of the Committee. The intense debate and divergence during deliberations within the Committee was not over the Government versus the Jan Lokpal or some other draft but was between one group of Committee Members who strongly advocated the total, absolute and complete exclusion of PM and another group which argued for inclusion subject to a few substantive subject matter exclusions in addition to very significant and broad procedural safeguards (including a prior clearance from either a 11 member Lokpal or the full Bench of the Apex Court).

II. SUMMARY OF SUGGESTIONS/OBSERVATIONS RECEIVED THROUGH WRITTEN MEMORANDA

- 5.2** The memoranda received by the Committee carried the following suggestions/ observations:-
- Prime Minister cannot be subjected to Lokpal's jurisdiction in a cavalier manner.
 - The PM should be altogether kept out of the jurisdiction of Lokpal since Parliament is the best forum we can trust to enforce integrity in the office of the PM .
 - Include PM in clause 2(1) (i) with certain caveats.
 - It is necessary to include PM within the purview of Lokpal otherwise, corrupt Ministers/Officers will get away by pleading that they had acted with the approval/knowledge of PM.
 - At present, any criminal investigation into allegations made against Prime Minister are required to be investigated by CBI. Therefore, there is no problem if Lokpal investigates, instead of CBI.
 - Proceedings concerning Prime Minister to be in camera.

- Lokpal may investigate into complaints against PM signed by 50/75/100 MPs; similar method in States for CM.
- Prime Minister is *primus inter pares* or 'first among equals' in the Council of Ministers. Hence viewed from the Constitutional position, the Prime Minister gets the position of 'keystone of the Cabinet arc' only because he is the Head of the Council of Ministers and nothing else. There is nothing inherent in the position of Prime Minister because of which he should be given any special status, especially in matters relating to investigation of corruption.
- Some qualification like 'clearance from the Supreme Court' may be introduced in the Bill to put a wall to prevent black mailing of the Prime Minister.
- Proviso may be added to clause 2(1) (i) of the Bill which may read : "Personnel of Prime Minister's Office, including Minister-in-charge shall be included within this clause."
- Any complaint against Prime Minister to be evaluated by a Full Bench of Lokpal for *prima facie* evidence. Once the Bench finds *prima facie* evidence in the complaint, it may be referred to Full Bench of the apex Court for their opinion. On positive opinion from the apex Court, Lokpal notifies the ruling dispensation of imminent inquiry proceedings with a notice of few days giving them time to re-elect a new Prime Minister.
- No special treatment is needed for Chief Minister since there is provision of President's rule at State Government level and no power vacuum is created if Chief Minister has to resign. Article 356 exists for the States, not for the Centre.
- Office of PM, including the PM should be under Lokpal. However, acts regarding to national interest and public order should be excluded from the purview of Lokpal. Upon indictment, any reference for prosecution action against the PM can be taken only if the decision is endorsed by simple majority of Joint Session of Parliament.
- Bill should include in its ambit, the PM in office; but with certain safeguards like enquiry only after deliberations by the Full Bench of Lokpal, in consultation with the CJI.

- Complaints against PM – all such investigations shall be made in a confidential manner and in camera; if any information about material aspects is leaked out, the Investigation Officer shall be prima facie held responsible for such leakage.
- If the Lokpal finds a prima facie case against the PM in any complaint against him, he shall send a detailed report to the CJI, along with all material evidence, to seek appropriate directions in the matter, and shall not proceed further to file a charge sheet against the PM, until appropriate direction to do so is given to the Lokpal by the CJI, or until the expiry of six months from the date of submission of report by the Lokpal to the CJI, in case the Lokpal does not receive any appropriate direction from the CJI.
- Proviso to Clause 17(1)(a) may be added providing for inclusion of serving Prime Minister if two thirds of members of Lokpal make reference to a sanctioning Committee comprising of Vice-President, Speaker and the Leader of Opposition, Lok Sabha and if that Committee sanctions an inquiry into the conduct of the Prime Minister; and also that no such sanction of inquiry be sought or given against the Prime Minister in respect of allegations on matter to sovereignty and integrity of India and the security of the State.
- Definition of “Minister” should include “Personnel of PMO, including Minister-in-charge” – All important policy matters are laid before the PM for its approval; they pass through PMO with valuable views. Exclusion of PM may protect all those persons who are privy to such decision.
- The personal immunity of PM will cease after he demits office, but if inquiry/investigation into the facts is postponed till then, valuable evidence may be lost and immediate adverse impact on the nation may not be prevented.

Short Global Survey*

- **Afghanistan** – The President heads the executive and His Office is not under the law on anti-corruption, nor is the judiciary; **Bhutan** – Every individual residing in Bhutan, including the Prime Minister, judges and lower bureaucracy, are within ACC Bhutan's jurisdiction; **Indonesia** – all included; **USA** – President Clinton was issued a subpoena to testify before a grand jury that was investigating him for possible federal crimes; the court ruled that President Nixon had to turn over the incriminating White House tapes, rejecting his claim of executive privilege; **UK** – Prime Minister is the head of Government, Prime Minister is subject to the law in the same manner as any member of the public; **Korea** – President is both the head of state & head of Govt. President is subject to the Anti-corruption Act, the Public Service Ethics Act & relevant corruption provisions under the Criminal Act. However, under the constitution, the President is entitled to criminal immunity during his tenure of office except for insurrection or; **Australia** - All MPs, judges, magistrates, holders of judicial office are public officials within the meaning of ICAC Act. It extends to public sector agencies also except Police Force – whose corruption is investigated by the Police Integrity Commission.
- Usually, the criminal investigations against heads of department/state would be closely linked to parliamentary investigations & legal procedures for impeachment of a sitting head of state.

III. SUMMARY OF DEPOSITIONS GIVEN BY WITNESSES

5.3 The written comments furnished by the Department of Personnel and Training on this issue are as follows:-

".....In the context of the Indian polity, the Prime Minister occupies a pivotal position in the Government's set up. To ensure that Prime Minister is able to discharge his functions without any interference from any quarter, it is felt that the Prime Minister may be kept outside the purview of the Lokpal. However, after the Prime Minister has demitted the office, he will come within the purview of the Lokpal"

5.4 Justice M.N. Venkatachalaiah, while placing his considered views, before the Committee, on this subject matter, opined :-

".....I have made it clear in the Constitution Review Commission Report that the Prime Minister's Office must be kept out of it. You have no idea of what the Prime Minister's Office is in a parliamentary democracy....."

* As extracted from written memoranda submitted by UNDP India to the Committee.

5.5 Dr. Jayaprakash Narayan, while articulating his Party's view on this topic, stated:-

"..... the Prime Minister in our Westminster model is no longer merely first among equals; the Prime Minister of the country is the leader of the nation. A very large complex federal polity like India cannot afford to have the Prime Minister go before a non-Parliamentary body and present himself or defend himself It does not mean that the Prime Minister should not be accountable. The Prime Minister should be accountable to the Lok Sabha. That is what the Constitution envisages. Certainly, if the Lok Sabha feels that there is something seriously wrong, even the parties in power will not allow the Prime Minister to continue because it is politically not feasible and, constitutionally, the Lok Sabha must be supreme in dealing with the accountability of the Government..... it also will lead to a potential situation where there will be roving inquiries without any substance and even if subsequently it is proved that the Prime Minister's conduct is totally honourable, the damage will be done to the country because if the country is destabilized, if a Government is weakened, the damage is irreversible....."

5.6 He further stated:

"..... Mr. Chairman, to ensure that there are very, very strong safeguards and, in those safeguards, we do not believe that judiciary should be the safeguard in protecting the Prime Minister's institution. We believe it must be a Parliamentary body and, therefore, what we propose is that in case the Prime Minister is sought to be brought within the purview of the Lokpal's jurisdiction, then, after Lokpal, on the basis of the prima facie evidence or the material before it, at least, two-thirds majority asks a Parliamentary Committee to sanction permission to inquire. Our humble suggestion is that committee should be a three-member committee -- we could actually have a variant of that -- headed by the Vice-President of India with the Speaker of the Lok Sabha as a Member and the third member being the Leader of the Opposition. Nobody can accuse this body of partisanship because, after all, these are the two high Chairs of the two Houses of the Parliament. The Leader of the Opposition cannot be accused of being partisan in favour of the Government. If anything, the Leader of the Opposition would probably be harshly critical. Perhaps, we can trust these three members to protect the dignity of the Parliament and the nation's institutions and the privileges of the Executive branch. So, if, indeed, it is found necessary to include the Prime Minister under the jurisdiction of the Lokpal, a safeguard of that kind would probably be practical and would probably protect the interests of the country..... the Prime Minister...is not merely first among equals, but he occupies a very pivotal position. There is no equivalent of Article 356 in the Government of India and the Prime Minister is not somebody who can be chosen just like that,....."

5.7 The representative of NCPRI, while advocating their views on this issue, stated that:-

".....So, we have suggested three or four type of safeguards. Number one, we have said that only a full Bench of the Lokpal could recommend investigation against the Prime Minister. Number two that Bench will have to refer the matter to a full Bench of the Supreme Court. This is like a mandatory appeal to the Supreme Court which will also examine if there is sufficient evidence. Number three, the Prime Minister cannot be investigated under vicarious responsibility what somebody else has done, but only what the Prime Minister allegedly himself or herself has done. Number four, that there are certain security and other issues which would be exempt from this....."

5.8 The views of the Bar Council of India, were expressed by its Chairman, in the following words :-

".....So we want the Prime Minister out of the Lokpal. Now what we suggest is if the Prime Minister is required to be included and if there is an inquiry against the Prime Minister, let it be investigated in-camera by a bench of five-judges of the hon. Supreme Court presided by the hon. Chief Justice and five senior judges. These proceedings will be in-camera till a definite conclusion is arrived at....."

5.9 The President, Center for Policy Research while tendering oral evidence before the Committee, put forth his suggestions as under:-

".....the manner in which the Prime Minister should be brought under the Lok Pal is of some importance. My own view is that I think the Lok Pal Bill, as it currently stands, gets it mostly right. It asserts the principle that the Prime Minister is not above the law, therefore, he can be investigated after he demits office. But he makes due allowance for the fact that the Prime Minister is not just an expression of the sovereignty of the people, the risks of needless investigations, frivolous investigations against the Prime Minister as it were holding Government to ransom, keeping the country's interests are not inconsiderable and, therefore, the Prime Minister should be out of the purview of the Lok Pal while he is in office"

5.10 During his deposition before the Committee, he further observed thus:-

".....Sir, I would submit, there are two models which you can look at. The U.K. has excessive exclusions, but it has list of exclusions. Foreign affairs and the affairs relating to the security of the State are two clear examples where, obviously, the Lokpal can have no look-in. The Hong Kong law is far narrower in its exclusions. One can debate individual items, whether they should or should not go; maybe the functioning of the Prime Minister's Office in the economic Ministries needs to be put under the Lokpal. But, outside the economic Ministries, I would suggest it would be hazardous to generally subject the Prime Minister to the jurisdiction of the Lokpal. We have to strike a balance somewhere and I think, that may be a good line to consider on which it can be divided.....As far as the inclusion of the Prime Minister in the ambit of the Bill is concerned, my suggestion was on the balance in India. We must include the Prime Minister, at least, in the working of the PMO in the Economic Ministry and that include the Ministry of Finance, Ministry of Mines, Ministry of Telecommunications, the Ministry of Urban Development, Ministry of all

natural resources, wherever dealing with the taxpayers' money, wherever you are dealing with the finance must come within the purview of the Lokpal Bill"

5.11 The representative of CII, commented on this issue as follows:

".....The first issue is the inclusion of the Prime Minister. We believe that the Prime Minister should be outside the purview of the Lokpal Bill. We also believe that he could be investigated after he demits office. The rationale for our saying this is that the Prime Minister is the head of the Government and he needs to run the Government on a day-to-day basis and anything that hampers his ability to run the Government is something which is not going to be good for the nation....."

5.12 The advocates of the Jan Lokpal Bill, expressed their views on this matter as under:-

".....If any PM works for two consecutive terms, then his works for the first few years cannot be investigated because no case earlier than seven years could be investigated....."

5.13 Shri Amod K. Kanth, while commenting on this issue, stated that :-

".....Anyone who has knowledge of our Constitution and Indian laws knows that the rule of law does not exclude the Prime Minister of India at all. Only the President and the Governors have the constitutional immunity. Even today the Prime Minister can be easily investigated. In fact, to make a special provision for the Prime Minister will be a wrong suggestion....."

5.14 It is significant to note that the Second Administrative Reforms Commission, in its Fourth Report on "Ethics in Governance" had observed that:-

"The Prime Minister's unchallenged authority and leadership are critical to ensure cohesion and sense of purpose in government, and to make our Constitutional scheme function in letter and spirit. The Prime Minister is accountable to the Parliament, and on his survival, depends the survival of the government. If the Prime Minister's conduct is open to formal scrutiny by extra-Parliamentary authorities, then the government's viability is eroded and Parliament's supremacy is in jeopardy... A Prime Minister facing formal enquiry by a Lok Pal would cripple the government. One can argue that such an enquiry gives the opportunity to the incumbent to defend himself against baseless charges and clear his name. But the fact is, one there is a formal enquiry by a Lok Pal on charges, however baseless they might be, the Prime Minister's authority is severely eroded, and the government will be paralysed. Subsequent exoneration of the Prime Minister cannot undo the damage done to the country or to the office of the Prime Minister. If the Prime Minister is indeed guilty of serious indiscretions, Parliament should be the judge of the matter, and the Lok Sabha should remove the Prime Minister from office."

5.15 During the deliberations of the Committee, one of the Members articulated his point of view as follows:-

".....प्राइम-मिनिस्टर की पूरी *liability* तो *vicarious* ही है। अगर मंत्रिमंडल में 20 मंत्री हैं, तो प्राइम-मिनिस्टर कोई विभाग डायरेक्टली नहीं देख रहे हैं। आप इसको व्यावहारिक तौर पर कैसे लाएंगे? अगर संचार मंत्रालय में कुछ गड़बड़ हुई, अगर पेट्रोल वाले मिनिस्टर से कुछ गड़बड़ हुई, तो आप यह जो *vicarious* की सील है, इसको कैसे *implement* करेंगे? दूसरा जब आप खुद कह रहे हैं कि *Anti-corruption Act* और *Prevention of Corruption Act* में वह *covered* है, तो क्या आप यह महसूस नहीं करते कि यह *sufficient safeguard* है?....."

5.16 Another Member of the Committee raised a pertinent concern on this topic in the following words :-

".....*Second was the inclusion of the Prime Minister within the ambit of the Lokpal. There are a lot of serious issues which could be national security, public order, foreign policy, even there are Ministers, for instance, the Ministers of Defence or Foreign Affairs. What do we do about them? You have your nuclear installations. You have your scientists. You have important issues. What do we do about them? Do we have them in the ambit of the Lokpal? Wouldn't we be compromising on the security and integrity of the country?.....*"

V. ANALYSIS AND DISCUSSION

5.17 The issue of the Prime Minister's inclusion or exclusion or partial inclusion or partial exclusion has been the subject of much debate in the Committee. Indeed, this has occupied the Committee's deliberations for at least three different meetings. Broadly, the models / options which emerged are as follows:

- (a) The Prime Minister should be altogether excluded, without exception and without qualification.
- (b) The Prime Minister should altogether be included, without exception and without qualification (though this view appears to be that of only one or two Members).
- (c) The Prime Minister should be fully included, with no exclusionary caveats but he should be liable to action / prosecution only after demitting office.
- (d) The Prime Minister should be included, with subject matter exclusions like national security, foreign affairs, atomic energy and space. Some variants and additions suggested included the addition of "national interest" and "public order" to this list of subject matter exclusions.
- (e) One learned Member also suggested that the Prime Minister be included but subject to the safeguard that the green signal for his prosecution must be first

obtained from either both Houses of Parliament in a joint sitting or some variation thereof.

- 5.18 It may be added that so far as the deferred prosecution model is concerned, the view was that if that model is adopted, there should be additional provisions limiting such deferment to one term of the Prime Minister only and not giving the Prime Minister the same benefit of deferred prosecution in case the Prime Minister is re-elected.
- 5.19 In a nut shell, as far as the large number of the Members of the Committee are concerned it was only three models above viz. as specified in paras (a), (c) and (d) in para 5.17 above which were seriously proposed.
- 5.20 Since the Committee finds that each of the views as specified in paras (a), (c) and (d) in para 5.17 above had reasonably broad and diverse support without going into the figures for or against or into the names of individual Members, the Committee believes that, in fairness, all these three options be transmitted by the Committee as options suggested by the Committee, leaving it to the good sense of Parliament to decide as to which option is to be adopted.
- 5.21 It would be, therefore, pointless in debating the diverse arguments in respect of the each option or against each option. In fairness, each of the above options has a reasonable zone of merit as also some areas of demerit. The Committee believes that the wisdom of Parliament in this respect should be deferred to and the Committee, therefore, so opines.

VI. REASONS AND RECOMMENDATIONS

- 5.22 The issue of the Prime Minister's inclusion or exclusion or partial inclusion or partial exclusion has been the subject of much debate in the Committee. Indeed, this has occupied the Committee's deliberations for at least three different meetings. Broadly, the models / options which emerged are as follows:**
- (a) The Prime Minister should be altogether excluded, without exception and without qualification.**

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- (c) The Prime Minister should be fully included, with no exclusionary caveats but he should be liable to action / prosecution only after demitting office.**
- (d) The Prime Minister should be included, with subject matter exclusions like national security, foreign affairs, atomic energy and space. Some variants and additions suggested included the addition of “national interest” and “public order” to this list of subject matter exclusions.**
- (e) One learned Member also suggested that the Prime Minister be included but subject to the safeguard that the green signal for his prosecution must be first obtained from either both Houses of Parliament in a joint sitting or some variation thereof.**

5.23 It may be added that so far as the deferred prosecution model is concerned, the view was that if that model is adopted, there should be additional provisions limiting such deferment to one term of the Prime Minister only and not giving the Prime Minister the same benefit of deferred prosecution in case the Prime Minister is re-elected.

5.24 In a nut shell, as far as the overwhelming number of Members of the Committee are concerned, it was only three models above viz. as specified in paras (a), (c) and (d) in para 5.17 above which were seriously proposed.

5.25 Since the Committee finds that each of the views as specified in paras (a), (c) and (d) in para 5.17 above had reasonably broad and diverse support without going into the figures for or against or into the names of individual Members, the Committee believes that, in fairness, all these three options be transmitted by the Committee as options suggested by the Committee, leaving it to the good sense of Parliament to decide as to which option is to be adopted.

5.26 It would be, therefore, pointless in debating the diverse arguments in respect of each option or against each option. In fairness, each of the above options has a reasonable zone of merit as also some areas of demerit. The Committee believes

that the wisdom of Parliament in this respect should be deferred to and the Committee, therefore, so opines.

CHAPTER - 6
MEMBERS OF PARLIAMENT: VOTE, SPEECH AND CONDUCT
WITHIN THE HOUSE

I. INTRODUCTION AND BACKGROUND

- 6.1 Clause 17(1)(c) of the Lokpal Bill, 2011 enables the Lokpal to inquire into any matter involved in, or arising from, or connected with, any allegation of corruption made in a complaint in respect of any person who is or has been a Member of either House of Parliament. However, sub-clause (2) of this clause specifies that Lokpal shall not inquire into any matter involved in, or arising from, or connected with, any allegation of corruption complaint against any Member of either House of Parliament in respect of anything said or vote given by him in Parliament or any Committee thereof covered under the provisions contained in clause (2) of Article 105 of the Constitution. In other words, MPs and ex-MPs fall under the jurisdiction of the Lokpal for their acts of corruption, except that their acts like speech or voting in the House cannot be inquired into by the Lokpal to the extent they are covered under Article 105(2) of the Constitution. The Committee had received detailed inputs on the issue whether the conduct of MPs in the House (in the form of speech/ vote or action) should also be brought under the jurisdiction of the Lokpal.

II. SUMMARY OF SUGGESTIONS/OBSERVATIONS RECEIVED THROUGH WRITTEN MEMORANDA

- 6.2 Any complaint against a member of any House by Lokpal can be sent to the Presiding Officer of the House, who will, within a limited (well defined) time, either approve the inquiry to be conducted against the Member or if he wants to reject the inquiry, refer it to the Bench of SC/HC which should validate the reasons for such rejection.
- 6.3 To ensure independence of institutions created under the Constitution, only those acts of MPs in the House where there is a case of undue pecuniary benefit should fall under purview of Lokpal. Moreover, for prosecution of MPs, the Lokpal Prosecution/Investigative Committee/Bench should for these specific cases co-opt additional members who are MPs nominated by the Speaker of Lok Sabha and Chairman of Rajya Sabha.

- 6.4 Parliamentary privilege does not cover corrupt acts committed by MPs in connection with their duties in the House or otherwise. Hence, the Bill should include such corrupt practices of MPs, whether done in or outside the House.
- 6.5 The speech of an elected MP inside Parliament cannot be subject to the ideological prejudices of a Lokpal; the vote of an elected Member, if tainted by corruption, must be tackled by Parliament itself as per its rules and norms.
- 6.6 Clause 17(2) of the Bill should be deleted since there is already a decision of a Constitution bench of the Supreme Court supporting what the sub section says and hence it is not necessary to repeat it in the Bill.

II. SUMMARY OF DEPOSITIONS GIVEN BY WITNESSES

- 6.7 The Ministry of Personnel (DoPT) in its comments furnished to Committee clarified the issue in the following terms:-
- ".....It is a matter for examination whether the inquiry by the Lokpal in respect of anything said or vote given by a Member of Parliament would fall under the category 'proceedings before a court of law'. If so, the MPs would certainly have to be kept outside the purview of the Lokpal"*
- 6.8 Chairman of Bar Council of India placed the views of the Bar Council over this issue before the Committee as follows:
- ".....Now so far as conduct of MPs within the Parliament is concerned, our view is they should be excluded from the purview of the Lokpal. What we believe is that conduct of MPs within Parliament should be excluded from the purview of the Lokpal Bill considering the constitutional provisions in respect of privileges of Members in Parliament. However, in terms of Article 105 (3) of the Constitution, the powers, privileges and immunities of each House of Parliament and of the Members and the Committees of each House should be defined by Parliament by a separate law dealing with the subject....."*
- 6.9 The President, Centre for Policy Research, while making a presentation before the Committee, emphasized that Constitutional protection given to MPs need not be changed. He put forward his views as:-
- ".....Now, about inclusion of Members of Parliament, my own view is that the protection provided to the Members of Parliament under article 105 (2)(iii) should be sacrosanct. I think for what you say on the floor of the House and the votes and so forth, there is a reason for that constitutional protection and that should remain....."*
- 6.10 Shri Harish Salve while placing his considered views before the Committee, on this subject matter, opined as follows:-

".....Article 105 is extremely clear. The control over the Parliament must lie within the Parliament. As much as the control within the Courts lie with the Presiding Officers, as much as nobody from outside Court can tell me what to say in the Court, nobody from outside Parliament can tell any parliamentarian how to behave and what to say in the Parliament, and that is far too precious a virtue for us to sacrifice or compromise. But, Sir, do take this occasion to clear up one terrible aberration that has come into our law. Where article 105 applies, there is complete immunity. But, Sir, please clarify that the immunity of article 105 is not a half-way house; the bribe taker is protected and the bribe giver is subjected to scrutiny of the law. That judgment needs to be corrected. If it is established that somebody has taken a bribe to vote in Parliament in a particular way, with the sanction of the Speaker, because Supreme Court read that in, that can be put on a statutory basis, and if the Speaker of the House considers it appropriate, it is a matter which can be put within the domain of the Lokpal for the investigation. And, once the Speaker of the House, which means once the House, feels that it is a fit case for the Lokpal, then this artificial divide between the bribe giver and the bribe taker must go....."

- 6.11 President of CII while apprising the Committee of his views/ comments on the issue, observed as follows:-

".....The next issue is MPs action inside the Parliament. We believe that the existing arrangement should continue. The Privileges Committee should take care of the MPs' action inside the Parliament. If there is any lacuna in the functioning of the Privileges Committee or if the Privileges Committee is lacking any teeth in the manner in which it can act, I believe that needs to be looked at and that needs to be strengthened....."

- 6.12 Shri Shekhar Singh of NCPRI while tendering oral evidence before the Committee, put forth his suggestions as under:-

"..... Let the matter stays as it is though we are not in agreement with what we understand to be the implications of the Supreme Court Order on this matter. We feel that that has gone beyond what the Constitution envisages. So, we would like a position which is strictly in keeping with the Constitutional position. But we would like the Parliament to consider whether it itself wants to review this position especially in the light of some of the past occurrences and, maybe, relax it in a way in which public feel that there is a greater answerability of the MPs even when they are in Parliament....."

- 6.13 Dr. Jayaprakash Narayan during his presentation before the Committee, elucidated upon the issue as follows:-

"As far as Members of Parliament are concerned, article 105(2), the present Bill makes a specific provision of that; I think, it is section 17 (2), if I am not mistaken. Sir, protection of privileges of Members of Parliament for their conduct in the House, what they say, what they believe, and what documents they furnish, that is absolutely inviolable. That is sacrosanct, including their vote Sir until that is undone, for the lower courts of the Country, the judgment of the Supreme Court is final and binding, and therefore there cannot be any prosecution of a Member of Parliament on grounds of corruption for an act committed in the House. Our view is that these two things

must be delinked—the act committed in the House and the corruption, i.e., receiving illegal gratification in order to do a certain thing or not to do in Parliament, in the interest of the Parliament and its dignity. That has to happen only through the Supreme Court pronouncement because Supreme Court has already held; or, it can happen by a law.

Parliament and institutions of Constitution are increasingly under attack and now if the Parliament takes this stand, it will actually undermine Parliamentary democracy and the Constitution. Therefore, very humbly, we submit that this must be delinked and section 17(2) must be deleted....."

IV. ANALYSIS AND DISCUSSION

- 6.14 From the constitutional perspective, it is quite clear that irrespective of demands, personal preferences, opinions or public perception, it is not possible to prosecute MPs for corruption related acts or omissions so long as such conduct is relatable either to their vote in the House and /or to their speech in the House and/or to publication thereof. The bar of Article 105 is complete and absolute and unless there is a constitutional amendment, the issue cannot be considered further.
- 6.15 As regards conduct of MPs, both sitting and former, in respect of allegations of corruption not related to their vote/speech/conduct in the House, the Lokpal Bill already mandates coverage under section 17 (1) (c).
- 6.16 There appears to be no consensus among the Committee Members or, indeed among political parties to the effect that Article 105 be deleted or substantially or marginally modified to erode or deprive MPs of this immunity. Such an enterprise would lead to avoidable confusion and certain and inordinate delay involving a constitutional amendment without even minimal consensus. Thus as far as Article 105 is concerned, there being united opposition regarding protecting the privilege of MPs and preservation of the essence of Article 105, it is recommended that the exception or clarification contained in section 17 (2) of the Lokpal Bill be retained.
- 6.17 There is a perception that conduct of MPs in the House is not subject to any monitoring or sanction. In this context it is critical to underscore that Article 105 does not provide MPs immunity or protection from disciplinary proceedings or sanctions initiated and conducted by the Parliament itself. As an illustration the cash for questions scam in this year led to the expulsion of 11 Members from different political parties. Their appeal to the Supreme Court challenging their expulsion was

also rejected by the Supreme Court². There is a weighty body of opinion in our country which thinks that this is the way it should be and that for vote, speech or action within Parliament, accountability must be demanded from and owed to Parliament itself and not to external policing bodies like Lokpal.

- 6.18 Even the Jan Lokpal Bill as presented by the team headed by Shri Anna Hazare proposed that investigations into affairs of the Members of Parliament should be permissible, subject to Article 105 of the Constitution. They, however, contend that Article 105 of the Indian Constitution does not seek to immunize corrupt vote, corrupt speech and corrupt action within the House. Alternatively, they contend that if Article 105 is read to granting immunity to vote, speech or conduct involving corruption, then Article 105 must necessarily be amended.

V. REASONS AND RECOMMENDATIONS

- 6.19 The Committee strongly feels that constitutional safeguards given to MPs under Article 105 are sacrosanct and time-tested and in view of the near unanimity in the Committee and among political parties on their retention, there is no scope for interfering with these provisions of the Constitution. Vote, conduct or speech within the House is intended to promote independent thought and action, without fetters, within Parliament. Its origin, lineage and continuance is ancient and time-tested. Even an investigation as to whether vote, speech or conduct in a particular case involves or does not involve corrupt practices, would whittle such unfettered autonomy and independence within the Houses of Parliament down to vanishing point. Such immunity for vote, speech or conduct within the Houses of Parliament does not in any manner leave culpable MPs blameless or free from sanction. They are liable to and, have, in the recent past, suffered severe parliamentary punishment including expulsion from the Houses of Parliament, for alleged taking of bribes amounting to as little as Rs. 10,000/- for asking questions on the floor of the House. It is only external policing of speech, vote or conduct within the House that Article 105 frowns upon. It leaves such speech, vote and conduct not only subject to severe intra-parliamentary scrutiny and action, but also does not seek to affect corrupt practices or any other vote, speech**

² See the judgement of five judges Constitutional bench headed by Chief Justice Y.K. Sabharwal in *Raja Rampal Vs. The Hon'ble Speaker, Lok Sabha and Ors.* dated 10th January, 2007.

or conduct outside Parliament. There is absolute clarity and continued unanimity on the necessity for this limited immunity to be retained. Hence, speculation on constitutional amendment in this regard is futile and engenders interminable delay.

6.20 Consequently, the existing structure, mechanism, text and context of clauses 17 (1) (c) and 17 (2) in the Lokpal Bill 2011 should be retained.

CHAPTER 7
LOKPAL AND STATE LOKAYUKTAS:
SINGLE ENACTMENT AND UNIFORM STANDARDS

I. INTRODUCTION AND BACKGROUND

7.1 Keeping in mind the federal structure of our country and the need to cover all public functionaries, either at the Centre or at the States under a corruption watchdog, it has long been proposed that while there would be a Lokpal for the Centre, there must be Lokayuktas for each State. The difference in terminology is merely to demarcate the Centre – State distinction, albeit the roles performed by the Lokpal and Lokayukta in their respective jurisdictions would be similar. Over a period of time some States have enacted legislations creating the office of the Lokayukta. Their evolution at the State level has been briefly adverted to in para 3.8 above. While some of these States have institutions which developed roots in that State, other States have not succeeded in realizing their own legislative mandate. Still others do not still have Lokayuktas, either on account of absence of legislation³ or due to unfulfilled vacancy⁴. Currently about 17 States and one Union Territory have Lokayukta enactments with huge variance in their jurisdiction, powers, scope, function and mandate. The standards applied to identifying offences, investigations, prosecution and penalties differ from State to State. Therefore there has been a huge clamor for universal standards and an omnibus umbrella enactment to cover all States as also the Union. However, considering the federal structure of the Constitution and the split of powers between Centre and State, there has been a debate about the constitutional feasibility of such an omnibus enactment.

II. SUMMARY OF SUGGESTIONS/OBSERVATIONS RECEIVED THROUGH WRITTEN MEMORANDA

7.2 Lokayuktas needed in States.

7.3 This Bill should also incorporate a separate chapter on Lokayukta in each State and local ombudsman in each city / district under the Lokayuktas. Lokayuktas may be empowered on the lines of Lokpal and CVC as in the case of Central Government.

³ Nine States and six UTs do not have institution of Lokayukta

⁴ Presently, post of Lokayukta is vacant in four States which have Lokayukta enactment.

- 7.4 Set up strong Lokayuktas in the States within the frame work of the Constitution
- 7.5 Lokpal needs to be a Constitutional authority, like the ECI or CAG rather than a statutory body, so that it has higher levels of legitimacy.

- 7.6 The DoPT, in its written comments on the issue, has stated:-

".....The Bill seeks to provide Lokpal at the Centre and it may constitute Benches which shall ordinarily sit at New Delhi [Clause 19]. At State level, the concerned State Government has to consider setting of Lokayuktas."

- 7.7. The proponents of the Jan Lokpal Bill, in their written submission, have opined thus:-

".....Similar provisions for Lokayuktas in the States to deal with public servants of respective State will have to be incorporated in this Bill. 18 States already have Lokayuktas. However, they are all very different from each other in terms of powers, jurisdictions etc. They have proved ineffective in checking corruption due to critical deficiencies in most of these legislations. Other States do not have any Lokayuktas. Therefore, it is urged that through the same Act, a uniform institution of Lokayukta should be set up in each State on the same lines as Lokpal at the Centre....."

III. SUMMARY OF DEPOSITIONS GIVEN BY WITNESSES

- 7.8 The representatives of NCPRI placed their views before the Committee as under:-

"...The first comment is that we were disappointed that in the Government Lokpal Bill there was no mention that there will be a corresponding Lokayuktas at the State level. It is our belief that the Parliament is competent to legislate despite the fact that there have been debates to the contrary on a Bill which includes both the Lokpal at the Centre and the Lokayukta at the State level. We have given our reasoning....."

- 7.9 Dr. Jayaprakash Narayan, while voicing his opinion on this issue, stated:-

"...I am going to argue that the Lokayukta must be mandatorily created and the law must be under article 253."

- 7.10 The CVC, in its written submission to the Committee, observed that:-

"At present, there are multiple agencies and bureaus in the States and the focus in addressing anticorruption matter in the States needs to be more organized. The Commission receives a large number of complaints relating to matters of State Governments and the Commission has no jurisdiction over the State mechanisms of Lokayuktas in the States on the lines of Lok Pal should be established within the frame work of our Constitution."

- 7.11 Justice J.S. Verma came forward with the following opinion on the issue of going in for an omnibus federal legislation to set up Lokayuktas in the States. The opinion of

Justice Verma which covers the aspect of the constitutionality of the proposed move also, reads as follows:-

"...Article 253 of the Constitution confers the legislative competence needed to implement the UN Convention, which has been signed and ratified by India. It is relevant to highlight that Article 6 of the convention enshrines a specific obligation for member states to establish bodies that present corruption.....The directive principle of State policy in Article 51(c), as a principle fundamental in governance is available as an aid. There is, therefore, no need to look for any additional support for the legislative competence of the Parliament to legislate on the subject for the whole territory of India. In addition, it would not be out of place to mention that the failure to take effective steps with respect to the establishment of such institutions could lead to India being considered to be in breach of its obligations under international law, which must obviously be avoided at all costs...."

...Similarly, for 'combating corruption' in a more effective manner a uniform legislation enacted by the Union Parliament by invoking Article 253 can provide for the Lokpal and the Lokayuktas....."

...The Parliamentary central enactment made by invoking Article 253 would be constitutionally valid, such legislative competence in the Union Parliament being expressly provided as a part of the constitutional scheme, consistent with the nature of federalism created by the Constitution...."

7.12 Justice J.S. Verma, while placing his considered views before the Committee, stated :-

".....But we are trying to say not a single word except to provide a declaration that there could be a Constitutional body and once this Constitution Amendment Bill is passed so that it becomes a part of the Constitution. Then, there are several other implications which have got to be taken note of. This is something which cannot be ordinarily amended like an ordinary statute by some simple majority. It would be difficult. Secondly, if it becomes a basic feature and, therefore, a part of the basic structure which personally, I think, my friend agrees, ultimately it will become a part of the indestructible basic structure of the Constitution which any kind of change in the political equations or formulations, it would be beyond amending power even of Parliament.

Article 253 of the Constitution clearly provides that for the purpose of implementing an international treaty, convention, etc., the Parliament is entitled to enact for the whole or any part of the territory. We have already a precedent. The Protection of Human Rights Act, 1993 was enacted by the Parliament. We deal with not only the Constitution and the National Human Rights Commission but also the State Human Rights Commission. It is for the whole.

My preference would be for a federal legislation because that is something which will ensure uniformity. The State would be involved only in making the appointment....."

7.13 The deposition of Dr. Jayaparakash Narayan on this issue was as under:-

"....That is the reason why we believe that a Lokayukta institution is absolutely necessary under Article 253, not under Article 252 with due respect. And, the Chief

Minister must be brought under the purview of Lokpal, but not under Lokayukta ideally....."

7.14 The Committee takes note of the opinion of Shri Harish Salve in this regard:-

".....We cannot sacrifice federalism because a group of people do not have faith in the State Governments. If the law is to come in that form, then it cannot, in my respectful opinion, apply to the States. The States in Entry 41 List-II of the Constitution have the right to regulate their own services as any employer should. If the States have to govern themselves, it must be under their own law"

7.15 In its written memorandum submitted to the Committee, CHRI has opined:

".....So a single law providing for both Lokpal and Lokayuktas can be enacted by Parliament under multiple fields mentioned in List III. As the scheme of division of powers mentioned in Articles 246 and 254 of the Constitution gives preeminence to laws made by Parliament [except under certain circumstances spelt out in Article 254(2)] this law will prevail over all other existing laws relating to the working of Lokayuktas. A law made by Parliament will ensure uniformity in the systems established for combating corruption throughout the country.....The proposed Lokayukta will have the power to recommend dismissal or other penalties against corrupt officers of the State Public services only in the context of a corruption-related matter brought before it. The proposed law does not seek to empower the Lokayukta to exercise such powers routinely in the manner of State Governments. Such incidental encroachment on any field contained in list II is permissible under this rule of interpretation. As the central purpose of the proposed Lokpal/ Lokayukta legislation is not the regulation of the State Public Services but combating corruption, the courts are no likely to strike it down on the ground of lack of legislative competence."

7.16 On the issue whether the Bill would also be entitled to repeal the existing Lokayukta enactments, the considered view of Justice J.S. Verma was:-

".....Once the Union Parliament enacts the central legislation by invoking Article 253 for the whole territory of India, the existing State legislations relating to the Lokayuktas being repugnant to it shall be void, by virtue of Article 254(1)....."

7.17 The Ministry of Law (Department of Legal Affairs) expressed their views in the following terms, on the issue under examination:-

"It may be stated in this regard that while examining the draft note for the Cabinet regarding Lokpal Bill, 2011, this Department has already opined that the subject matter of the Draft Bill is relatable to Entry 1 and 2 of List III i.e. Concurrent List of the Seventh Scheduled to the Constitution, As such the Parliament as well as Legislative Assemblies have legislative competence over the subject. Further, as the proposed Bill would extend to the whole of India, the constitution of Investigation wing having powers of Police for the purpose of investigation of offences punishable under the Prevention of Corruption Act, 1988 (Clauses 12& 13 of the Draft Bill) and the establishment of Prosecution Wing (Clause 15 of the Draft Bill) may likely to affect the powers of the States, as "Police" and "Public Order" are the subjects

which find place as Entry 1 and 2 respectively in the List II i.e. State List of the Seventh Schedule to the Constitution. Therefore, an enactment by the Parliament on the subject to provide for State Lokayuktas in Lok Pal Bill 2011, may not only amount to encroachment upon the jurisdiction of the States but would also affect the federal structure of the Constitution.

Besides the aforesaid, under the proposed Bill, no sanction or approval would be required under Section 197 of the Code of Criminal Procedure, 1973 or Section 19 of the Prevention of Corruption Act, 1988 where prosecution is proposed by Lokpal (Clause 26 of the Draft Bill). This may also be against the concept of the protection presently available to the public servants. Under Article 253 of the Constitution the Parliament can enact with respect to any subject (including State subjects) for the purpose of implementing any treaty or agreement or convention with any other country or countries or any decision made at any international conference or body. But the enactment by Parliament, if any, under Article 253 would also be within the ambit of the constitution.

Regarding the Constitutionality of including State Lokayuktas in the Lokpal Bill, 2011, the Parliament may consider to enact a model law for the States.”

7.18 Shri Rajeev Dhawan, Sr. Advocate, Supreme Court of India while placing his views before the Committee, stated thus:-

".....Bringing Lokayuktas under the Bill may be unconstitutional. It is certainly anti-federal. Let the states decide what they want and how their chief Ministers should be toppled....."

IV. ANALYSIS AND DISCUSSION

7.19 There are many advantages to having the Lokayukta provisions in the same federal enactment. Uniformity is the most important, since there is no reason why a public servant in one State should be prosecutable on different standards than a public servant in an adjoining State with the federal Lokpal Act enunciating a possible third standard, all in the same country.

7.20 However, the main issue which arises is ensuring constitutional validity of such an omnibus federal enactment. This can be approached from two routes, both cumulative, and not in the alternative.

7.21 Firstly, Article 253 of the Constitution provides a strong constitutional basis for such an enactment, since the Lokpal Act is admittedly being included pursuant to the UN Convention on Corruption, now ratified by India. This view has been endorsed by some noted jurists and witnesses, whose opinion is with the Committee⁵ (**Annexure E**). There is also a precedent in an earlier parliamentary enactment viz. the Protection of Human Rights Act, 1986 which was enacted under Article 253 power to implement

⁵ See, inter alia, opinion of former Chief Justice of India/ Hon'ble Mr. Justice J.S. Verma dated 4th November, 2011.

the UN Convention for the Protection of Human Rights. This Act provided for setting up of both the National Human Rights Commission and for establishment of State Human Rights Commissions.

- 7.22 Secondly, the Lokpal Act deals with criminal/penal action against public servants including application of the IPC and the CrPC, both of which are covered under List III, entries 1 & 2. The Lokpal Bill also touches upon the issue of administration of justice specifically covered under Entry 11A of List III.
- 7.23 In view of the above, the Committee is of the view that Parliament is fully empowered under either Article 253 and/ or Entries 1, 2 and 11 A of List III to enact an all India legislation providing for both Lokpal at the Centre and Lokayukta in each State.
- 7.24 As regards the status of existing State Lokayuktas Acts, Article 254 of the Constitution provides that State laws shall be void to the extent of repugnancy with Parliamentary law. States do have the option of over-riding Parliamentary supremacy in List-III by making State amendments with Presidential assent. The Committee therefore feels that there would be no constitutional hurdle in providing a comprehensive and single legislation for both the Lokpal and the Lokayuktas..
- 7.25 The Lokpal Bill will have to include additional chapters in order to prescribe provisions applicable for Lokayuktas in the States which will adopt the Lokpal provisions, mutatis mutandis, for the States.

V. REASONS AND RECOMMENDATIONS

- 7.26 The Committee finds merit in the suggestion for a single comprehensive federal enactment dealing with Lokpal and State Lokayuktas. The availability of uniform standards across the country is desirable; the prosecution of public servants based upon widely divergent standards in neighboring states is an obvious anomaly. The Committee has given its earnest attention to the constitutional validity of a single enactment subsuming both the Lokpal and Lokayukta and concludes that such an enactment would be not only desirable but constitutionally valid, inter alia because,**
- (a) The legislation seeks to implement the UN Convention on Corruption ratified by India.**
- (b) Such implementing legislation is recognized by Article 253 and is treated as one in List III of the 7th Schedule.**

- (c) It gets additional legislative competence, inter-alia, individually or jointly under Entries 1, 2 and 11A of List-III.
- (d) A direct example of provision for National Human Rights Commission and also for State Human Rights Commissions in the same Act is provided in the Protection of the Human Rights Act 1986 seeking to implement the UN Convention for the Protection of Human Rights.
- (e) Such Parliamentary legislation under Article 253, if enacted, can provide for repealing of State Lokayukta Acts; subject, however, to the power of any State to make State specific amendments to the federal enactments after securing Presidential assent for such State specific amendments.

7.27 Additionally, it is recommended that the content of the provisions dealing with State Lokayuktas in the proposed central/ federal enactment must be covered under a separate chapter in the Lokpal Bill. That may be included in one or more chapters possibly after Chapter II and before Chapter III as found in the Lokpal Bill 2011. The entire Lokpal Bill 2011 would have to incorporate necessary changes and additions, mutatis mutandis, in respect of the State Lokayukta institutions. To give one out of many examples, the Selection Committee would be comprised of the State Chief Minister, the Speaker of the Lower House of the State, the Leader of Opposition in the Lower House, the Chief Justice of the High Court and a joint nominee of the State Election Commissioner, the State Auditor General and State PSC Chairman or, where one or more of such institutions is absent in the State, a joint nominee of comparable institutions having statutory status within the State.

7.28 All these State enactments shall include the Chief Minister within their purview. The Committee believes that the position of the State Chief Minister is not identical to that of the Prime Minister. The arguments for preventing instability and those relating to national security or the image of the country do not apply in case of a Chief Minister. Finally, while Article 356 is available to prevent a vacuum for the post of Chief Minister, there is no counterpart constitutional provision in respect of the federal Government.

7.29 Article 51 (c) of the Directive Principles of State Policy enjoining the federation to *“foster respect for international law and treaty obligations.....”* must also be kept in mind while dealing with implementing legislations pursuant to

international treaties, thus providing an additional validating basis for a single enactment.

7.30 The Committee recommends that the Lokpal Bill 2011 may be expanded to include several substantive provisions which would be applicable for Lokayuktas in each State to deal with issues of corruption of functionaries under the State Government and employees of those organizations controlled by the State Government, but that, unlike the Lokpal, the state Lokayuktas would cover all classes of employees.

7.31 The Committee recommends that if the above recommendation is implemented the Lokpal Bill 2011 may be renamed as “Lokpal and Lokayuktas Bill 2011”

7.32 The Committee believes that the recommendations, made herein, are fully consistent with and implement, in letter and spirit, the conclusions of the Minister of Finance on the floor of the Houses in respect of establishment of Lokayuktas in the States, as quoted in para 1.8 above. The Committee is conscious of the fact that the few States which have responded to the Secretariat’s letter sent to each and every State seeking to elicit their views, have opposed a uniform Central federal Lokpal and Lokayukta Bill and, understandably and expectedly, have sought to retain their powers to enact State level Lokayukta Acts. The Committee repeats and reiterates the reasons given hereinabove, in support of the desirability of one uniform enactment for both Lokpal and Lokayuktas. The Committee also reminds itself that if such a uniform Central enactment is passed, it would not preclude States from making any number of State specific amendments, subject to prior Presidential assent, as provided in the Indian Constitution. The Committee, therefore, believes that it has rightly addressed the two issues which arise in this respect viz. the need and desirability for a uniform single enactment and, secondly, if the latter is answered in the affirmative, that such a uniform enactment is Constitutionally valid and permissible.

7.33 Since this report, and especially this chapter, recommends the creation of a uniform enactment for both Central and State Lokayuktas, it is reiterated that a whole separate chapter (or, indeed, more than one chapter) would have to be inserted in the Lokpal Bill of 2011 providing for State specific issues. Secondly, this would have to be coupled with mutatis mutandis changes in other parts of

the Act to accommodate the fact that the same Act is addressing the requirement of both the federal institution and also the State level institution.

7.34 Furthermore, each and every chapter and set of recommendations in this report should also be made applicable, *mutatis mutandis*, by appropriate provisions in the Chapter dealing with State Lokayuktas.

7.35 Although it is not possible for this Committee to specifically list the particularised version of each and every amendment or adaptation required to the Lokpal Bill, 2011 to subsume State Lokayuktas within the same enactment, it gives below a representative non-exhaustive list of such amendments/adaptations, which the Government should suitably implement in the context of one uniform enactment for both Lokpal and Lokayuktas. These include:

- (a) Clause 1 (2) should be retained even for the State Lokayukta provisions since State level officers could well be serving in parts of India other than the State concerned as also beyond the shores of India.
- (b) The Chief Minister must be included within the State Lokayukta on the same basis as any other Minister of the Council of Ministers at the State level. Clause 2 of the 2011 Bill must be amended to include Government servants at the State level. The competent authority in each case would also accordingly change e.g. for a Minister of the Council of Minister, it would be the Chief Minister; for MLAs, it would be the presiding officer of the respective House and so on and so forth. The competent authority for the Chief Minister would be the Governor.
- (c) As regards Clause 3, the only change would be in respect of the Chairperson, which should be as per the recommendation made for the Lokpal.
- (d) As regards the Selection Committee, the issue at the Lokayukta level has already been addressed above.
- (e) References in the Lokpal context to the President of India shall naturally have to be substituted at the Lokayukta level by references to the Governor of the State.
- (f) The demarcation of the criminal justice process into five broad areas from the initiation of complaint till its adjudication, as provided in Chapter 12, should also apply at the State Lokayukta level. The

investigative agency, like the CBI, shall be the anti-corruption unit of the State but crucially, it shall be statutorily made independent by similar declarations of independence as already elaborated in the discussion in Chapter 12. All other recommendations in Chapter 12 can and should be applied mutatis mutandis for the Lokayukta.

- (g) Similarly, all the recommendations in Chapter 12 in respect of departmental inquiry shall apply to the Lokayukta with changes made, mutatis mutandis, in respect of State bodies. The State Vigilance Commission/machinery would, in such cases, discharge the functions of the CVC. However, wherever wanting, similar provisions as found in the CVC Act buttressing the independence of the CVC shall be provided.
- (h) The recommendations made in respect of elimination of sanction as also the other recommendations, especially in Chapter 12, relating to Lokpal, can and should be applied mutatis mutandis in respect of Lokayukta.
- (i) Although no concrete fact situation exists in respect of a genuine multi-State or inter-State corruption issue, the Committee opines that in the rare and unusual case where the same person is sought to be prosecuted by two or more State machineries of two or more Lokayuktas, there should be a provision entitling the matter to be referred by either of the States or by the accused to the Lokpal at the federal level, to ensure uniformity and to eliminate turf wars between States or jurisdictional skirmishes by the accused.
- (j) As already stated above, the coverage of the State Lokayukta, unlike the Lokpal, would extend to all classes of employees, including employees of state owned or controlled entities.

CHAPTER 8
LOWER BUREAUCRACY: DEGREES OF INCLUSION
INTRODUCTION AND BACKGROUND

8.1 The current provisions of the Lokpal Bill 2011 [section 17 (1) (d)] include, inter alia, only Group A officers or equivalent, (serving or has served) from amongst the Public Servants defined in section 2 (c) of the Prevention of Corruption Act 1988. The central bureaucracy is broadly classified into Groups A, B, C and D – such categories being drawn on the lines of decision making power and remuneration. While Group A includes almost all officers from the rank of Section Officer and above, Group C and D form the very lower rungs of the bureaucracy including posts of attendants, clerks, senior clerks, stenographers, peons, drivers et al. On a broad estimate, as of 2010, Group A officers comprise about 80,000 in number and Group B officers comprise about 1.75 Lakhs. Group C and D on the other hand are about 28 Lakhs in number. This classification and categorization may be different from State to State and will therefore have to be addressed separately in respect of the State bureaucracy. The debate revolved around the extent of inclusion of the bureaucracy within the ambit of the Lokpal particularly in the context of the humongous numbers which the Lokpal may have to handle as well as the speed, efficiency and workability of the Lokpal institution. It is important to emphasize at this stage that the aforesaid Group A and B numbers of approximately 2.56 lakhs excludes the substantial numbers of Group A and B or equivalent officers in all public sectors or all entities owned or controlled by the Central Government and, more significantly, the entire Railways and P&T departments, for which the figures are not readily available. However, all such categories are subsumed under the Lokpal.

SUMMARY OF SUGGESTION/OBSERVATIONS RECEIVED THROUGH WRITTEN MEMORANDA

- 8.2 The major points raised in the memoranda received by the Committee, on this topic are:
- Include lower level of public and private functionaries in the Bill.
 - The word Group “A” service and equivalent needs wider definition.
 - (i) CVC to be strengthened
 - (ii) CVC to cover Public Servants other than Group ‘A’ Officers; and
 - (iii) State Vigilance Commissions to be created in each State.

- All the big cases of corruption involve various ranks simultaneously. So, dividing public servants into two categories will frustrate the investigations and help the corrupt.
- Single directive that protected JS and seniors have scuttled investigations.
- Lokpal's direct jurisdiction be limited to those as provided in the present Bill.
- Strengthen CVC making it part of Lokpal with specific jurisdiction to deal with officials below Joint Secretary rank but above a certain rank.
- Vigilance Organisations in each agencies will deal with all the Ministerial staff.

III. SUMMARY OF DEPOSITIONS GIVEN BY THE WITNESSES

8.3 The Chairman, Bar Council of India opined thus:-

".....One, confine the Lokpal to investigate into allegations of corruption against Central Ministers and higher officers in the Government, not below the rank of Joint Secretaries. Limit it at that so far as the Lokpal is concerned. In the alternative, have different benches to hear different kinds of cases....."

8.4 One of the witnesses who appeared before the Committee, stated as under:-

"..... My view is that the lower bureaucracy should not come under the ambit of the Lokpal, one for very practical reason which is that then the Lokpal itself will become a gigantic bureaucracy and a gigantic bureaucracy superintending another gigantic bureaucracy is not a recipe for efficiency. You need a separate mechanism for local bureaucracy."

8.5 Shri B. Muthuraman, while placing the views of CII before the Committee, stated :-

".....We believe that all bureaucracy should be included under the Lokpal, but we also think it may become an unworkable proposition from the point of view of numbers. So, if for the first few years, let us say 3 to 5 years, Lokpal should restrict itself only to higher bureaucracy and after it settles down and starts functioning well, then you can add lower level bureaucracy....."

8.6 The DoPT, in its written comments, has stated :-

".....The provisions made in clause 17 of the Bill appear to be adequate. If lower bureaucracy and other institutions suggested by the author are also brought within the purview of the Lokpal, it will over burden the Lokpal"

8.7 Shri Shekhar Singh (NCPRI) stated as follows :-

".....Therefore, we have argued that for 'B' and 'C' and 'D' officers complaints under the Prevention of Corruption Act must first be to the police or Anti-Corruption Bureaus which are under the elected Governments.....So, it is a system similar to the High Court system where there is going to be territorial jurisdiction and any Central Government officer wherever he or she is posted a complaint will rest with the local police there. They would be prepared in keeping with, for example, the CBI manual, a

protocol of investigation and if that protocol is violated, then, a complainant or anybody can move the Up- Lokayukta or the Up-Lokpal where the complainant is located and then they can examine it and take over the investigation. After they have accepted and taken over the investigation they are not only obliged to complete that investigation but they are also obliged to fix the responsibility and if need be take action against that Investigating Officer who did not perform his or her job and, therefore, the matter had to be taken over. So what we are thinking of is an interlocking responsibility so that pressure builds up on the State Governments to make sure that they do their job and everything does not come to this independent body.

.....we were also disappointed that there were many categories of public servants who were left out from the Government Lokpal Bill. First of all, the Judges or higher judiciary was left out and we are of the view that whereas the higher judiciary should not be part of the Lokpal, but simultaneously there should be a strengthened Judicial Accountability Bill which covers this....."

- 8.8 Shri P.S. Bawa, Transparency International India placed before the Committee, their views as:-

".....Our contention is that Grade 'A' is not defined in any law. It is a sort of a financial categorization of Grade 'A', 'B' and 'C' officers. This criterion, based on the salary, is not a correct criterion. Therefore, this defies the equality clause in the Constitution where justice is to be delivered to everybody and everybody is equal before law. We feel that the Bill should cover all public servants irrespective of their being category a, b, c, or whatever it is....."

- 8.9 One of the Members of the Committee, opined in this regard as:-

".....एक फोर्थक्लास का कर्मचारी है, फोर्थ क्लास का तो करप्शन से कोई लेना-देना ही नहीं है। Who are the people covered under fourth class? It includes the Peon and the lady जो पानी पिलाने वाली बाई है या फिर सफाई कर्मचारी हैं, ऐसे लोग फोर्थ क्लास में आते हैं। What kind of scope he is getting in his life to get involved in corruption? लेकिन उसे भी लोकायुक्त में रखने के लिए कहा जा रहा है। मान लीजिए मेरी कालोनी में सफाई कर्मचारी सफाई करने नहीं आया, चूंकि मैं अपर क्लास का हूं, इसलिए मैंने एप्लीकेशन कर दी कि यह आदमी काम करने के लिए नहीं आया, इसलिए इसे निकाला जाए। इसमें दो-तीन बातें हैं, अपनी इज्जत बनाने में और ईमानदारी से काम करने में सरकारी कर्मचारियों को सालों लग जाते हैं।....."

- 8.10 Dr. Jayaprakash Narayan, while speaking on this issue, stated thus:-

"We believe the Lok Pal should not cover everybody; it must cover only the high functionaries, both political and bureaucratic. The CVC, directly or indirectly, takes charge of others. In fact, that addresses the problem of lower bureaucracy. There is no single body that can deal with 20 million employees in this country at the State and national levels. Even at the national level alone, there are about 6 million plus

employees. If you include the public sector undertakings, maybe it is actually a million more or so. You will have tens of thousands of petitions everyday..."

- 8.11 The Central Vigilance Commissioner, while deposing before the Committee, stated thus :-

".....There is a basic difference. This is a question why disciplinary action has been taken against Government servants. In my presentation, I tried to explain why all other people are covered only under the Prevention of Corruption Act whereas only Government servants they are there. They are covered under the departmental disciplinary rules. Under the departmental disciplinary rules, under lower standards of proof also they get dismissed. So, basically the entire bureaucracy is handled under the departmental rules. It is only in selected cases that Prevention of Corruption Act is done. If you bring the entire people under the Prevention of Corruption Act, firstly, the courts will get clogged. There will be no action taken; and the standards of proof that would be required would be much higher if you follow an investigation which is there in the courts is not a desirable mechanism for this thing, because what is important for civil servants is if there is a corruption, action should be swift and fast and the outcome should be certain. That is only possible in disciplinary inquiries which finish between one or two years whereas if you put them under the PC Act, this will go on and on for years and the senior officers will escape the net...."

IV. ANALYSIS AND DISCUSSION

- 8.12 Any Lokpal would be approximately a 7 or 9 or 11 member body and it would be virtually impossible for any such body to cover all the 30 lakh employees of Central Government spread over categories 'A' to 'D'. (excluding Railways, PSUs, P&T etc, also covered under Classes A and B.

- 8.13 The object is to create a new body i.e. the Lokpal, which, unlike the pre-existing bodies, is far more efficacious and swift. That objective would obviously be defeated if humungous numbers are added to this coverage.

- 8.14 The impression that inclusion of Group 'A' plus 'B' involves exclusion of large sections of the bureaucracy must be dispelled. Though in terms of number, the aggregation of Groups 'C' and 'D' is an overwhelming percentage of total Central Government employees, Group 'A' and Group 'B' include the entire class above the supervisory level. Effectively this means that virtually all Central Government employees at the Section Officer level and above would be included. It is vital to emphasize that this demarcation has to be viewed in functional terms and status, since it gives such categories significant decision making power in contra-distinction to

mere numbers and necessarily subsumes a major chunk of medium and big ticket corruption.

- 8.15 The current, contemporary context has been one of anger and dissatisfaction mainly with corruption in the higher echelons, whether of the bureaucracy or of the political class. A majority of Committee Members expressed the opinion that while inclusion of Class C and D would unnecessarily overburden the Lokpal as also create a mechanism and avenue for exploitation of economically weaker sections, inclusion of Group B would not do much damage or obstruction to the speed, efficiency and functioning of the Lokpal.
- 8.16 The Committee has therefore considered including Group B officers as well within the ambit of the Lokpal.
- 8.17 The Committee would like to clarify that Group C and D officers or government employees are already within the purview of the Prevention of Corruption Act and therefore not outside the ambit of investigation and prosecution. In the proposed recommended regime (as is being suggested by this Committee) the existing fetters of section 19 of the Prevention of Corruption Act (prior sanction) would be removed for all classes. If this be so, there would be an equally robust mechanism for addressing complaints against Group C and D officers as well.

V. REASONS AND RECOMMENDATIONS

8.18 The Committee, therefore, recommends:

- (a) **That for the Lokpal at the federal level, the coverage should be expanded to include Group A and Group B officers but not to include Group C and Group D.**
- (b) **The provisions for the State Lokayuktas should contain similar counterpart reference, for purposes of coverage, of all similar categories at the State level which are the same or equivalent to Group A and Group B for the federal Lokpal. Though the Committee was tempted to provide only for enabling power for the States to include the State Lokayuktas to include the lower levels of bureaucracy like groups 'C' and 'D' at the**

State level, the Committee, on careful consideration, recommends that all the groups, including the lower bureaucracy at the State level and the groups equivalent with 'C' and 'D' at the State level should also be included within the jurisdiction of State Lokayuktas with no exclusion. Employees of state owned or controlled entities should also be covered.

(c) The Committee is informed by the DoPT that after the Sixth Pay Commission Report, Group-D has been/will be transposed and sub-merged fully in Group-C. In other words, after the implementation of the Sixth Pay Commission Report, which is already under implementation, Group-D will disappear and there will be only Group-C as far as the Central Government employees are concerned.

(i) Consequently, Group-C, which will shortly include the whole of Group-D will comprise a total number of approximately 30 lakhs (3 million) employees. Though the figures are not fully updated, A+B classes recommended for inclusion by this Committee would comprise just under 3 lakhs employees. With some degree of approximation, the number of Railway employees from group A to D inclusive can be pegged at about 13½ lakhs (as on March 2010). If Central Government PSUs are added, personnel across all categories (Group A, B, C and D as existing) would be approximately an additional 15 lakhs employees. Post and Telegraph across all categories would further number approximately 4½ lakhs employees. Hence the total, on the aforesaid basis (which is undoubtedly an approximation and a 2010 figure) for Group A to D (soon, as explained above, to be only Group-C) + Railways + Central PSUs + Post and Telegraph would be approximately 63 lakhs, or at 2011 estimates, let us assume 65 lakhs i.e. 6.5 million.

(ii) On a conservative estimate of one policing officer per 200 employees (a ratio propounded by several witnesses including team Anna), approximately 35000 employees would be required in the Lokpal to police the aforesaid group of Central Government employees (including, as explained above, Railways, Central PSUs, P&T etc.). This policing is certainly not possible by the proposed

nine member Lokpal. The Lokpal would have to spawn a bureaucracy of at least 35000 personnel who would, in turn, be recruited for a parallel Lokpal bureaucracy. Such a mammoth bureaucracy, till it is created, would render the Lokpal unworkable. Even after it is created, it may lead to a huge parallel bureaucracy which would set in train its own set of consequences, including arbitrariness, harassment and unfair and illegal action by the same bureaucracy which, in the ultimate analysis would be nothing but a set of similar employees cutting across the same A, B and C categories. As some of the Members of the Committee, in a lighter vein put it, one would then have to initiate a debate on creating a super Lokpal or a Dharampal for the policing of the new bureaucracy of the Lokpal institution itself.

- (ii-a) The Committee also notes that as far as the Lokpal institution is concerned, it is proposed as a new body and there is no such preexisting Lokpal bureaucracy available. In this respect, there is a fundamental difference between the Lokpal and Lokayuktas, the latter having functioned, in one form or the other in India for the last several decades, with a readily available structure and manpower in most parts of India.
- (iii) If, from the above approximate figure of 65 lakhs, we exclude C and D categories (as explained earlier, D will soon become part of C) from Central Government, Railways, PSUs, Post and Telegraph etc., the number of A and B categories employees in these departments would aggregate approximately 7.75 lakhs. In other words, the aggregate of C and D employees in these classes aggregate approximately 57 or 58 lakhs. The Committee believes that this figure of 7.75 or 8 lakhs would be a more manageable, workable and desirable figure for the Lokpal institution, at least to start with.
- (iv) The impression that inclusion of Group 'A' and B alone involves exclusion of large sections of the bureaucracy, must be dispelled. Though in terms of number, the aggregation of Groups 'C' and 'D' is an overwhelming percentage of total Central Government

employees, Groups 'A' and B include the entire class above the supervisory level. Effectively, this means that virtually all Central Government employees at the Section Officer level and above would be included. It is vital to emphasize that this demarcation has to be viewed in functional terms, since it gives such categories significant decision making power in contra-distinction to mere numbers and necessarily subsumes a major chunk of medium and big ticket corruption.

- (v) Another misconception needs to be clarified. There is understandable and justifiable anger that inclusion of Group C and D would mean exclusion of a particular class which has tormented the common man in different ways over the years viz. Tehsildar, Patwari and similarly named or equivalent officers. Upon checking, the Secretariat has clarified that these posts are State Government posts under gazette notification notified by the State Government and hence the earlier recommendation of this Committee will enable their full inclusion.
- (vi) We further recommend that for the hybrid category of Union Territories, the same power be given as is recommended above in respect of State Lokayuktas. The Committee also believes that this is the appropriate approach since a top heavy approach should be avoided and the inclusionary ambit should be larger and higher at the state level rather than burdening the Lokpal with all classes of employees.
- (vii) As of now, prior to the coming into force of the Lokpal Act or any of the recommendations of this report, Group C and D officers are not dealt with by the CVC. Group C & D employees have to be proceeded against departmentally by the appropriate Department Head, who may either conduct a departmental enquiry or file a criminal corruption complain against the relevant employee through the CBI and/or the normal Police forces. The Committee now recommends that the entire Group C & D, (later only Group C as explained above) shall be brought specifically under the jurisdiction of the CVC. In other words, the CVC, which is a high

statutory body of repute and whose selection process includes the Leader of the Opposition, should be made to exercise powers identical to or at least largely analogous, in respect of these class C and class D employees as the Lokpal does for Group A and B employees. The ultimate Lokpal Bill/Act should thus become a model for the CVC, in so far as Group C & D employees are concerned. If that requires large scale changes in the CVC Act, the same should be carried out. This would considerably strengthen the existing regime of policing, both departmentally and in terms of anti-corruption criminal prosecutions, all Group C & D employees and would not in any manner leave them either unpoliced or subject to a lax or ineffective regime of policing.

- (viii) Furthermore, this Committee recommends that there would be broad supervisory fusion at the apex level by some appropriate changes in the CVC Act. The CVC should be made to file periodical reports, say every three months, to the Lokpal in respect of action taken for these class C and D categories. On these reports, the Lokpal shall be entitled to make comments and suggestions for improvement and strengthening the functioning of CVC, which in turn, shall file, appropriate action taken reports with the Lokpal.
- (ix) Appropriate increase in the strength of the CVC manpower, in the light of the foregoing recommendations, would also have to be considered by the Government.
- (x) The Committee also feels that this is the start of the Lokpal institution and it should not be dogmatic and inflexible on any of the issues. For a swift and efficient start, the Lokpal should be kept slim, trim, effective and swift. However, after sometime, once the Lokpal institution has stabilized and taken root, the issue of possible inclusion of Group C classes also within the Lokpal may be considered. This phase-wise flexible and calibrated approach would, in the opinion of this Committee, be more desirable instead of any blanket inclusion of all classes at this stage.

- (xi) Another consideration which the Committee has kept in mind is the fact that if all the classes of higher, middle and lower bureaucracy are included within the Lokpal at the first instance itself, in addition to all the aforesaid reasons, the CVC's role and functioning would virtually cease altogether, since the CVC would have no role in respect of any class of employee and would be reduced, at best, to a vigilance clearance authority. This would be undesirable in the very first phase of reforms, especially since the CVC is a high statutory authority in this country which has, over the last half century, acquired a certain institutional identity and stability along with conventions and practices which ought not to be uprooted in this manner.
- (d) All provisions for prior sanction / prior permission, whether under the CrPC or Prevention of Corruption Act or DSPE Act or related legislation must be repealed in respect of all categories of bureaucrats / government servants, whether covered by the Lokpal or not, and there should consequently be no requirement of sanction of any kind in respect of any class or category of officers at any level in any Lokpal and Lokayukta or , indeed, CVC proceedings (for non Lokpal covered categories). In other words, the requirement of sanction must go not only for Lokpal covered personnel but also for non-Lokpal covered personnel i.e. class 'C' and 'D' (Class D, as explained elsewhere, will eventually be submerged into Class 'C'). The sanction requirement, originating as a salutary safeguard against witch hunting has, over the years, as applied by the bureaucracy itself, degenerated into a refuge for the guilty, engendering either endless delay or obstructing all meaningful action. Moreover, the strong filtering mechanism at the stage of preliminary inquiry proposed in respect of the Lokpal, is a more than adequate safeguard, substituting effectively for the sanction requirement.
- (e) No doubt corruption at all levels is reprehensible and no doubt corruption at the lowest levels does affect the common man and inflicts pain and injury upon him but the Committee, on deep consideration and reconsideration of this issue, concluded that this new initiative is intended to send a clear and unequivocal message, first and foremost, in respect of

medium and big ticket corruption. Secondly, this Committee is not oblivious to the fact that jurisdiction to cover the smallest Government functionary at the peon and driver level (class C largely covers peons, assistants, drivers, and so on, though it does also cover some other more "powerful" posts) may well provide an excuse and a pretext to divert the focus from combating medium and big ticket corruption to merely catching the smaller fry and building up an impressive array of statistical prosecutions and convictions without really being able to root out the true malaise of medium and big ticket corruption which has largely escaped scrutiny and punishment over the last 60 years.

- (f) The Committee also believes that the recommendations in respect of scope of coverage of the lower bureaucracy, made herein, are fully consistent with the conclusions of the Minister of Finance on the floor of the Houses, as quoted in para 1.8 above of this Report. Firstly, the lower bureaucracy has been, partly, brought within the coverage as per the recommendations above and is, thus, consistent with the essence of the conclusion contained in para 1.8 above. Secondly, the Committee does not read para 1.8 above to meet an inevitable and inexorable mandate to necessarily subsume each and every group of civil servant (like Group 'C' or Group 'D', etc.). Thirdly, the in principle consensus reflected in para 1.8 would be properly, and in true letter and spirit, be implemented in regard to the recommendations in the present Chapter for scope and coverage of Lokpal presently. Lastly, it must be kept in mind that several other recommendations in this Report have suggested substantial improvements and strengthening of the provisions relating to policing of other categories of personnel like C and D, inter alia, by the CVC and/or to the extent relevant, to be dealt with as Citizens' Charter and Grievance Redressal issues.

CHAPTER 9

FALSE COMPLAINTS AND COMPLAINANTS: PUNITIVE MEASURES

I. INTRODUCTION AND BACKGROUND

9.1 There is a genuine fear that the institution of the Lokpal, while empowering the common citizen, would also create avenues for false and frivolous complaints by persons against those officials whose decisions are either not palatable or generate cases where complaints are actuated by animosity or external agenda and ulterior motives. It is for this reason that provisions relating to false complaints were provided in the Lokpal Bill 2011 (sections 49 and 50). The provision stipulates punishment for not less than 2 years and upto 5 years and a fine not less than Rs 25,000/- and upto Rs 2 Lakhs for false, frivolous or vexatious complainants. This was seen as overbearing and disproportionately high and it was felt that it may act as a huge deterrent and possibly a virtual de facto bar to people seeking to make complaints to the Lokpal. The debate therefore revolved around both defining the scope of the nature of complaints (false or frivolous or vexatious or malicious) which would be penalized as also the amount of fine or punishment.

II. SUMMARY OF SUGGESTIONS/ OBSERVATIONS RECEIVED THROUGH WRITTEN MEMORANDA

9.2 The memoranda received by the Committee carried the following suggestions/ observations:-

- Second Proviso to clause (g) of 17 (1) – that a free citizen of this nation would be subjected to 'responsibility' without any power of a Public Servant - 'liability, without 'right' - and to 'culpability' without an 'overt' act is simply preposterous.
- Punishment in case of "mala-fide and false complaints with malicious intent" only.
- Fine not less than Rs. 5000/-, but which may extend to Rs. 1 lakh.
- In case of frivolous/vexations complaint against an SC/ST functionary, relevant clauses under the SCs and STs (Prevention of Atrocities Act), 1989 also need to be invoked and needs mention in the Lokpal Bill.
- Monetary penalties to those who make frivolous complaints and such penalties to be deposited in the PM Relief Fund.

III. SUMMARY OF DEPOSITIONS GIVEN BY THE WITNESSES

9.3 Shri Shekhar Singh (NCPRI), while speaking on this issue, stated:-

".....we are very against, and this I think we have much debated, the penalties' clause that has been put into the Bill where somebody who files, what is called, a frivolous or a vexatious complaint, gets a higher level of punishment than somebody who is judged as being corrupt. Our problems are two. One is that it is very difficult to define what is 'frivolous' and 'vexatious'. And secondly, that this is sort of a punishment will deter even genuine complaint makers. We have suggested, drop 'frivolous' and 'vexatious'; say 'malicious' or where you have a malign intent and reduce the punishment to a fine....."

9.4 One of the Members of the Committee, observed as follows:-

".....When a complaint is made, it is a frivolous complaint or a false complaint, immediately it will appear in the media. कोई गलत कम्प्लेंट करता है, जैसे ही लोकायुक्त के सामने वह कम्प्लेंट जाएगी, चाहे वे चुने हुए लोग हों या पीछे बैठे हुए लोग हों अथवा यहां के पहले पंक्ति वाले लोग हों, आप सब जानते हैं कि हमारा सार्वजनिक जीवन तीस-तीस पैंतीस-पैंतीस साल का होता है। यहां जो लोग बैठे हैं, वे भी 40, 45 या 50 साल पुराने लोग हैं। मैं स्वयं 36 साल से लगातार चुनाव जीतता आया हूं, मेरी पब्लिक लाइफ को भी 45 साल हो गए। मान लीजिए हमने किसी कार्य के लिए बजट नहीं दिया, किसी ने पानी की टंकी के लिए बजट मांगा, हमने नहीं दिया, बस फिर क्या है, एक कम्प्लेंट कर दो, पूरे मीडिया में हम छा जाएंगे, हमारी 40-45 साल की मेहनत बेकार हो जाएगी। लेकिन आप कहते हैं कि उस आदमी को कुछ सजा नहीं की जाए, सिर्फ 5000 रुपये फाइन करके छोड़ दिया जाए, यह कहां तक उचित होगा?....."

9.5 PRS Legislative Research, in its written memorandum, has opined:-

False and Frivolous Complaint :-

*".....Issue: Penalty may act as deterrent
[Clause 49(1)] Any person making false and frivolous or vexatious complaints shall be penalized with two to five years of jail and fine of Rs. 25,000 to Rs. 2 lakh.
The penalty amount may act as a deterrent for people to complain against a public official. Other legislations have different penalties for similar offences. For example, in the Public Interest Disclosure Bill, 2010 (now pending in Parliament), a false complaint carries a penalty of imprisonment upto 2 years and fine of upto Rs. 30,000.⁴ The Indian Penal Code states that any person who gives false information shall be punishable with a prison term of upto six months or a fine of upto Rs. 1,000 or both.⁵ The Judicial Standards and Accountability Bill, 2010 (pending in Parliament), on the other hand, prescribes a higher penalty for frivolous or vexatious complaints. A person making frivolous or vexatious complaints can be penalized by rigorous imprisonment of up to five years and fine of up to five lakh rupees.⁶ The*

Standing Committee, while examining that Bill, has recommended that the quantum of punishment should be diluted and "in any case, it should not exceed the punishment provided under the Contempt of Court Act" (which is six months imprisonment and a fine of Rs. 2,000).

IV. ANALYSIS AND DISCUSSION

9.5 A There is no doubt that the penalty for false and frivolous complaints should not be such a huge deterrent that it stops even genuine complainants from approaching the Lokpal. There has to be a harmonious balance which needs to be drawn out between prevention of false complaints and a consequent penalty and that of not prescribing a deterrent so great that it renders the institution and function of the Lokpal nugatory.

9.5 B This Committee discussed in detail similar provisions while dealing with the Judicial Standards and Accountability Bill in its Report submitted on August 30, 2011. It deliberated upon the issue as to how to strike this balance and concluded that the punishment ought not to be more than what is prescribed in the Contempt of Courts Act. This is an apposite benchmark considering that the Lokpal also effectively deals with administration of justice.

V. REASONS AND RECOMMENDATIONS

9.6 It cannot be gainsaid that after the enormous productive effort put in by the entire nation over the last few months for the creation of a new initiative like the Lokpal Bill, it would not and cannot be assumed to be anyone's intention to create a remedy virtually impossible to activate, or worse in consequence than the disease. The Committee, therefore, starts with the basic principle that it must harmoniously balance the legitimate but competing demands of prevention of false, frivolous complaints on the one hand as also the clear necessity of ensuring that no preclusive bar arises which would act as a deterrent for genuine and *bona fide* complaints.

9.7 The Committee sees the existing provisions in this regard as disproportionate, to the point of being a deterrent.

9.8 The Committee finds a convenient analogous solution and therefore adopts the model which the same Committee has adopted in its recently submitted report

on Judicial Standards and Accountability Bill, 2010 presented to the Rajya Sabha on August 30, 2011.

9.9 In para 18.8 of the aforesaid Report, the Committee, in the context of Judicial Standards and Accountability Bill, 2010 said : "The Committee endorses the rationale of making a provision for punishment for making frivolous or vexatious complaints. The Committee, however, expresses its reservation over the prescribed quantum of punishment both in terms of imprisonment which is up to 5 years and fine which is up to 5 lakh rupees. The severe punishment prescribed in the Bill may deter the prospective complainants from coming forward and defeat the very rationale of the Bill. In view of this, the Committee recommends that Government should substantially dilute the quantum of the punishment so as not to discourage people from taking initiatives against the misbehaviour of a judge. In any case, it should not exceed the punishment provided under the Contempt of Court Act. The Government may also consider specifically providing in the Bill a proviso to protect those complainants from punishment / penalty who for some genuine reasons fail to prove their complaints. The Committee, accordingly, recommends that the Bill should specifically provide for protection in case of complaints made 'in good faith' in line with the defence of good faith available under the Indian Penal Code."

9.10 Consequently, in respect of the Lokpal Bill, the Committee recommends that, in respect of false and frivolous complaints, :

- (a)** The punishment should include simple imprisonment not exceeding six months;
- (b)** The fine should not exceed Rs.25000; and
- (c)** The Bill should specifically provide for protection in case of complaints made in good faith in line with the defence of good faith available under the Indian Penal Code under Section 52 IPC.

CHAPTER 10

THE JUDICIARY: TO INCLUDE OR EXCLUDE

I. INTRODUCTION AND BACKGROUND

10.1. There has been public clamor for laying down standards for the Judiciary and creating an efficient, workable and effective mechanism for ensuring accountability of Judiciary including, in particular, effective and efficient mechanisms for criminal prosecution for corruption practiced by judicial officers and the higher judiciary. Currently the process of removal of any Judge of the Supreme Court or the High Court involves a tedious and virtually unimplementable procedure of impeachment as per the Constitution. This has been widely seen as being, by itself, an ineffective deterrent for capricious or corrupt conduct by any member of the judiciary. The debate around this issue was centered on whether the Judiciary should be made accountable to an institution like the Lokpal or whether it should, as one of the three wings of the country enjoy virtual immunity in respect of criminal prosecution for corrupt practices.

II. SUMMARY OF SUGGESTIONS/ OBSERVATIONS RECEIVED THROUGH WRITTEN MEMORANDA

10.2 Judges of higher judiciary not to be under Lokpal jurisdiction.

10.3 The jurisdiction of Lokpal should be limited to cover only the following:-

- i. All MPs, including PM & Ministers;
- ii. All other Constitutional & top statutory office holders (excluding President, VP and those of judiciary) under GoI; and
- iii. Officers of the rank of JS & above in the GoI and its PSUs & other organisations.
- iv. The existing institutions and laws should continue to deal with the corruption in GoI at other levels.

10.4 A National Judicial Commission headed by the Vice President, and with Prime Minister, Speaker, Law Minister, Leaders of Opposition in both Houses, and Chief Justice (Chief Minister and Chief Justice of concerned High Court in case of High Court judges) should be constituted for judicial appointments and oversight; and the Judicial Standards and Accountability Bill should be enacted into law. Both together will address issues relating to higher judiciary.

- 10.5 Subordinate Judiciary is under the control of the High Court under Article 235, and that should remain so.
- 10.6 Functional independence of judiciary should be ensured; but criminal legislation, conflicts of interest regulations, income and asset disclosure laws and ethical codes should apply to the judiciary as well as other public officials.
- 10.7 Amending the Judicial Accountability and Standards Bill, that is currently before the Parliament, to ensure that the judiciary is also made effectively and appropriately accountable, without compromising its independence from the executive or the integrity of its functions.

III. SUMMARY OF DEPOSITIONS GIVEN BY THE WITNESSES

- 10.8 Justice JS. Verma, in his presentation before the Committee, very categorically expressed his views over the issue in the following words:

".....That is my view for consideration. Now, so far as Judiciary is concerned, well, as I see it, the Constitution itself, as initially framed, treats the Judiciary separately and not only the higher judiciary but even the subordinate judiciary....."

- 10.9 Shri Jayaprakash Narayan expressed his detailed views on all related aspects to the issue of inclusion of the judiciary within the ambit of Lokpal. He put forward his views as:

".....Firstly, we believe that judiciary cannot be a part of Lokpal's jurisdiction for a variety of reasons. Eminent jurist like you and many other members with deep experience and insights know too well the reasons. The Supreme Court and the High courts not only have the Constitutional authority but they are also held in high esteem in this country. Whenever there is a crisis in this country, we always depend on these High Courts. For instance, Babri Masjid demolition issue, or, the reservation issue, or, contentious issues like reservation, etc. which are fragmenting our country. We, ultimately, depend on the Courts to bring some sense and some balance. And, if that Court's authority is in any way undermined, that will do immense damage to the country....."

.....The Government's draft Bill which is now before the Parliament has envisaged that inquiry into misconduct or allegations against the members of the Lokpal will be entrusted to a Bench of the Supreme Court. If, in turn, the Lokpal institution is to inquire into the misconduct, if any, or the corruption of the judges, it will certainly not be a very healthy thing. Of course, finally, already because of a variety of pronouncements in judiciary, the Constitution, to some extent, has been diluted. The Constitution-makers never envisaged that judiciary will be completely away from

the purview of the Parliament and the Executive of the country. Unfortunately, after the judges' case judgment, the judiciary has taken over more or less and, now, if you further dilute it and make an extra-Parliamentary statutory institution control the way the judiciary functions, at least, to this extent, that will undermine the constitutional structure even further. It is not desirable at all.....

.....Now, it does not mean that judiciary must be unaccountable. Judiciary must be held to account. Right now before the Parliament there is a Bill pending, the Judicial Standards and Accountability Bill which, as we all know, now creates a permanent mechanism for inquiry into judges' conduct, not an ad hoc mechanism, and also codifies the judicial code of conduct and makes any violation of that a matter of an inquiry and, if that law is enacted and with that a National Judicial Commission comes into place amending articles 124 (2) and 124(5), in effect, it will be a constitutional amendment, then, together, they will take care of the problem of judicial accountability in the higher judiciary because both appointments and removals as we envisage, if the Parliament approves, will be with the National Judicial Commission headed by the Vice-President of India, with the Prime Minister, with the Leader of the Opposition and the Judiciary.....

- 10.10 Shri Jayaprakash Narayan also elaborated upon the issue of inclusion of subordinate judiciary within the ambit of the Lokpal. He refuted the idea and expressed his views as follows:-

".....About the lower judiciary, Mr. Chairman, article 235 is very clear; the High Court has complete authority and, time and again, in States like Maharashtra, and if I am not mistaken, Rajasthan, West Bengal, High Courts have exercised the jurisdiction very effectively, weeded out the corrupt lower judiciary members and that must be retained as it is. Therefore, there is no case for an extra-judicial body, apart from the National Judicial Commission, to go into matters of judicial accountability....."

- 10.11 The advocates of the Jan Lokpal Bill, while appearing before the Committee, expressed their views on this issue as follows:

".....The judiciary may be brought under the purview of anti-corruption system through a separate Bill, to be introduced simultaneously, provided the Judicial Conduct Commission so set up is also independent of the government as well as the judiciary and has the power of investigating and prosecuting judges for corruption. The Judicial Standards and Accountability bill of the government does not deal with criminal investigation of judges, nor does it set up an independent committee.....

- 10.12 Shri Harish Salve, Senior Advocate, in his presentation before the Committee, floated a unique idea to create a collegium which would deal with the appointment of the Members of the Lokpal along with the selection of judges in higher judiciary. He made his point as follows:

".....There is a crying need for accountability in the judiciary. They cannot be put under the Lokpal but, at the same time, there has to be some machinery. One very important area is the appointment of judges, and, I submit, Sir, this is a golden opportunity for this Committee to set up a collegium, which today may appoint a Lokpal but tomorrow can be extended to appointment of Judges. Why should we not have one collegium for appointment to these offices? You don't need separate collegium. Whether it has the Prime Minister -- as it possibly must, whether it has the Leader of Opposition – as it possibly must; whether it has the Speaker of the House – may be or may not be; whether it has the Chief Justice – as it possibly must; you add these people, and, you add a few people and say how they are to be selected. If they are good people to appoint a Lokpal, tomorrow, you will have a strong case to say that they are good enough to appoint of Supreme Court judges. So, I submit, Sir, when you are drafting this bit of the law, please have in mind that you are creating somebody as important or depending on the structure of the law more important than a Supreme Court judge. Please create a collegium, which is appropriate for that appointment, and, you would have killed two birds with one stone. You would have laid the foundation and solved half the problem of the judicial accountability....."

10.13 Representatives of the Business Associations who appeared before the Committee also did not favour the idea to include the judiciary under the purview of Lokpal. They put forward their views over the issue as under:

10.14 The President, CII said:-

".....We believe that Lokpal should not cover Judiciary. We believe that we should strengthen the existing Judicial Standards and Accountability Bill, 2010 in the Parliament. I understand that there is a Bill in the Parliament and we believe that that Bill needs to be re-looked and strengthened. We also believe that the Judiciary needs to be helped to perform better through setting up more courts, more infrastructure, more application of technology and also promote arbitration. The rationale for all this is that we believe that independence of the Judiciary should be maintained. The Judiciary needs to be kept separate because if the linkage between the Judiciary and the Lokpal, cases will be going there. If it covers the Judiciary, the Lokpal will become entirely unwieldy. We don't see any need for it....."

10.15 The President, ASSOCHAM opined:-

".....judiciary should be kept out of this Bill because the independence of judiciary is very important and it is very important that this independence be maintained, and, today, सर, हमारा जो संविधान है, कंस्टीट्यूशन है, it provides for checks and balances. So, I think, we have to ensure that those checks and balances remain....."

10.16 The Vice-President, FICCI stated:-

".....Judicial Accountability Bill should be independent of the Lokpal Bill. We believe that the judiciary's independence should be undermined, but, at the same time, it is very necessary to have a Judicial Accountability Bill and we believe that it should be a parallel legislation to the Lokpal Bill and again I am going into a fundamental principal that justice delayed is justice denied. So, whenever we talk about judicial

accountability, simultaneously we must also be talking about judicial reforms to ensure that the time aspect of handling cases is addressed.....

- 10.17 Shri Jayaprakash Narayan, while making his presentation before the Committee, dwelt at length on this aspect. He stated as follows:-

".....as you know the 1973 judgment of the Supreme Court in the Kesavananda Bharati case held that the basic features of the Constitution are inviolable and the court has the ultimate power to decide what the basic features are. There is a real danger that the Supreme Court may hold that any inclusion of higher courts' judges in the jurisdiction of the Lokpal or Lokayukta is violative of the basic features of the Constitution. It may or may not be violative but once the court says so, you know the implications, Mr. Chairman. I don't think India at this point of time should have a confrontation between the Parliament and the higher judiciary. We as a country cannot afford that....."

- 10.18 Likewise, Justice J.S. Verma while appearing before the Committee, opined that the issue of inclusion of judiciary within the ambit of Lokpal needs to be examined in the light of the scheme of the Constitution. He was of the view that not only the higher judiciary but even the subordinate judiciary need not be brought under the Lokpal, the issue of accountability of these institution should be determined in accordance with the spirit of the Constitution. He put forward his expert opinion thus:-

".....Article 50 clearly provides and mandates separation of Judiciary from the Executive. Article 235... But I am speaking from my own experience as a Judge and the former CJI. Article 235 gives control over subordinate judiciary and also the High Courts; there is no one else. In the case of the higher judiciary, the Parliament comes in as the ultimate authority. And according to the law which was made in 1968 or any other law, you will have a body but the final word would be of the Parliament, not of a few individuals as such. Then, you cannot discuss the conduct of any High Court or Supreme Court Judge; those are articles 121 and 211 in the State Legislature or Parliament except on a motion for removal....."

IV ANALYSIS AND DISCUSSION

- 10.19 The opinions received by this Committee were almost unanimous in recommending that the Judiciary be kept out of the ambit of the Lokpal. However, it was equally strongly opined that the judiciary must be regulated and made accountable by a separate mechanism.
- 10.20 Previously in this year, such a mechanism was mooted by the government through the Judicial Standards and Accountability Bill 2010 which was also referred to this very Committee. This Committee has already submitted a report on that Bill and suggested

various modifications. However, it is a common ground that the said Judicial Accountability Bill does not seek to address judicial corruption at all and an independent mechanism for appointment of Judges also needs to be created. The Committee takes serious note and cognizance of these sentiments and wishes to place its recommendations as below.

V REASONS AND RECOMMENDATIONS

10.21 The Committee recommends:

- (i) The Judiciary, comprising 31 odd judges of the Apex Court, 800 odd judges of the High Courts, and 20,000 odd judges of the subordinate judiciary are a part of a separate and distinct organ of the State. Such separation of judicial power is vitally necessary for an independent judiciary in any system and has been recognized specifically in Article 50 of the Indian Constitution. It is interesting that while the British Parliamentary democratic system, which India adopted, has never followed the absolute separation of powers doctrine between the Legislature and the Executive, as, for example, found in the US system, India has specifically mandated under its Constitution itself that such separation must necessarily be maintained between the Executive and the Legislature on the one hand and the Judiciary on the other.**
- (ii) Such separation, autonomy and necessary isolation is vital for ensuring an independent judicial system. India is justifiably proud of a vigorous (indeed sometimes over vigorous) adjudicatory judicial organ. Subjecting that organ to the normal process of criminal prosecution or punishment through the normal courts of the land would not be conducive to the preservation of judicial independence in the long run.**
- (iii) If the Judiciary were included simpliciter as suggested in certain quarters, the end result would be the possible and potential direct prosecution of even an apex Court Judge before the relevant magistrate exercising the relevant jurisdiction. The same would apply to High Court**

Judges. This would lead to an extraordinarily piquant and an untenable situation and would undermine judicial independence at its very root.

- (iv) Not including the Judiciary under the present Lokpal dispensation does not in any manner mean that this organ should be left unpoliced in respect of corruption issues. This Committee has already proposed and recommended a comprehensive Judicial Standards and Accountability Bill which provides a complete in-house departmental mechanism, to deal with errant judicial behavior by way of censure, warning, suspension, recommendation or removal and so on within the judicial fold itself. The Committee deprecates the criticism of the Judicial Standards and Accountability Bill as excluding issues of corruption for the simple reason that they were never intended to be addressed by that Bill and were consciously excluded.**
- (iv) As stated in para 21 of the report of this Committee on the Judicial Standards and Accountability Bill, the Committee again recommends, in the present context of the Lokpal Bill, that the entire appointment process of the higher judiciary needs to be revamped and reformed. The appointment process cannot be allowed and should not be allowed to continue in the hands of a self-appointed common law mechanism created by judicial order operating since the early 1990s. A National Judicial Commission must be set up to create a broad-based and comprehensive model for judicial appointments, including, if necessary, by way of amendment of Articles 124 and 217 of the Indian Constitution. Without such a fundamental revamp of the appointment process at source and at the inception, all other measures remain purely ex-post facto and curative. Preventive measures to ensure high quality judicial recruitment at the entrance point is vital.**
- (v) It is the same National Judicial Commission which has to be entrusted with powers of both transfer and criminal prosecution of judges for corruption. If desired, by amending the provisions of the Constitution as they stand today, such proposed National Judicial Commission may also**

be given the power of dismissal / removal. In any event, this mechanism of the National Judicial Commission is essential since it would obviate allegations and challenges to the validity of any enactment dealing with judges on the ground of erosion or impairment of judicial independence. Such judicial independence has been held to be part of the basic structure of the Indian Constitution and is therefore unamendable even by way of an amendment of the Indian Constitution. It is for this reason that while this Committee is very categorically and strongly of the view that there should be a comprehensive mechanism for dealing with the trinity of judicial appointments, judicial transfers and criminal prosecution of judges, it is resisting the temptation of including them in the present Lokpal Bill. The Committee, however, exhorts the appropriate departments, with all the power at its command, to expeditiously bring a Constitutional Amendment Bill to address the aforesaid trinity of core issues directly impinging on the judicial system today viz. appointment of high quality and high caliber judges at the inception, non-discriminatory and effective transfers and fair and vigorous criminal prosecution of corrupt judges without impairing or affecting judicial independence.

- (vii) The Committee finds no reason to exclude from the conclusions on this subject, the burgeoning number of quasi-judicial authorities including tribunals as also other statutory and non-statutory bodies which, where not covered under category 'A' and 'B' bureaucrats, exercise quasi-judicial powers of any kind. Arbitrations and other modes of alternative dispute resolution should also be specifically covered in this proposed mechanism. They should be covered in any eventual legislation dealing with corruption in the higher judiciary. The Committee notes that a large mass of full judicial functions, especially from the High Courts has, for the last 30 to 40 years, been progressively hived off to diverse tribunals exercising diverse powers under diverse statutory enactments. The Committee also notes that apart from and in addition to such tribunals, a plethora of Government officials or other persona designata exercise quasi judicial powers in diverse situations and diverse contexts. Whatever has been said in respect of the judiciary in this chapter should, in the

considered opinion of this Committee, be made applicable, with appropriate modifications in respect of quasi-judicial bodies, tribunals and persons as well.

CHAPTER - 11

THE LOKPAL: SEARCH AND SELECTION

I. INTRODUCTION AND BACKGROUND

11.1. The institution of the Lokpal is being mooted and created for ensuring that the scourge of corruption is punitively attacked and that honesty, transparency and probity imbue public and private life to the highest extent and degree possible. The selection of the Lokpal, therefore, has to be at the highest levels and has to achieve the selection of the best and the brightest at the entry point. Section 4 (1) of the Lokpal Bill prescribes a Selection Committee while section 4 (3) provides that the Selection Committee may, if it considers necessary for the purpose of preparing a Panel to be considered for such appointment, constitute a Search Committee. There have been many permutations and combinations suggested by the witnesses for the Selection and/or the Search Committee.

II. SUMMARY OF SUGGESTIONS/ OBSERVATIONS RECEIVED THROUGH WRITTEN MEMORANDA

- 11.2 The major points raised in the memoranda received by the Committee, on this topic are:
- Strength of Government in Lokpal should not exceed half the total strength
 - Membership of Lokpal – 50% for women, 25% from SC/ST, 20% from minorities proposed.
 - Need for representation for women, minority community, SC/ST/OBC in Lokpal.
 - The representation of SC/ST/OBCs/DTs/NTs and religious minorities in Lokpal and Lokayuktas suggested.
 - Representation for SCs, STs, BCs including BCs of religious minorities need in Lokpal.
 - Need to avoid ex-politicians and MPs as members of Lokpal and specific exclusion to be added in Chapter-II Clause 4.
 - Need to add exclusions for individuals who have any charge sheet or investigation pending against them or who have been prosecuted for any offence/ malpractice.
 - There should be a minimum age criterion for membership of Lokpal – 45 years.
 - Selection should have at least four independent members from public life, but who are not serving any function of government/ judiciary but can be retired SC judges,

Magsasay award winners, Directors or IIT, IIM, ISI, IIS or Bharat Ratna awardees.

No need for MP.LOP in the Selection Committee

- Persons in active politics must not be appointed as Lokpal.
- Lokpal may be appointed as per norms applicable to HC judges and CVC.
- There is no justification for the provision which states that all previous Chairpersons of Lokpal will be members of the Selection Committee. Over time, this will give undue weight age to retired Lokpals and create an exclusive club of Lokpals accountable only to themselves. In no other constitutional office, is there provision to select the successor.
- Any person who has received an award, recognition/monetary purse from a foreign govt./institution/foundation, should not be appointed to Lokpal office.
- Any person who has been associated with an international body that interferes in the internal affairs of other nations, such as Amnesty International, Human Rights Watch etc. should not be appointed to Lokpal office.
- Any person/NGO that has received funds from a foreign organization/person to do advocacy in his/her home country, such as promoting GM seeds, should not be appointed to Lokpal office.
- NRIs should not be appointed to Lokpal Office.
- A person of Indian origin, who is no longer a citizen of India, should not be appointed to Lokpal office.
- Out of the Members as provided in Section 4, two nominees i.e. one prominent jurist and one person of prominence in public life may be chosen by the Members of Lokpal collectively and not by Central Government.
- Clause 3(2)(c) be inserted to provide the CVC and two Vigilance Commissioners to function as Ex-officio Members of the Lokpal.
- CVC Chairman and Members be made Ex-officio Members of Lokpal and they may be appointed or removed in the manner of Members of Lokpal.
- CVC should be made an Ex-officio Member of the Lokpal as recommended by second ARC.
- The concept of 'person of eminence in public life' is a vague and ambiguous expression which may lead to avoidable controversies.
- Those in the age group of 55-70/65 years should be considered for appointment as Chairpersons/ Members of Lokpal in view of maturity and experience required.

- Lower age limit should be fixed as 60 years
- Chairperson of Lokpal – male & female for alternate terms; Members – 50% women
- Tenure – 6 years; 1/3rd to retire every two years
- In order to provide stability to the institution of Lokpal, “no person who does not have less than two years to serve as Chairman or Member of Lokpal, shall be considered for appointment to the post of such Chairman/ Member.”
- Selection Committee should have representation from disadvantaged sections of the society – Chairperson of National Womens’ Commission, Chairperson of SC/ST Commission and Chairperson of National Commission of Minorities.
- There must be a balance between the Government, the opposition and the judiciary in the Selection Committee.
- Selection process should be aired live.
- NRIs may also be made members of the Selection Committee.
- Has recommended public participation in appointment process.
- Undue weightage to Govt. in Selection Committee; Cabinet Minister and person of eminence can be done away with ‘eminent jurist’ at (h) may better be nominated by CJI. The remaining 7 Members should be enough to propose a suitable panel and governmental influence be reduced to minimum.
- There must be a Search Committee for recommending names of Chairperson and Members of Lokpal.
- Search Committee should be mandatory for appointment of Chairperson and Members of Lokpal

III. SUMMARY OF DEPOSITIONS GIVEN BY THE WITNESSES

11.3 Shri Shekhar Singh (NCPRI) stated as follows:-

“...the selection process and selection committee of the Government Lokpal Bill. It prescribes 11 members in the selection committee. A majority of them are either from the Government or, from the ruling party, or, nominated by the Government. So, we feel that is not fair.

We are suggesting a very simple selection committee of three members the Prime Minister, the Leader of the Opposition in the Lok Sabha and a Judge of the Supreme Court nominated by the Chief Justice of India. Why a Judge and not the Chief Justices? This is being done so that there is no complication when an appeal or a writ petition goes to the Supreme Court. It could be another composition, but it must be a composition which is not biased towards either the Government or any other party, the ruling party etcetera etcetera...”

He further stated:-

".....It is our experience that these high-powered Selection Committees of Prime Ministers and Leaders of Opposition do not have the time to actually go out and search who could be a good candidate. In effect, what happens in such situations, and we have seen it in other cases, which I will not mention, but you are familiar, is that the dealing Department of the Government actually decides who is going to become the Chief Lokpal, who is going to become the Lokpal, by the names that they nominate. Therefore, we feel that the Search Committee is very critical and the Search Committee should be mandatory....."

11.4 Shri Harish Salve opined thus:-

".....I completely share the perception that unless there is perceptible inclusiveness, the institution will not enjoy the kind of public respect and public support which needs to enjoy and that is one of the major problems with our judiciary"

11.5 Shri Udit Raj, while appearing before the Committee, said :-

".....In this context, we request that the representation of the SCs/STs, Backwards and minorities should be ensured not only at the committee level but also at the level of the search and selection process. Of course, 'probable' candidates will be selected by the search and selection committee. But whatever may be the final decision, eventually, out of those probable candidates there would be members and the Chairman of the Committee"

11.6 The DoPT, in its written comments, has stated:-

"...In the light of the duties and responsibilities of the Lokpal, it is felt that a person with judicial background would be more suitable to hold the position of Chairman of Lokpal..."

IV ANALYSIS AND DISCUSSION

11.7 The central principle which should dictate the composition of the Selection Committee is that the Committee should, in logistics and deliberations, be manageable, compact and representative without being unwieldy.

11.8 The Lokpal Bill, 2011 contemplates a very large Selection Committee which may or may not appoint a Search Committee. The Jan Lokpal Bill also contemplates a large Selection Committee and an even larger Search Committee.

11.9 The Selection Committee should be kept reasonably compact to enable swift functioning. It should also be representative. Consequently, a Selection Committee comprising of all the three organs of State viz. the Prime Minister (as head of the

Executive), the Speaker of Lok Sabha (as Head of the Lower House) and the Chief Justice of India (as head of the Judiciary), as also the Leader of the Opposition in the Lower House would be a good starting point. The fifth Member of the Selection Committee should be an eminent Indian qualified by all adjectives in clause 4(1)(i) of the Lokpal Bill, 2011 but should be a single nominee, collectively and conjointly, of the following/designated constitutional bodies, viz. CAG, CEC, UPSC Chairman with such nominee having a term of a maximum of five years. This would be a compact five-member body and would have inputs and representations from all relevant sections of the society and government.

11.10 There should, however, be a proviso in Clause 4(3) to the effect that a Search Committee shall comprise at least seven Members and shall ensure representation 50 per cent to Members of SC's and/or STs and/or Other Backward Classes and/or Minorities and/or Women or any category or combination thereof. Though there is some merit in the suggestion that the Search Committee should not be mandatory since, firstly, the Selection Committee may not need to conduct any search and secondly, since this gives a higher degree of flexibility and speed to the Selection Committee, the Committee, on deep consideration, finally opines that the Search Committee should be made mandatory. The Committee does so, in particular, in view of the high desirability of providing representation in the Search Committee as stated above which, this Committee believes, cannot be effectively ensured without the mandatory requirement to have a Search Committee. It should, however, be clarified that the person/s selected by the Search Committee shall not be binding on the Selection Committee and secondly, that, where the Selection Committee rejects the recommendations of the Search Committee in respect of any particular post, the Selection Committee shall not be obliged to go back to the Search Committee for the same post but would be entitled to proceed directly by itself.

11.11 Over the years, there has been growing concern in India that the entire mass of statutory quasi judicial and other similar tribunal bodies or entities have been operated by judicial personnel i.e. retired judges, mainly of the higher judiciary viz. the High Courts and the Supreme Court.

- 11.12 There is no doubt that judicial training and experience imparts not only a certain objectivity but a certain technique of adjudication which, intrinsically and by training, is likely to lead to greater care and caution in preserving principles like fair play, natural justice, burden of proof and so on and so forth. Familiarity with case law and knowledge of sometimes intricate legal principles is naturally available in retired judicial personnel of the higher judiciary.
- 11.13 However, when new and nascent structures are being contemplated it is necessary not to fetter or circumscribe the discretion of the appointing authority. The latter is certainly entitled to appoint judges, and specific exclusion of judges is neither contemplated nor being provided. However, to consider, as the Lokpal Bill 2011 does, only former Chief Justices of India or former judges of the Supreme Court as the Chairperson of the Lokpal would be a totally uncalled for and unnecessary fetter. The Committee, therefore, recommends that clause 3(2) be suitably modified not to restrict the Selection Committee to selecting only a sitting or former Chief Justice of India or judge of the Supreme Court as Chairperson of the Lokpal.
- 11.14 A similar change is not suggested in respect of Members of the Lokpal and the existing provision in clause 3 (2) (b) read with clause 19 may continue. Although the Committee does believe that it is time to consider tribunals staffed by outstanding and eminent Indians, not necessarily only from a pool of retired members of the higher judiciary, the Committee feels **hamstrung** by the Apex Court decision in L. Chandra Kumar v. Union of India 1997 (3) SCC 261 which has held and has been interpreted to hold that statutory tribunals involving adjudicatory functions must not sit singly but must sit in benches of two and that at least one of the two members must be a judicial member. Hence, unless the aforesaid judgment of the Apex Court in L. Chandra Kumar v. Union of India is reconsidered, the Committee refrains from suggesting corresponding changes in clause 3 (2) (b) read with clause 19, though it has been tempted to do so.
- 11.15 There is merit in the suggestion that clause 3 (4) of the Lokpal 2011 be further amended to clarify that a person shall not be eligible to become Chairperson or Member of Lokpal if:
- (a) He/ she is a person convicted of any offence involving moral turpitude;

- (b) He/ she is a person less than 45 years of age, on date of assuming office as Chairperson or Member of Lokpal;
- (c) He/ she has been in the service of any Central or State Government or any entity owned or controlled by the Central or State Government and has vacated office either by way of resignation, removal or retirement within the period of 12 months prior to the date of appointment as Chairperson or Member of Lokpal.

11.16 In clause 9 (2), the existing provision should be retained but it should be added at the end of that clause, for the purpose of clarification, that no one shall be eligible for re-appointment as Chairperson or Member of the Lokpal if he has already enjoyed a term of five years.

11.17 The Committee has already recommended in para 11.10 above appropriate representation on the Search Committee of certain sections of society who have been historically marginalized. The Committee also believes that although the institution of Lokpal is a relatively small body of nine members and specific reservation cannot and ought not to be provided in the Lokpal institution itself, there should be a provision added after clause 4 (5) to the effect that the selection committee and the search committee shall make every endeavour to reflect the diversity of India by including the representation, as far as practicable, of historically marginalized sections of the society on the Lokpal Bill like SCs/ STs, OBCs, minorities and women.

V. REASONS AND RECOMMENDATIONS

11.18 To ensure flexibility, speed and efficiency on the one hand and representation to all organs of State on the other, the Committee recommends a Selection Committee comprising:-

- (a) The Prime Minister of India- as Head of the Executive.**
- (b) The Speaker Lok Sabha, as Head of the Legislature.**
- (c) The Chief Justice of India-as Head of the Judiciary.**
- (d) The leader of the Opposition of the Lower House.**
- (e) An eminent Indian, selected as elaborated in the next paragraph.**

N.B.: functionaries like the Chairman and Leader of the Opposition of the Upper House have not been included in the interests of compactness and flexibility. The Prime Minister would preside over the Selection Committee.

11.19 The 5th Member of the Selection Committee in (e) above should be a joint nominee selected jointly by the three designated Constitutional bodies viz., the Comptroller and Auditor General of India, the Chief Election Commissioner and the UPSC Chairman. This ensures a reasonably wide and representative degree of inputs from eminent Constitutional bodies, without making the exercise too cumbersome. Since the other Members of the Selection Committee are all ex-officio, this 5th nominee of the aforesaid Constitutional bodies shall be nominated for a fixed term of five years. Additionally, it should be clarified that he should be an eminent Indian and all the diverse criteria, individually, jointly or severally, applicable as specified in Clause 4 (1) (i) of the Lokpal Bill 2011 should be kept in mind by the aforesaid three designated Constitutional nominators.

11.20 There should, however, be a proviso in Clause 4(3) to the effect that a Search Committee shall comprise at least seven Members and shall ensure representation 50 per cent to Members of SC's and/or STs and/or Other Backward Classes and/or Minorities and/or Women or any category or combination thereof. Though there is some merit in the suggestion that the Search Committee should not be mandatory since, firstly, the Selection Committee may not need to conduct any search and secondly, since this gives a higher degree of flexibility and speed to the Selection Committee, the Committee, on deep consideration, finally opines that the Search Committee should be made mandatory. The Committee does so, in particular, in view of the high desirability of providing representation in the Search Committee as stated above which, this Committee believes, cannot be effectively ensured without the mandatory requirement to have a Search Committee. It should, however, be clarified that the person/s selected by the Search Committee shall not be binding on the Selection Committee and secondly, that, where the Selection Committee rejects the recommendations of the Search Committee in respect of any particular post, the Selection Committee shall not be obliged to go back to the Search Committee for the same post but would be entitled to proceed directly by itself.

11.20(A) Over the years, there has been growing concern in India that the entire mass of statutory quasi judicial and other similar tribunals, bodies or entities have been operated by judicial personnel i.e. retired judges, mainly of the higher judiciary viz. the High Courts and the Supreme Court.

11.20 (B) There is no doubt that judicial training and experience imparts not only a certain objectivity but a certain technique of adjudication which, intrinsically and by training, is likely to lead to greater care and caution in preserving principles like fair play, natural justice, burden of proof and so on and so forth. Familiarity with case law and knowledge of intricate legal principles, is naturally available in retired judicial personnel of the higher judiciary.

11.20 (C) However, when a new and nascent structure like Lokpal is being contemplated, it is necessary not to fetter or circumscribe the discretion of the appointing authority. The latter is certainly entitled to appoint judges to the Lokpal, and specific exclusion of judges is neither contemplated nor being provided. However, to consider, as the Lokpal Bill 2011 does, only former Chief Justices of India or former judges of the Supreme Court as the Chairperson of the Lokpal would be a totally uncalled for and unnecessary fetter. The Committee, therefore, recommends that clause 3(2) be suitably modified not to restrict the Selection Committee to selecting only a sitting or former Chief Justice of India or judge of the Supreme Court as Chairperson of the Lokpal.

11.20 (D) A similar change is not suggested in respect of Members of the Lokpal and the existing provision in clause 3 (2) (b) read with clause 19 may continue. Although the Committee does believe that it is time to consider tribunals staffed by outstanding and eminent Indians, not necessarily only from a pool of retired members of the higher judiciary, the Committee feels **hamstrung** by the Apex Court decision in *L. Chandra Kumar v. Union of India 1997 (3) SCC 261* which has held and has been interpreted to hold that statutory tribunals involving adjudicatory functions must not sit singly but must sit in benches of two and that at least one of the two members must be a judicial member. Hence, unless the aforesaid judgment of the Apex Court in *L. Chandra Kumar v. Union of India* is

reconsidered, the Committee refrains from suggesting corresponding changes in clause 3 (2) (b) read with clause 19, though it has been tempted to do so.

11.20 (E) There is merit in the suggestion that clause 3 (4) of the Lokpal 2011 be further amended to clarify that a person shall not be eligible to become Chairperson or Member of Lokpal if:

- (a) He/ she is a person convicted of any offence involving moral turpitude;
- (b) He/ she is a person less than 45 years of age, on date of assuming office as Chairperson or Member of Lokpal;
- (c) He/ she has been in the service of any Central or State Government or any entity owned or controlled by the Central or State Government and has vacated office either by way of resignation, removal or retirement within the period of 12 months prior to the date of appointment as Chairperson or Member of Lokpal.

11.20 (F) In clause 9 (2), the existing provision should be retained but it should be added at the end of that clause, for the purpose of clarification, that no one shall be eligible for re-appointment as Chairperson or Member of the Lokpal if he has already enjoyed a term of five years.

11.20 (G) The Committee has already recommended appropriate representation on the Search Committee, to certain sections of society who have been historically marginalized. The Committee also believes that although the institution of Lokpal is a relatively small body of nine members and specific reservation cannot and ought not to be provided in the Lokpal institution itself, there should be a provision added after clause 4 (5) to the effect that the Selection Committee and the Search Committee shall make every endeavour to reflect, on the Lokpal institution, the diversity of India by including the representation, as far as practicable, of historically marginalized sections of the society like SCs/ STs, OBCs, minorities and women.

CHAPTER - 12

THE TRINITY OF THE LOKPAL, CBI AND CVC : IN SEARCH OF AN EQUILIBRIUM

I. INTRODUCTION AND BACKGROUND

12.1. The large body of opinion as available through the witnesses and the memoranda received, clearly suggested that existing institutions, including CBI and CVC should be strengthened. They also said that merely creating fresh ones without eradicating the ills which plagued existing structures, would not have the desired effect. The proposed concept of the Lokpal is, in essence, a monitoring body (with or without investigative/prosecuting powers, as the case may be) for offences under the Prevention of Corruption Act 1988. The substantive law of POCA is largely not under change: what is desirable is a powerful and efficacious body to go after corruption. Therefore it is appropriate to reassess the roles played by the existing institutions i.e. CBI and CVC which already have investigative/prosecuting powers under the 1988 Act. The major thorn which seems to have created years of dissatisfaction with the system relates to the monitoring of the CBI by the government and the fetters imposed by section 6 A (single directive) of the DSPE Act and section 19 of the POCA Act, in addition to S. 197 IPC. Their effect on independent and autonomous investigation and prosecution has been felt to be adverse and counter productive. Absent such and other weaknesses, there would perhaps be no objection to retaining these institutions and in fact strengthening them to a point where they work in tandem with the new Lokpal – creating a powerful Trinity, with mutual checks and balances to increase the quality and efficacy of both investigation and prosecution, while avoiding excessive fusion of power in one body alone. The opinions received relating to the roles of CBI and CVC, as well as the overall proposed structure of the Lokpal, are discussed below.

II. SUMMARY OF SUGGESTIONS/ OBSERVATIONS RECEIVED THROUGH WRITTEN MEMORANDA

12.2 The major points raised in the memoranda received by the Committee, on this topic are:

- It would not be prudent to take over the entire anti-corruption division of CBI. Instead, the Lokpal should set up its own investigation and prosecution wing, taking senior officers on deputation basis to get rid of those who fail to deliver.
- Investigation and Prosecution Wing should consist of officers who have never faced any departmental enquiry or charged of any offence.
- I&P Wing should consist of persons representing communities of Muslim, Hindu, Christians & Dalits.
- Officers of I& P should declare their assets on joining & every year, till relinquishment of office and discrepancy ought to be dealt in accordance with law.
- Economic Offences Wing of CBI cannot be separated from the Anti-Corruption Wing as the two are inter woven. Therefore, they should not be split; rather, there is need to bring the Enforcement Directorate also under the same umbrella.
- It should be made binding on CBI to register and investigate a case if recommended by the Lokpal.
- With regard to placing of CBI and other investigating agencies under Lokpal, it is suggested that once the persons from such agencies are affiliated to Lokpal, they should not be posted back to their parent organizations as a measure to safeguard their service interests/career.
- Bring CVC and Anti-Corruption Wing of CBI under Lokpal.
- The personnel for the departmental anti-corruption/vigilance wings must be selected by Lokpal on inter-departmental basis and not intra-departmental basis. They must function under Lokpal only, with duty to report details to Lokpal monthly.
- The anti-corruption division should be merged as an administrative arm of Lokpal and suitable amendments should be made to exclude these from the direct control of the govt. which has been the consistent criticism of the DPSE.
- Section 6A of DSPE Act, 1946 may be repealed.
- Appoint independent prosecutors to prosecute all corruption, money laundering and benami cases.
- Strengthening of anti-corruption agencies and their infrastructure and manpower, taking into account the best international practices.

- DSPE Act be so amended that no sanction for inquiry or investigation or prosecution is needed.
- Confer more administrative and functional autonomy to the CBI.
- Since the anti-corruption agencies oversee government operations and provide oversight over the offences of corruption, there is an emerging consensus that the anti-corruption body/ bodies should report to the parliament (through parliamentary committees). However, experience also shows that to be effective, legislatures require such resources as a technically competent staff, strong committees, budgetary independence and significant bureaucratic oversight powers.
- There hardly exist any anti-corruption institutions in the world that report to the Supreme Court.
- Experiences show that it may not matter much whether an anti-corruption agency is reporting to the executive or Parliament or the SC so long as it's operational independence is guaranteed.
- Amend Section 197 of CrPC and Section 19 of PCA so as to provide for ordering of prosecution by CVC/ Lokpal and not by the Government.
- CBI be split in two separate agencies; for cases relating to corruption, money laundering and Benami properties, CBI may be accountable to CVC only.
- Bring Enforcement Directorate under CVC.
- All prosecutors with respect to anti- corruption cases should be under the Lokpal.
- Regarding confiscation of properties of corrupt public servants, a law needs to be enacted at the earliest on the lines of Corrupt Public Servants (Forfeitures of Property) Bill drafted by the Law Commission.
- Benami Transactions (Prohibition) Bill, 2011 needs to be enacted/amended immediately to ensure action against corrupt public servants.

III. SUMMARY OF DEPOSITIONS GIVEN BY THE WITNESSES

12.3. The Committee takes note of the submission made by Justice J.S.Verma, while tendering his considered advice before the Committee :-

".....When CBI and CVC are mentioned, they could be appointed by the same law as members of the body. You could consider the same process for their appointment;.....it is over time you gain experience. If you are going to have a more effective procedure for appointment of Lokpal, then the same should apply also for the CBI Director and CVC. Why not consider they to be ex-officio members of the Lokpal just as in the case of National Human Rights Commission you have Chairman and others as ex-officio members. You could think of that system....."

12.4. Dr. Jayaparakash Narayan, during his deposition before the Committee, stated :-

"....my humble appeal is, the Central Vigilance Commission and the CVC Act must be retained with certain modifications. One, the CVC members, including the Chairperson should be made, in addition to their functions under the CVC Act, ex-officio members of the Lok Pal institution so that they have the institutional authority and there will be total seamless integration of functioning. But, in addition to being members of the Lok Pal, the CVC must function under the CVC Act, and exercise all the functions of the CVC Act. It has three advantages,

Therefore, the autonomy that we seek, the independence and the insulation of the crime investigation, particularly in respect of matters of corruption on economic offences from the political executive and partisan politics, that will be achieved by merely retaining that but strengthening and giving autonomy to the Vigilance Commission. Therefore, the autonomy that we seek, the independence and the insulation of the crime investigation, particularly in respect of matters of corruption on economic offences from the political executive and partisan politics, that will be achieved by merely retaining that but strengthening and giving autonomy to the Vigilance Commission. Therefore, destruction of the Vigilance Commission or blind merger or repeal of the CVC Act would be retrogressive steps because we have to achieve many more things, apart from merely creating an institution called Lok Pal or Lokayukta.

Mr. Chairman, Sir, we must go all the way. We must ensure a real and full autonomy but with accountability to all anti-corruption investigative agencies in all matters of corruption. Even as we ensure that there is no need for a roving enquiry, there is no under-mining of the morale of those in the Government. That should be accomplished, if (a) Section 6(a) of the Delhi Special Police Establishment Act is repealed; (b) the executive orders, if any, in the States, in respect of the ACB, similar orders but by an executive order, they apply in State also, they all must go by a specific statutory provision; (c) that sanction of prosecution, probably, there is a case for prior vetting before prosecuting. In such a case, we urge two safeguards. One is, let the CVC be the sanctioning authority because that is envisaged to be an independent authority; that is an authority with deep administrative experience and institutional strength, we can trust that authority. However, before sanctioning prosecution against high officials, the CVC can be asked to write to the Government, indicating what they are going to do. In case the Government of the day, at the State level, in the case of the Lokayukta, and at the national level, in the case of the CVC, has very compelling reasons why a prosecution should not be sanctioned, sometimes, there may be national security considerations that the authorities may not be aware of, sometimes, there may be some other compelling national interest issues, in which case, the Government will have to then record the reasons in writing and communicate to the CVC, and the CVC will take a final decision on the basis of the Government's inputs.....but there may be instances where the actions of an individual, even if they

are seemed to be corrupt in the ordinary law of the land, they are, in a specific context of the national security, necessary and, therefore, the Government believes that the balance of convenience lies not in prosecuting but in denying prosecution. But the CVC must be the final authority. With such safeguards, if the CVC is given the power to sanction prosecution at the national level, in case of the States, the Lokayukta is given the power to sanction prosecution that will suffice.

Lokpal or CVC must be empowered to appoint independent prosecutors because prosecution after all is really a quasi judicial function. It is not something to be trifled with through political interference or partisanship. Investigation, evidence gathering is really an independent thing of the politics of the day. It is entirely based on evidence. It has importance as judicial functioning.....the Lokpal should have a team of investigators, that eventually can be decided but that must be more to go into some of the cases that Lokpal will directly go into because of the sensitivity and complexity of the cases or for a preliminary examination before CBI takes over investigation and prosecution in the large measure.....”

- 12.5. The Chairman of the Bar Council of India, while placing their views before the Committee, said:-

“.....The Anti-corruption Wing of the CBI should be separated and made completely autonomous. Now, accountability mechanisms can be evolved through a Committee. Like the Lokpal, the CAG, the CVC and the CBI should have its own prosecution wing. The Director of CBI and other key officials should be appointed by a Committee, a broad Committee, similar to the one which almost appoints the Lokpal.....”

- 12.6. Dr. Bhanu Pratap Mehta, while deposing before the Committee, said:-

“.....What to matter for institutions is who writes your confidential report, who determines the structure of promotion and so forth. By bringing it under the Lokpal, you actually change that entire culture which currently exists in the CBI. So, my own submission is that to peg the CBI to report to this. The CVC, as I said, the CVC Act could be amended to make it a kind of supervisory body for the lower bureaucracy.....”

- 12.7. The views of the representatives of CII were as follows:

“.....We also believe, as a recommendation, that the Director of the CBI and the Director of the CVC should be made members of the Lokpal in order to promote a collaborative behaviour in terms of ensuring that investigations are done quickly and one agency helps the other agency and so on.....”

- 12.8. Shri Amod K. Kanth, while placing his views before the Committee, said:-

“.....Sir, according to our suggestion, the CBI will remain accountable only to Lokpal. The accountability of the CBI, so far as its anti-corruption wing is concerned, can remain only with the Lokpal. Accountability in other matters can remain with the Government also because there are different kinds of matters.....”

12.9. The views of NCPRI in this regard were that:-

"..... we have said specifically, in the medium to long term, we would much prefer an independent prosecution body along the lines, for example, which is in the UK and it is keeping with a Supreme Court order to the effect. We would also much prefer in the long term, medium to long term not having both prosecution and investigation both in the same body....."

12.10. The Central Vigilance Commissioner, while elucidating upon the role played by CVC, stated thus:-

".....We cannot build a society on distrust and fear alone. सीवीसी यह काम करता है। पॉलिटिकल करप्शन के अंदर जो सिविल सर्वेंट्स उनके साथ लिप्त हैं, उनको देखने के लिए कोऑर्डिनेशन मैकेनिज्म होना चाहिए। उसमें अगर सीवीसी को आप हिस्सा बनाना चाहते हैं तो लोकपाल का एक्स ऑफिशियो कर दें। अगर नहीं भी बनाना चाहते तो हमें कोई ऐतराज नहीं है। मैं समझता हूं कि सिद्धांत रूप से सीबीआई को लोकपाल का सदस्य नहीं बनाना चाहिए।

If you want a definitive recommendation, I would suggest that we should go by the recommendations of the Second Administrative Reforms Commission which says that CVC should be made an ex-officio member of the Lokpal.

CVC is not an investigating agency. It is an integrity institution responsible for coordinating the superintendence of vigilance administration. It does not do investigation. So, this misperception that the CVC does the investigation itself is not there.....".

12.11. The Committee also takes into account the arguments put forth by the Director, CBI on this issue :-

".....The Government Lokpal Bill says, give the Lokpal a fresh or a new anti-corruption investigating agency. Our thinking is that we are an anti-corruption body. We have always been an anti-corruption body right from its inception. The primary focus of the CBI has always been anti-corruption work. That is our forte and that is our expertise. So, why should the anti-corruption work be taken out of the CBI?....

.....Sir, because it being an investigating agency, there has to be a proper command and control system. And it can only be the Director; you cannot have ten members of the Lokpal giving directions.....

.....Sir, CVC also is general superintendence. Therefore, we are saying that if you have a Lokpal, the general superintendence can transfer to the Lokpal. You can't have so many bodies for superintendence. It is a choice.....

.....I would also like to point out that it is not so simple to create a separate agency. People say to create a separate agency. It is not so simple to create a separate agency. To create an agency it is going to take you ten or fifteen years. What would happen then is that there would be nobody looking after anti-corruption. The CBI would be out of anti-corruption and you will be trying to set up a new agency which will be equally ineffective. So, your basic anti-corruption movement would be a non-

starter unless you have the CBI in its complete present structure totally involved in whatever architecture you would be proposing....”

12.12. The Committee notes that the opinion of Dr. Jayaprakash Narayan placed before the Committee on this matter, is quite similar:

“.....It cannot be a separate parallel body fully dealing with all cases of investigation. That simply is not possible. For 64 years we could not build a CBI which has more than 2000 investigative officers. To think that tomorrow overnight you can build an agency with some 50000 investigators, it is not realistic. We must utilize the existing strength and expand it and bring more expertise and more technology and more manpower, more resources to CBI and make it strong, effective and accountable rather than deplete existing institutions..... So, some kind of a provision in the law also will be helpful subject to the caveat in States Lokayuktas but at the national level as we submitted earlier the CVC is fully capable of handling it with the changes that we proposed. But the CBI must be strengthened and Section 6A of the Delhi Police Establishment Act must go and the relaxation given to Lokpal institution in respect of prosecution must apply to all cases.....”

12.13. The considered view of Shri Harish Salve was that :-

“.....Sir, I have, with great respect, strong views about subjecting the working of the CBI in its investigative area to any kind of interference. The Code of Criminal Procedure confers sole jurisdiction on the judicial system, principally the Magistracy, to oversee investigations and that is where, Sir, in my respectful submission, this power must continue to lie.....

.....As for the decision whether or not to prosecute, we must follow the system; we have two mistakes in our law. In America, as you know, it is the District Attorney’s Office or the State Attorney General’s office, or, at the federal level, it is the Attorney Level or the Solicitor General’s office, which takes a final call on whether or not to press charges. In India, some judgements have taken the view that the police cannot even consult the Public Prosecutor which, according to me, is wrong. Many times, especially, in complex corporate crimes or in Prevention of Corruption crimes, you may end up filing chargesheets which fail because you got the law wrong. Now, the CBI must have a powerful Public Prosecutorial Wing.....”

12.14. The Chairman of the Committee, while voicing his opinion on this issue, stated:-

“.....The CBI for all its faults has expertise in investigation. If you are going to give investigation to Lokpal without investigative wing, so you will have to have existing wing. However the CBI without its anti-corruption wing is left with nothing and their stature goes.....”

12.15. One of the Members of the Committee highlighted a problem area in this regard as:-

“..... The problem arises when CVC wants sanction against higher bureaucracy but the sanction is not granted normally. Even when it is granted, the time taken is far too long as a result the accused bureaucrat continues to exercise the authority.....”

12.16. The Committee, while examining the crucial role played by CBI, gave serious thought and consideration to the written submission made by CBI that:

“.....Since the Government has introduced Lokpal Bill and has proposed creating a separate investigation Wing for the Lokpal, CBI is of the view that rather than creating new investigation Wing, CBI should be utilized for investigation of cases referred by Lokpal.... However, the relationship between CBI and Lokpal should be similar to the superintendence over CBI presently exercised by the CVC in the manner as laid down under Sec. 8 (1) (b) of the CVC Act..... The CBI would like to work in close association with the Lokpal with Director CBI as Ex-officio member of Lokpal..... CBI will continue to exercise the police powers to take final decision after completion of investigation of a case and file police report in the competent court and intimate Lokpal as well in the matters referred by it. The relationship between CBI and Lokpal should be similar to the superintendence over CBI presently exercised by the CVC in the manner as laid down under Sec. 8 (1) (b) of the CVC Act.....CBI is of the view that it is capable to take care of all the matters referred for investigation by the Lokpal and there is no need for a separate Investigation Wing of Lokpal. However, the manpower and other resources will need to be augmented to cater to this additional workload.....CBI is of the view that it should not be bifurcated and should be granted full functional autonomy.....Keeping in view the Lokpal Bill, already introduced by the government in the Parliament, which inter alia envisages creation of a separate Investigation Wing for looking into corruption cases, it was proposed by CBI that as investigation of Anti-corruption cases is the primary activity of CBI and CBI has evolved itself into a premier investigation agency of the country over 70 years of its existence, there is no need for creation of a new agency in Lokpal for investigation of anti-corruption cases. The CBI is capable of taking care of all the matters referred for investigation by the Lokpal, if it is created.Looking into professional competence, credibility of CBI; it should be made an integral though independent component of any Anti-corruption apparatus to fight corruption. To ensure full functional autonomy, it has been proposed to make Director CBI, an Ex-officio member of the Lokpal. However, the Lokpal may exercise general superintendence over CBI for PC Act cases referred by it through Director CBI as its Ex-officio member in a similar manner as being done by the CVC under the CVC Act.....”

12.17. With regard to the Prosecution Wing, CBI has submitted that:

“.....A proposal for creation of 907 posts has been sent in 2008 to Department of Personnel Training to strengthen the Prosecution Wing of CBI..... Director of Prosecution of CBI is the officer borne on the cadre of Ministry of Law, Justice & Legal Affairs. He is the head of Prosecution Wing of CBI. In addition to this, three Additional Legal Advisors who are also on the strength of department of Legal Affairs, Ministry of Law, Justice & Legal Affairs, work for CBI.....LA of CBI does not have veto power. Director, CBI seeks his legal opinion in important cases. However, the same is not binding on the Director, CBI.”

12.18. The Committee also took into account the opinion of CVC in this matter, the major points of which are as under:

- CVC should remain the Premier Integrity Institution to address the corruption and it should have jurisdiction over the higher bureaucracy.
- Lokpal and CVC should work in close cooperation. Mechanism need to be developed for effective coordination.
- Amend suitably Section 6(a) of DSPE Act for according prior approvals to CBI under PC Act.
- CVC should be empowered to grant sanction for prosecution in cases of Government Servants.
- CVC's advice should be binding on the appointing authorities in respect of cases of lower officials under PC Act.
- Adequate autonomy to CVC on the lines of UPSC and C&AG.
- Amend CVC Act providing for the Government Departments to explain the reasons to the Parliament for non- acceptance of CVC advice.
- Lokpal should focus on political corruptions involving Ministers, MPs and Higher Civil Servants who have connived in the grand political corruption which is difficult to curb with existing mechanism.
- The existing structure of Vigilance administration should not be disturbed.

12.19. The CVC has further stated that:

“.....The Committee while exercising its superintendence over DSPE (CBI) holds regular review monthly meetings with Director, CBI. The following matters are reviewed during the meetings:-

- Complaints referred by Commission to CBI for investigation and reports
- Review of cases of requests made for sanction of prosecution by CBI and pending with concerned administrative authorities.
- Matters relating to proposals of vigilance clearance referred to CBI for record check etc.
- Cases registered during the month under PC Act
- Pendency of cases under investigation and trial under PC Act
- Long delayed cases of PC Act under investigations
- Administrative issues and manpower position and steps of address the same.
- Specific issues of concern, if any, in discharging its functions under DSPE Act.

12.20. Besides above, the appointments, promotions, extension of tenure or otherwise, for posts of Superintendent of Police and above in CBI are recommended to the Government in the meeting of the Committee headed by the Central Vigilance Commissioner as and when required.

12.21. A separate chapter covering the superintendence over the functioning of the CBI is also included in the Commission's Annual report.....

".....Prime-facie complaints containing serious allegations received by the Commission are forwarded to concerned CVOs of the CBI for in depth investigation and submission of reports. In addition, the CVO of the various organizations also investigate allegations contained in complaints received at their end. CBI also registers cases for investigation based on their source information. On receipt of investigation reports from the CVOs or the CBI recommending further course of action, the Commission examines the reports and thereafter tenders its first stage advice. As per information, around 60% of such investigation reports have ended in closure of the cases as the allegations were not found substantiated and also not found serious enough to proceed further for any departmental action. Further, there are cases where the allegations leveled turn out to be baseless, motivated and vexatious which may also be the reason for closure of cases after investigation. In a significant number of complaints relating to grievances, the issues get redressed. As regards reasons for the rate of around 60% closure of the allegations at first stage advice it may be mentioned that evidence gathering of corruption issues generally being a post-mortem exercise is a difficult task. Once incidents of corrupt practices are committed, the investigations basically focus on the documents and files only....."

IV. ANALYSIS AND DISCUSSION

12.22. The basic objective of a new Lokpal initiative is or at least should be to create an autonomous, independent investigative and prosecution wing for corruption in bureaucracy and the political class

12.23. The basic elements of policing corruption are:

- Receiving and screening of complaints
- Preliminary investigation of complaint
- Full/ final further investigation
- Prosecution
- Adjudication and punishment
- Departmental action

12.24. Presently, all these functions and powers (except departmental action) are centered with the CBI subject to ministerial intervention at some levels. For States where there is no CBI, the State police (frequently called Anti-corruption Bureau) does the job.

- 12.25. As far as departmental action is concerned, the CBI has no role and the CVC exercises full power but can only make non-binding recommendations for departmental action which is to be ultimately taken by the concerned department.
- 12.26. The aforesaid summary of the system shows an undesirable, inefficient and conflicted fusion of investigative and prosecutorial powers. It has also attenuated independence and autonomy in practice. If a new mechanism like the Lokpal is being created for a large part of bureaucratic and political class, the undesirable features of the existing system must be necessarily addressed.
- 12.27. The proposed solution
- i. Make Lokpal, for the subjects it covers, in-charge of receiving complaints and doing a detailed preliminary inquiry through its own internal inquiry wing.
 - ii. Referring to the CBI (a separate statutory body) for detailed investigation must remain, as today, if the preliminary inquiry stage has been crossed as per the Lokpal.
 - iii. Have the CBI be subjected only to the general superintendence of the Lokpal, similar to that to which it is subjected today under the CVC Act. During the actual detailed investigation by CBI, the merits of the investigation cannot be gone into by either the Lokpal or the administrative Ministry. The analogy here would be the same as applied to the present Court monitored criminal investigations (courts can also exercise only supervisory power but they cannot interfere in the contents or merits of the investigation).
 - iv. After investigation by the CBI for the Lokpal covered persons/ offences is over, the matter would revert to a special prosecutorial wing of the Lokpal which would conduct the entire prosecution in an appropriate Court presently called the CBI Special Judge but could then be called the Lokpal Special Judge.
 - v. Adjudication, punishment and appellate recourse would continue to be covered by the normal existing law except that the numbers of the Special Judges would have to be increased dramatically to achieve quick results.
 - vi. For all the non-Lokpal covered persons/ offences, the existing CBI controlled investigation and prosecution system would continue with logistical infrastructural strengthening.

- vii. There can be no question of sanction for the Lokpal covered persons. In practise, the provisions of single directive and sanction have worked as a huge delaying tactic by vested interests over the years and have frustrated prosecutions.
- viii. For the Lokpal covered persons/ offences, the entire power of recommendation for departmental action would be taken away from the CVC and entrusted to the Lokpal whose recommendations shall be binding (the Lokpal Bill, 2011 already so provides). At worst, an alternative check can be provided by saying that the department is bound by the Lokpal recommendations unless, for reasons to be recorded in writing by a person of the rank of not less than Minister of State, the conclusions of the Lokpal are rejected.
- ix. For those persons not covered by the Lokpal, the CVC would retain jurisdiction (though this Committee does recommend that the CVC's recommendations should be binding unlike the present situation where very few departmental actions actually take place on the recommendations of the CVC).

12.28 The aforesaid would also obviate the current criticism of both the Lokpal Bill and the Jan Lokpal Bill which appear to fuse investigation, prosecution, superintendence and departmental recommendation into one body, though the Jan Lokpal Bill does it to a far higher and unacceptable degree than the Lokpal Bill.

12.29 Indeed, since India has been talking of an independent structure for a fairly long time, the proposed structure herein would commence a culture of Chinese wall demarcations between investigation and prosecution, the former with the CBI and the latter with the Lokpal in so far as the Lokpal covered persons are concerned. It is true that there would be teething problems for some time due to lack of coordination between investigative and prosecution wings. But this insulation of investigation and prosecution has been considered desirable for many years and we have frequently lamented the absence of this demarcation in India, as operationally present in the USA and UK. Over a short period of time, an independent Directorate of Public Prosecution (DPP) culture is hoped to emerge and considerably strengthen the quality of investigation and impart far greater objectivity to the prosecution process.

12.30 Lastly, the advantage of this model would be that:

- i. *The CBI's apprehension, not entirely baseless, that it would then become a Hamlet without a Prince of Denmark if its Anti-Corruption Wing was hived off to the Lokpal, would be taken care of.*
- ii. *It would be unnecessary to make CBI or CVC a Member of the Lokpal body itself.*
- iii. *The CBI would not be subordinate to the Lokpal nor its esprit de corps be adversely affected; it would only be subject to general superintendence of Lokpal. It must be kept in mind that the CBI is an over 60 year old body, which has developed a certain morale and esprit de corps, a particular culture and set of practices, which should be strengthened and improved, rather than merely subsumed within a new or nascent institution, which is yet to take roots. Equally, the CBI, while enhancing its autonomy and independence, cannot be left on auto pilot.*
- iv. *The CVC would retain a large part of its disciplinary and functional role for non Lokpal personnel and misconduct and would also not be subordinate to the Lokpal.*

12.31. Consequently, it is suggested that the aforesaid structure reasonably harmonizes and creates the necessary equilibrium for the independence and harmonised functioning of the so-called Trinity viz. Lokpal, CBI and CVC, with neither obliterating, superseding or weakening the other. It also advocates the strengthening of existing institutions, the creation of a new culture of professional investigation insulated from inception and a distinctly professional prosecution department.

V. REASONS AND RECOMMENDATIONS

12.32 (A) Whatever is stated hereinafter in these recommendations is obviously applicable only to Lokpal and Lokayukta covered personnel and offences/misconduct, as already delineated in this Report earlier, inter alia, in Chapter 8 and elsewhere.

(B) For those outside (A) above, the existing law, except to the extent changed, would continue to apply.

- 12.33. This Chapter, in the opinion of the Committee, raises an important issue of the quality of both investigation and prosecution; the correct balance and an apposite equilibrium of 3 entities (viz. Lokpal, CBI and CVC) after creation of the new entity called Lokpal; harmonious functioning and real life operational efficacy of procedural and substantive safeguards; the correct balance between initiation of complaint, its preliminary screening/ inquiry, its further investigation, prosecution, adjudication and punishment; and the correct harmonization of diverse provisions of law arising from the Delhi Special Police Establishment Act, the CVC Act, the proposed Lokpal Act, the IPC, CrPC and the Prevention of Corruption Act. It is, therefore, a somewhat delicate and technical task.**
- 12.34 The stages of criminal prosecution of the Lokpal and Lokayukta covered persons and officers can be divided broadly into 5 stages, viz. (a) The stage of complaint, whether by a complainant or suo motu, (b) the preliminary screening of such a complaint, (c) the full investigation of the complaint and the report in that respect, (d) prosecution, if any, on the basis of the investigation and (e) adjudication, including punishment, if any.**
- 12.35 The Committee recommends that the complaint should be allowed to be made either by any complainant or initiated suo motu by the Lokpal. Since, presently, the CBI also has full powers of suo motu initiation of investigation, a power which is frequently exercised, it is felt that the same power of suo motu proceedings should also be preserved for both the CBI and the Lokpal, subject, however, to overall supervisory jurisdiction of the Lokpal over the CBI, including simultaneous intimation and continued disclosure of progress of any inquiry or investigation by the CBI to the Lokpal, subject to what has been elaborated in the next paragraph.**
- 12.36 Once the complaint, through any party or suo motu has arisen, it must be subject to a careful and comprehensive preliminary screening to rule out false, frivolous and vexatious complaints. This power of preliminary inquiry must necessarily vest in the Lokpal. However, in this respect, the recommendations of the Committee in para 12.36(I) should be read with this para. This is largely covered in clause 23 (1) of the Lokpal Bill, 2011. However, in this respect, the**

Lokpal would have to be provided, at the inception, with a sufficiently large internal inquiry machinery. The Lokpal Bill, 2011 has an existing set of provisions (Clauses 13 and 14 in Chapter III) which refers to a full-fledged investigation wing. In view of the structure proposed in this Chapter, there need not be such an investigation wing but an efficacious inquiry division for holding the preliminary inquiry in respect of the complaint at the threshold. Preliminary inquiry by the Lokpal also semantically distinguishes itself from the actual investigation by the CBI after it is referred by the Lokpal to the CBI. The pattern for provision of such an inquiry wing may be similar to the existing structure as provided in Chapter III of the Lokpal Bill 2011 but with suitable changes made, *mutatis mutandis*, and possible merger of the provisions of Chapter VII with Chapter III.

12.36 (A)The Committee is concerned at the overlap of terminology used and procedures proposed, between preliminary inquiry by the Lokpal as opposed to investigation by the investigating agency, presently provided in Clause 23 of the Lokpal Bill. The Committee, therefore, recommends:

- (a) that only two terms be used to demarcate and differentiate between the preliminary inquiry to be conducted by the Lokpal, *inter-alia*, under Chapters VI and VII read with Clause 2(1)(e) as opposed to an investigation by the investigating agency which has been proposed to be the CBI in the present report. Appropriate changes should make it clear that the investigation (by the CBI as recommended in this report), shall have the same meaning as provided in Clause 2 (h) of the Cr.P.C whereas the terms “inquiry” or “preliminary investigation” should be eschewed and the only two terms used should be “preliminary inquiry” (by the Lokpal) on the one hand & “investigation” (by the CBI), on the other.
- (b) the term preliminary inquiry should be used instead of the term inquiry in clause 2(1)(e) and it should be clarified therein that it refers to preliminary inquiry done by the Lokpal in terms of

Chapters VI and VII of the Lokpal Bill, 2011 and does not mean or refer to the inquiry mentioned in Section 2(g) of the Cr.P.C.

- (c) the term “investigation” alone should be used while eschewing terms like “preliminary investigation” and a similar definitional provision may be inserted after Clause 2(1)(e) to state that the term investigation shall have the same meaning as defined in Clause 2(h) of the Cr.P.C.
- (d) Similar changes would have to be made in all other clauses in the Lokpal Bill, 2011, one example of which includes Clause-14.

12.36 (B) There are several parts of Clause 23 of the 2011 Bill, including Clauses 23(4), 23(5), 23(6), 23(9) and 23(11) which require an opportunity of being heard to be given to the public servant during the course of the preliminary inquiry i.e. the threshold proceedings before the Lokpal in the sense discussed above. After deep consideration, the Committee concludes that it is unknown to criminal law to provide for hearing to the accused at the stage of preliminary inquiry by the appropriate authority i.e. Lokpal or Lokayukta in this case. Secondly, the preliminary inquiry is the stage of verification of basic facts regarding the complaint, the process of filtering out false, frivolous, fictitious and vexatious complaints and the general process of seeing that there is sufficient material to indicate the commission of cognizable offences to justify investigation by the appropriate investigating agency. If the material available in the complaint at the stage of its verification through the preliminary inquiry is fully disclosed to the accused, a large part of the entire preliminary inquiry, later investigation, prosecution and so on, may stand frustrated or irreversibly prejudiced at the threshold. Thirdly, and most importantly, the preliminary inquiry is being provided as a threshold filter in favour of the accused and is being entrusted to an extremely high authority like the Lokpal, created after a rigorous selection procedure. Other agencies like the CBI also presently conduct preliminary inquiries but do not hear or afford natural justice to the accused during that process. Consequently the Committee recommends that all references in Clause 23 or elsewhere in the Lokpal Bill, 2011 to hearing of the accused at the preliminary inquiry stage should be deleted.

- 12.36 (BB)** Since the Committee has recommended abolition of the personal hearing process before the Lokpal during the preliminary inquiry, the Committee deems it fit and proper to provide for the additional safeguard that the decision of the Lokpal at the conclusion of the preliminary inquiry to refer the matter further for investigation to the CBI, shall be taken by a Bench of the Lokpal consisting of not less than 3 Members which shall decide the issue regarding reference to investigation, by a majority out of these three.
- 12.36 (C)** Naturally it should also be made clear that the accused is entitled to a full hearing before charges are framed. Some stylistic additions like referring to the charge sheet “if any” (since there may or may not be a chargesheet) may also be added to Clause 23(6). Consequently, Clauses like 23(7) and other similar clauses contemplating proceedings open to public hearing must also be deleted.
- 12.36 (D)** Clause 23(8) would have to be suitably modified to provide that the appropriate investigation period for the appropriate investigating agency i.e. CBI in the present case, should normally be within six months with only one extension of a further six months, for special reasons. Reference in Clause 23(8) to “inquiry” creates highly avoidable confusion and it should be specified that the meanings assigned to inquire and investigate should be as explained above.
- 12.36 (E)** The Committee also believes that there may be several exigencies during the course of both preliminary inquiry and investigation which may lead to a violation of the 30 days or six months periods respectively specified in Clause 27(2) and 23(8). The Committee believes that it cannot be the intention of the law that where acts and omissions by the accused create an inordinate delay in the preliminary inquiry and / or other factors arise which are entirely beyond the control of the Lokpal, the accused should get the benefit or that the criminal trial should terminate. For that purpose it is necessary to insert a separate and distinct provision which states that Clauses 23(2), 23(8) or other similar time limit clauses elsewhere in the Lokpal Bill, 2011, shall not automatically give any benefit or undue advantage to the accused and shall not automatically thwart or terminate the trial.

- 12.36 (F)** Clause 23(10) also needs to be modified. Presently, it states in general terms the discretion to hold or not to hold preliminary inquiry by the Lokpal for reasons to be recorded in writing. However, this may lead to allegations of pick and choose and of arbitrariness and selectivity. The Committee believes that Clause 23(10) should be amended to provide for only one definition viz., that preliminary inquiry may be dispensed with only in trap cases and must be held in all other cases. Even under the present established practice, the CBI dispenses with preliminary inquiry only in a trap case for the simple reason that the context of the trap case itself constitutes preliminary verification of the offence and no further preliminary inquiry is necessary. Indeed, for the trap cases, Section 6 A (ii) of the Delhi Special Police Establishment Act, 1946 also dispenses with the provision of preliminary inquiries. For all cases other than the trap cases, the preliminary inquiry by the Lokpal must be a non dispensable necessity.
- 12.36 (G)** Clause 23(11) also needs to be modified / deleted since, in this Report, it is proposed that it is the CBI which conducts the investigation which covers and includes the process of filing the charge sheet and closure report.
- 12.36 (H)** Similarly Clause 23 (12) (b) would have to be deleted, in view of the conclusion hereinabove regarding the absence of any need to provide natural justice to the accused at the stage of preliminary inquiry. Clause 23(14) is also unusually widely worded. It does not indicate as to whom the Lokpal withhold records from. Consequently that cannot be a general blanket power given to the Lokpal to withhold records from the accused or from the investigating agency. Indeed, that would be unfair, illegal and unconstitutional since it would permit selectivity as also suppress relevant information. The clause, therefore, needs to be amended.
- 12.36 (I)** The case of the Lokpal initiating action suo motu, requires separate comment. In a sense, the preliminary inquiry in the case of a Lokpal suo motu action becomes superfluous since the same body (i.e. Lokpal) which initiates the complaint, is supposed to do a preliminary inquiry. This may, however, not be as anomalous as it sounds since even under the present structure, the CBI, or

indeed the local police, does both activities ie suo motu action as also preliminary screening/ inquiry. The Committee was tempted to provide for another body to do preliminary inquiry in cases where the Lokpal initiates suo motu action, but in fact no such body exists and it would create great multiplicity and logistical difficulty in creating and managing so many bodies. Hence the Committee concludes that in cases of suo motu action by Lokpal, a specific provision must provide that that part of the Lokpal which initiates the suo motu proposal, should be scrupulously kept insulated from any part of the preliminary inquiry process following upon such suo motu initiation. It must be further provided that the preliminary inquiry in cases of suo motu initiation must be done by a Lokpal Bench of not less than five Members and these should be unconnected with those who do the suo motu initiation.

12.37. These recommendations also prevent the Lokpal from becoming a single institution fusing unto itself the functions of complainant, preliminary inquirer, full investigator and prosecutor. It increases objectivity and impartiality in the criminal investigative process and precludes the charge of creating an unmanageable behemoth like Lokpal, while diminishing the possibility of abuse of power by the Lokpal itself.

12.38. These recommendations also have the following advantages:

- (i) The CBI's apprehension, not entirely baseless, that it would become a Hamlet without a Prince of Denmark if its Anti-Corruption Wing was hived off to the Lokpal, would be taken care of.
- (ii) It would be unnecessary to make CBI or CVC a Member of the Lokpal body itself.
- (iii) The CBI would not be subordinate to the Lokpal nor its esprit de corps be adversely affected; it would only be subject to general superintendence of Lokpal. It must be kept in mind that the CBI is an over 60 year old body, which has developed a certain morale and esprit de corps, a particular culture and set of practices, which should be strengthened and improved, rather than merely subsumed or submerged within a new or nascent institution, which is yet to take root. Equally, the CBI, while enhancing its autonomy and independence, cannot be left on auto pilot.

- (iv) The CVC would retain a large part of its disciplinary and functional role for non Lokpal personnel and regarding misconduct while not being subordinate to the Lokpal. However, for Lokpal covered personnel and issues, including the role of the CBI, the CVC would have no role.
- (v) Mutatis mutandis statutory changes in the Lokpal Bill, the CVC and the CBI Acts and in related legislation, is accordingly recommended.

12.39. After the Lokpal has cleared the stage for further investigation, the matter should proceed to the CBI. This stage of the investigation must operate with the following specific enumerated statutory principles and provisions:

- (A) On the merits of the investigation in any case, the CBI shall not be answerable or liable to be monitored either by the Administrative Ministry or by the Lokpal. This is also fully consistent with the established jurisprudence on the subject which makes it clear that the merits of the criminal investigation cannot be gone into or dealt with even by the superior courts. However, since in practise it has been observed in the breach, it needs to be unequivocally reiterated as a statutory provision, in the proposed Lokpal Act, a first in India.
- (B) The CBI shall, however, continue to be subject to the general supervisory superintendence of the Lokpal. This shall be done by adding a provision as exists today in the CVC Act which shall now apply to the Lokpal in respect of the CBI. Consequently, the whole of the Section 8 (1) (not Section 8 (2)) of the CVC Act should be included in the Lokpal Bill to provide for the superintendence power of the Lokpal over the CBI.

12.40. Correspondingly, reference in Section 4 of the Delhi Special Police Establishment Act to the CVC would have to be altered to refer to the Lokpal.

12.41. At this stage, the powers of the CBI would further be strengthened and enhanced by clarifying explicitly in the Lokpal Bill that all types of prior sanctions/terms or authorizations, by whatever name called, shall not be applicable to Lokpal covered persons or prosecutions. Consequently, the provisions of Section 6 (A) of the Delhi Special Police Establishment Act, Section 19 of the Prevention of Corruption Act and Section 197 of the IPC or any other provision of the law,

wherever applicable, fully or partially, will stand repealed and rendered inoperative in respect of Lokpal and Lokayukta prosecutions, another first in India. Clause 27 of the Lokpal Bill, 2011 is largely consistent with this but the Committee recommends that it should further clarify that Section 6 A of the DSPE Act shall also not apply in any manner to proceedings under the proposed Act. The sanction requirement, originating as a salutary safeguard against witch hunting has, over the years, as applied by the bureaucracy itself, degenerated into a refuge for the guilty, engendering either endless delay or obstructing all meaningful action. Moreover, the strong filtering mechanism at the stage of preliminary inquiry proposed in respect of the Lokpal, is a more than adequate safeguard, substituting effectively for the sanction requirement. Elsewhere, this Report recommends that all sanction requirements should be eliminated even in respect of non Lokpal covered personnel.

12.42. The previous two paragraphs if implemented, would achieve genuine and declared statutory independence of investigation for the first time for the CBI.

12.43. The main investigation, discussed in the previous few paragraphs, to be conducted by the CBI, necessarily means the stage from which it is handed over to the CBI by the Lokpal, till the stage that the CBI files either a chargesheet or a closure report under Section 173 of the CrPC. However, one caveat needs to be added at this stage. The CBI's chargesheet or closure report must be filed after the approval by the Lokpal and, if necessary, suitable changes may have to be made in this regard to Section 173 Cr PC and other related provisions.

12.44. The aforesaid independence of the CBI is reasonable and harmonizes well with the supervisory superintendence of the Lokpal in the proposed Lokpal Bill, which is now exercised by CVC under Section 8 (1) of the CVC Act. The Committee recommends the above provision, suitably adapted to be applicable in the relationship between the Lokpal and the CBI.

12.45. The next stage of the criminal process would go back to the Lokpal with full powers of prosecution on the basis of the investigation by the CBI. The following points in this respect are noteworthy:

- **Clause 15 in Chapter IV of the Lokpal Bill, 2011 already contains adequate provisions in this regard and they can, with some modifications, be retained and applied.**
- **The Committee's recommendations create, again for the first time, a fair demarcation between independent investigation and independent prosecution by two distinct bodies, which would considerably enhance impartiality, objectivity and the quality of the entire criminal process.**
- **It creates, for the first time in India, an independent prosecution wing, under the general control and superintendence of the Lokpal, which, hopefully will eventually develop into a premium, independent autonomous Directorate of Public Prosecution with an independent prosecution service (under the Lokpal institution). The Committee also believes that this structure would not in any manner diminish or dilute the cooperative and harmonious interface between the investigation and prosecution processes since the former, though conducted by the CBI, comes under the supervisory jurisdiction of the Lokpal.**

12.46. The next stage is that of adjudication and punishment, if any, which shall, as before, be done by a special Judge. The Committee considers that it would be desirable to use the nomenclature of 'Lokpal Judge' (or Lokayukta Judge in respect of states) under the new dispensation. However, this is largely a matter of nomenclature and existing provisions in the Lokpal Bill, 2011 in Chapter IX are adequate, though they need to be applied, with modifications.

12.47. The aforesaid integrates all the stages of a criminal prosecution for an offence of corruption but still leaves open the issue of departmental proceedings in respect of the same accused.

12.48. The Committee agrees that for the Lokpal covered personnel and issues, it would be counter-productive, superfluous and unnecessary to have the CVC to play any role in departmental proceedings. Such a role would be needlessly duplicative and superfluous. For such matters, the Lokpal should be largely empowered to do all those things which the CVC presently does, but with some significant changes, elaborated below.

12.49 Clauses 28 and 29 of the Lokpal Bill are adequate in this regard but the following changes are recommended:

- (i)** The Lokpal or Lokayukta would be the authority to recommend disciplinary proceedings for all Lokpal or Lokayukta covered persons.
- (ii)** The CVC would exercise jurisdiction for all non Lokpal covered persons in respect of disciplinary proceedings.
- (iii)** The CBI would similarly continue to exercise its existing powers under the CVC's superintendence for all non Lokpal personnel and proceedings.
- (iv)** Departmental action must, as the law today stands, comply with the over arching mandate of Article 311 of the Indian Constitution. Dissatisfaction or objection to the practical operation of Article 311, fully understandable and indeed justifiable, does not permit or impel us to ignore the existence of Article 311, until altered. If there is consensus outside the Committee on amending Article 311, it must be amended as elaborated and recommended by the Committee in paragraph 12.49. However, absent such a consensus, the passage of the Lokpal Bill need not be held up on that account and hence the present report makes recommendations on the basis of the continuance of Article 311. If, however, it is amended as per paragraph 12.49, the proposed Lokpal Act can easily be modified to reflect such changes.
- (v)** It may also be remembered that the Lokpal itself does not conduct the departmental proceedings. For the law to provide for Lokpal to conduct the entire departmental proceedings itself, would be to put a humungous and unworkable burden on the institution.
- (vi)** Therefore, the power to take departmental action whether in the case of bureaucrats or in the case of Ministers as provided in Clauses 28 and 29 of the Lokpal Bill 2011, are largely appropriate.
- (vii)** The Committee is informed that suspension of a delinquent officer during his criminal prosecution is virtually automatic in practice. However, the Committee feels the need to emphasize that a specific provision be added in Chapter VII making it clear that once any bureaucrat (viz. group A or group B officer) as covered in the proposed Lokpal Bill is under investigation and the Lokpal makes a recommendation that such a person

be suspended, such suspension should mandatorily be carried out unless, for reasons to be recorded in writing by a majority out of a group of 3 persons not below the rank of Ministers of State belonging to the Ministries of Home, Personnel and the relevant administrative Ministry of the delinquent officer, opine to the contrary. Such suspension on Lokpal recommendation does not violate Article 311 in any manner. Refusal by the aforesaid Committee of three provides a check and balance qua possibly unreasonable Lokpal recommendations. The reference is to three high functionaries of three Ministries and not to the Administrative Ministry alone since it is frequently found in practise that the Administrative Ministry's responses alone may seek to preserve the status quo on account of vested interests arising from the presence of the delinquent officer in that Administrative Ministry.

- (viii) There cannot be a counterpart suspension provision in respect of MPs or Ministers or the like, but an explicit clause may be added to the existing Clause 29 that the Presiding Officer of the relevant House in the case of MPs and Prime Minister in the case of a member of the Council of Ministers shall record a note in writing indicating the action being taken in regard to the Lokpal's recommendations or the reasons for not taking such action.
- (ix) Wherever otherwise applicable, in respect of the details of the departmental inquiry, the provisions of Article 311 would, unless altered and subject to Paras D above and 12.49 below, continue to apply.

12.50 The Committee strongly pleads and recommends that the provisions of Article 311 require a close and careful relook to ensure that reasonable protection is given to bureaucrats for the independent and fair discharge of their functions but that the enormous paraphernalia of procedural rules and regulations which have become a major obstacle in the taking of genuine and legitimate departmental action against delinquent officers, be eliminated. The Committee notes with concern and with growing apprehension that serious and high level / big ticket corruption has increased exponentially since independence at all levels in the Lokpal proposed categories of personnel. In particular, bureaucratic corruption has been relatively ignored or underplayed in the context of the

excessive media and civil society focus on political corruption, coupled with the doctrine of civil service anonymity, which this country imported from our former colonial masters. Hence, the substantial modification of Article 311 or, indeed, its replacement by a much lesser statutory (not constitutional counterpart) should be taken up and implemented at the earliest. It may be added that what requires to be looked into is not the mere text of Article 311 but the context which has grown around it, through an undesirably large number of statutory and non-statutory rules, procedures and regulations coupled with huge common law jurisprudence over the last 6 decades. It is universally believed that the aforesaid has, in practice, converted Article 311, from a reasonable and salutary safeguard to a haven for those indulging in mal-administration and/ corruption with no fear of consequences and the certainty of endless delay. The fact that Article 311 had been given constitutional and not mere statutory status is also responsible for its largely unchanged character over the last six plus decades.

12.51 Though not strictly within the purview of the Lokpal Bill 2011 itself, the Committee also recommends that CVC's advice in respect of departmental action to be taken by the relevant department in case of non-Lokpal covered personnel must, by a suitable amendment to the CVC Act, be made binding to the extent that, unless for reasons to be recorded by a majority out of the same joint group as aforesaid, comprising 3 persons not below the rank of Ministers of State belonging respectively to the Ministries of Home Affairs, Personnel and the Administrative Ministry to which the delinquent officer belongs, states that CVC advice be not followed, such CVC advice shall be binding.

12.52 The Committee has deliberated long and hard on whether it can or should go to the extent of suggesting changes in the selection procedure of the CBI chief. Presently, the CBI chief is appointed by the Government on the recommendation of a Committee consisting of the CVC as Chairperson, Vigilance Commissioner, Secretary, Government of India in the Ministry of Home Affairs and Secretary of the Administrative Ministry (in this case the Ministry of Personnel) [see Section 4A of the Delhi Special Police Establishment Act, 1946]. Section 8 (2) of the 1946 Act further provides for a mandatory input in the selection of a new

Director to be made by the outgoing Director and also enjoins upon the Committee, in Section 8 (3), to make recommendations for a panel of officers on the basis of seniority, integrity and experience in the investigation of anti-corruption cases, necessarily belonging to the Indian Police Services.

12.53 Interestingly, Section 4 C of the same 1946 Act provides for the same Committee to make recommendations for all appointments as also extension or curtailment of tenure of all officers above the level of Superintendent of Police in the CBI.

12.54. It is thus clear that it is not correct to suggest that the Central Government has absolute discretion in appointing the CBI Director. After the Vineet Narain vs. Union of India judgment* by the Apex Court, significant changes were brought into the Delhi Special Police Establishment Act, 1946. In 2003 (by Act 45 of 2003) providing for the aforesaid independent and autonomous regime for selection and appointment of CBI Director. The Central Vigilance Commissioner who heads the selection and recommendation process is itself a high statutory authority under a separate enactment called the Central Vigilance Commission Act of 2003 which, in turn in Section 4, obliges the Government to appoint the CVC on the basis of a recommendation of a high powered Committee comprising the Prime Minister, the Home Minister and the leader of opposition in the Lok Sabha. It is, therefore, erroneous to brush aside the existing system as merely involving absolute power/discretion to select Government favourites as CBI Director.

12.55 Furthermore, the Committee believes that it would neither be proper nor desirable for the Committee to go into and suggest fundamental statutory alterations to the procedure for selection and appointment of CBI Director, which appears, nowhere, directly or indirectly, to be a subject referred for the consideration of this Committee. Collateral recommendations of this nature by a side wind should, in the opinion of this Committee, be avoided, especially since significant statutory changes have been brought in with respect to the appointment of the CBI Director less than 8 years ago.

* 1996(2) SCC 199.

CHAPTER – 13

CONSTITUTIONAL STATUS : IF, HOW AND HOW MUCH

I. INTRODUCTION AND BACKGROUND

13.1. On 26th August, 2011, Shri Rahul Gandhi, Member of Parliament, in the course of his speech in the Lok Sabha, strongly advocated constitutional status to the institution of Lokpal. He said:-

"An effective Lokpal law is only one element in the legal framework to combat corruption. The Lokpal institution alone cannot be a substitute for a comprehensive anti-corruption code. A set of effective laws is required. Laws that address the following critical issues are necessary to stand alongside the Lokpal initiative: Government funding of elections and political parties; transparency in public procurement; proper regulation of sectors that fuel corruption like land and mining.... We speak of a statutory Lokpal but our discussions cease at the point of its accountability to the people and the risk that it might itself become corrupt. Madam Speaker, why not elevate the debate? Let us make it further and fortify the Lokpal Bill by making it a constitutional body like the Election Commission of India. I feel the time has come for us to seriously consider this idea. Madam Speaker, laws and institutions are not enough. A representative, inclusive and accessible democracy is central to fighting corruption. Individuals have brought our country great gains. They have galvanized the people in the cause of freedom and development. However, we must not weaken the democratic process. This process is often lengthy and lumbering. But it is so in order to be inclusive and fair".¹

13.2 The suggestion set off an intense debate on the subject. Many argued that the giving of constitutional status to the Lokpal would immensely enhance its stature. Doubts and questions were, however, raised about its feasibility and, more importantly, the possible inherent details involved in the process of giving constitutional status. The debate was carried on at several levels and fora including, within Parliament and in the Press, in this Parliamentary Committee and in diverse sections of civil society. The Committee also received specific inputs on the subject from diverse sources. This chapter discusses pros and cons and makes final recommendations in this regard.

II. SUMMARY OF SUGGESTIONS/OBSERVATIONS RECEIVED THROUGH WRITTEN MEMORANDA

13.3 The major points raised in the memoranda received by the Committee are:-

¹ Statement made by Shri Rahul Gandhi in the Lok Sabha on 26th August, 2011.

- Lokpal needs to be a Constitutional authority, like the ECI or CAG rather than a statutory body, so that it has higher stature and increased legitimacy.
- As the ECI has powers to transfer officers which it deems would hinder the conduct of free & fair elections, the Lokpal should also have complete powers to transfer officers who would be prejudicial to the case and Govt. 'should' comply with the same. Hence, Lokpal should be a constitutional authority in these regards.

III. SUMMARY OF DEPOSITIONS GIVEN BY WITNESSES

13.4. Justice J.S. Verma, while placing his considered views before the Committee, stated :-

".....But we are trying to say not a single word except to provide a declaration that there could be a Constitutional body and once this Constitution Amendment Bill is passed so that it becomes a part of the Constitution. Then, there are several other implications which have got to be taken note of. This is something which cannot be ordinarily amended like an ordinary statute by some simple majority. It would be difficult. Secondly, if it becomes a basic feature and, therefore, a part of the basic structure which personally, I think, my friend agrees, ultimately it will become a part of the indestructable basic structure of the Constitution which any kind of change in the political equations or formulations, it would be beyond amending power even of Parliament.

Article 253 of the Constitution clearly provides that for the purpose of implementing an international treaty, convention, etc., the Parliament is entitled to enact for the whole or any part of the territory. We have already a precedent. The Protection of Human Rights Act, 1993 was enacted by the Parliament. We deal with not only the Constitution and the National Human Rights Commission but also the State Human Rights Commission. It is for the whole....."

13.5. The Chairman, Bar Council of India, while speaking on this topic, observed:-

"..... our view is this should be a constitutional body in line with the Election Commission. The structure, functions and jurisdictions may be left to be provided by a parliamentary legislation like the one we have presently. Our first submission would be, please make it a constitutional body....."

13.6. Shri Shanti Bhushan, while appearing before the Committee, said:-

".....My first point is about the constitutional amendment. We have no objection in this regard. In fact, we would welcome a constitutional amendment to give a constitutional status to the Lokpal, subject to two conditions. One, Mr. Seshan had suggested a Bill which would have involved ratification by fifty per cent of the State Assemblies because it was altering the legislative list. It is not required in this case. No alteration in the legislative list is required. Therefore, it must be ensured -- if that is going to be constitutional amendment Bill -- that it will be passed by the Parliament itself without the requirement of being sent to the State Legislative Assemblies. Of course, it will have to be ensured, and I have no doubt, that two-third majority of

those present and voting would be available, particularly after the Uttarakhand experiment. When Uttarakhand, where all the major parties are present, has already put their seal of approval on all these provisions, I don't see any difficulty with the political parties, here at the Centre, also endorse all these suggestions. One thing more, it should not be a mere skeleton Bill. If it has to be a constitutional amendment Bill, it should not merely provide that State Legislatures and the Lok Sabha would be competent to enact a Bill. The constitutional amendment Bill must itself make all the provisions so that as soon as the constitutional amendment Bill is adopted all the provisions – the powers of the Lokpal, the functions of the Lokpal, the authority of the Lokpal – get passed by this constitutional amendment alone. There is no problem in doing it. It can be done and it should be done....."

13.7. Justice M.N. Venkatachaliah and Justice J.S. Verma, in the memorandum submitted to the Committee, has enumerated the advantages of making the Lokpal as a constitutional body, as follows :-

1. *"The demand is for a "strong" body against corruption. The strongest body that can be created by law is a body established under the Constitution. A purely statutory body will be weaker than a Constitutional body for the following reasons.*
2. *The independence of the proposed anti-Corruption body (on matters such as its mandate, powers, appointment and removal, functions and accountability), will be more secure and tamper proof if entrenched in the Constitution than if placed in an ordinary legislation. A simple majority can amend ordinary laws. Constitutional provisions may be amended only by Constitutional amendment (2/3rd majority of those voting plus, in specified cases, approval of 50% of State legislatures).*
3. *A Constitutional body will be protected from challenges in a court of law that its mandate, powers and functions are in conflict with the Constitution or with any other statute- Constitution provisions establishing a Constitutional body may be challenged only on the ground that it is in conflict with the "basic structure" of the Constitution.*
4. *A Constitutional amendment will provide a basis for a unified and comprehensive national statutory framework for combating corruption at the national, state and local level. This would not be possible in an ordinary legislation because Parliament may generally enact ordinary legislation only on subjects within the Union and Concurrent Lists. However, when Parliament amends the Constitution it is not "making law" - it is exercising "constituent power"; exercise of constituent power is not restricted to the Union list or barred from matter in the State list.
*In this particular case it may be possible for Parliament to make law on matters in the State list on the basis that it is doing so to implement India's obligations under the UN Convention Against Corruption. This may, however, be subject to challenge and will require all provisions to be based on obligations under the UN Convention, directly or indirectly.**
5. *As a matter of practical reality, experience shows that Constitutional bodies enjoy greater immunity from extraneous influences than statutory bodies. Courts are more vigilant in protecting the independence of these bodies.*

6. *Again as a practical matter, Constitutional bodies enjoy higher status than bodies established under statutes. A proposal to establish a statute against corruption betrays a lack of the highest level of commitment to the issue.*
7. *Constitutional provisions set out the most important normative concerns of society. By establishing a Constitutional body to fight corruption, this country will be establishing its civilizational commitment to uphold probity in public life.”*

13.8. The written note submitted by Justice J.S.Verma states as under :-

“.....a constitutional amendment would not attract the Proviso to Sub-Article (2) of Article 368 of the Constitution, and, therefore, it would not require ratification by the States.....

As would be evident on a plain reading of Article 368(2), the only requirement is for it to be passed by the majority of total membership of each House and by a majority of not less than two-thirds of members present and voting.

With the unanimous demand in the people supported by unanimity of all political parties in the Parliament to constitute a strong Lokpal/Lokayuktas, there can be no doubt of unanimous support for a constitutional body, which would obviously be the strongest visualized in the constitutional scheme. Once the constitutional amendment is made, it would become a part of the indestructible ‘basic structure’, immune from any future attempt to erode its status. The exercise for the accompanying consequent legislation providing the details dealing with the contentious issues can continue simultaneously, since it must follow to complete the process.

There is no occasion to doubt the sincerity of the commitment and resolve of the people and the political will in this behalf. Therefore, there can be no risk of any delay in this method.....

The directive principle of State policy in Article 51(c), as a principle fundamental in governance is available as an aid. (Article 51 states: “The State shall endeavour to...(c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another...”.) There is, therefore, no need to look for any additional support for the legislative competence of the Parliament to legislate on the subject for the whole territory of India.”

IV ANALYSIS AND DISCUSSION

13.9. Two former Chief Justices of India gave detailed evidence and submitted drafts of the proposed constitutional amendments. The obvious advantage of giving constitutional status to the Lokpal institution would be, firstly, that its status would be immeasurably enhanced; secondly, existence or essence of the institution would not be liable to be tinkered with as a mere statutory enactment would be liable to be dealt with; thirdly, it would entrench certain basic principles and ideas and protect them from the vicissitudes of transient majorities, thereby making them more sacrosanct and; fourthly, the moral and legal effect of the Lokpal decisions would carry considerable enhanced legitimacy and moral and legal authority as a constitutional body.

13.10. The argument regarding possibility of delay was not real or, in any case, not substantial. Those desirous of having an effective Lokpal institution could hardly

complain that it was being given constitutional status. The constitutional amendment could be introduced not only in theory but in practice on the very same day as the Lokpal (Statutory Bill) is introduced in Parliament and there was no reason to suppose that the Constitutional Amendment Bill would not be passed on the same day and the same time as the statute. Indeed, it would be difficult to conceive of a situation as to any political party opposing the constitutional amendment while supporting, in principle, the creation of Lokpal through a statute.

- 13.11. Shri Shanti Bhushan's suggestion that if there has to be constitutional amendment, virtually the entire Bill must be put within the Constitution, was felt both unnecessary and impracticable. The constitutional provisions are supposed to contain immutable principles or deals with basic principles not intended to be subject to frequent change. It will be self-defeating to transpose the entire Lokpal as a constitutional amendment to the Constitution itself, and that would considerably diminish its flexibility, apart from being impractical and totally unnecessary.

V. REASONS AND RECOMMENDATIONS

13.12 The Committee, therefore, recommends:-

- (a) The institution of Lokpal must be given constitutional status by inserting into the Constitution by way of constitutional amendment certain basic principles about the Lokpal and leaving the details in the new proposed statute on which this Committee is opining.**
- (b) One practical, reasonable and legally valid model would be for the Government to consider the model and set of provisions asked for by the Committee and presented in the evidence to the Committee as a draft constitutional amendment by two former Chief Justices of India. That draft is enclosed herewith as Annexure 'F' and is self-explanatory.**
- (c) This constitutional amendment does not require ratification by not less than half of the State Legislatures since it does not seek to make any change in any of the provisions listed in the second proviso to Article 368 (2) of the Indian Constitution.**
- (d) The constitutional amendment should, as reflected in the enclosed Annexure 'F' be a set of basic principles for the Lokpal as also provide for the basic set up of the Lokayuktas. Both these provisions, proposed in**

the enclosed draft, propose Part XVA and Articles 329(C) and 329(D), as enabling, empowering and permissive provisions and authorize and empower the appropriate legislature to make proper laws, mutatis mutandis, for Lokpal at the Centre and for Lokayuktas at the State.

- (e) Such a constitutional status would not only considerably enhance the stature, legal and moral authority of the Lokpal institution but would make interference and tinkering in these basic principles not subject to the vicissitudes of ordinary or transient majorities. Over a period of time, it is likely that these principles would develop into a set of immutable principles and, possibly, even become part of basic structure of the Constitution rendering the existence of the Lokpal and its basic features un-amendable even by a constitutional amendment.
- (f) Apprehensions regarding delay are misplaced. The constitutional amendment bill would be much shorter than the statutory bill for the new proposed Lokpal and can be passed on the same day and at the same time as the latter, though by a different majority. It is inconceivable that while parties are in favour of the institution of Lokpal in principle, as a statutory body, parties would not agree with equal alacrity for the passage of a constitutional amendment bill.
- (g) The suggestion that the entire statutory bill should be transposed as a constitutional amendment into the Constitution is untenable and impracticable. That would eliminate flexibility and would require a constitutional amendment for the smallest future change. Moreover, the Constitution does not and is not intended to provide for nitty gritty operational details. It should be and is intended to be a declaration of general and basic principles which, in turn, enable and empower formal legislation, which in turn would take care of the details.
- (h) An easy or casual repeal of the entire Lokpal scheme would not be possible once it is constitutionally entrenched.
- (i) Similarly, there would be no option for the federal or State Legislatures not to have a Lokpal or a Lokayukta at all since the constitutional mandate would be to the contrary.
- (j) Contextually, the issues and some of the suggestions in this Chapter may overlap with and should, therefore, be read in conjunction with Chapter 7

of this report. Though the Committee has already opined in Chapter 4 of this Report here that the issues of grievance redressal should be dealt with in a separate legislation, the Committee hereby also strongly recommends that there should be a similar declaration either in the same Chapter of the Lokpal or in a separate Chapter proposed to be added in the Indian Constitution, giving the same constitutional status to the citizens grievances and redressal machinery.

- (k) This recommendation also reflects the genuine and deep concern of this Committee about the need, urgency, status and importance of a citizen's charter/grievance machinery and the Committee believes that the giving of the aforesaid constitutional status to this machinery would go a long way in enhancing its efficacy and in providing a healing touch to the common man.
- (l) Furthermore, the Committee believes that this recommendation herein is also fully consistent with the letter and spirit of para 1.8 above viz. the conclusions of the Minister of Finance in the Lower House recorded in para 1.8 above.

CHAPTER – 14

THE JURISDICTIONAL LIMITS OF LOKPAL: PRIVATE NGOS, CORPORATES AND MEDIA.

I. INTRODUCTION AND BACKGROUND

- 14.1. There was an intense debate in the Committee on whether to include purely private NGOs, corporations, corporate entities and media under the institution of Lokpal being proposed in this Report and, if so, to what extent and, if not, why not.
- 14.2. A large number of Members, cutting across party lines, felt that the proposed Bill on the Lokpal pending before this Committee would, at best, be a partial and incomplete measure since it did not police and regulate in respect of corruption, large segments of society, especially private NGOs, corporate entities and media. It was felt that for the last six decades, the focus had been only on policing and regulating the political classes and, to a lesser extent, the bureaucracy, in respect of issues relating to corruption. It was strongly believed that a substantial slice of society should not be excluded from such regulatory purview and that the entire gamut of ‘private’ corruption (in the sense of corruption not involving the political class or bureaucrats) with all its attendant features and facets, is also required to be dealt with by an effective legal regime.

II. SUMMARY OF SUGGESTIONS/OBSERVATIONS RECEIVED THROUGH WRITTEN MEMORANDA

- 14.3. The memoranda received by the Committee carried the following suggestions/ observations:-
- Since media is the fourth pillar of democracy, it should be brought under the purview of Lokpal.
 - The aspect of paid news should also be covered under the Lokpal Bill.
 - Office bearers of NGOs and movements that do not receive any government funds cannot be treated as “public servants”.
 - Jurisdiction of Lokpal should be extended to societies/associations/trusts that are constituted for religious purposes.
 - Large corporate houses & activities of corporate lobbyists should be brought under the scanner of Lokpal.
 - PSUs should be brought under the ambit of Lokpal.

- Only Government supported NGOs to be brought under Lokpal.
- Consequent tangible & intangible losses to the nation should also be included under the Bill.
- Powerful media houses, NGOs, corporate bodies, organizations & institutions, because of their clout and their ability to manipulate public opinion in a way that suits their interests need to be dealt separately & effectively when an individual complaints against them for the corrupt practices employed by them. By including them in the ambit of a legislation like Lokpal, a common man will be provided with a level playing field to take on the might of these bodies engaged in corrupt practices, just as it would provide people the same to take on the might of the State.
- Only NGOs and firms that are funded by Govt. should be brought within the purview of Lokpal.
- All NGOs, with which any public servant is associated in their management, should be brought under the ambit of Lokpal Bill and “acts of corruption” in the definition clause should include the acts of omissions and omissions of public servants, in relation to management of any society/trust/any other institution, with which such public servant may be associated in its management.
- The fundamental right to establish an independent association should not be curbed; otherwise a lot of useful activity of the citizen for social benefit would be curtailed. Further, ‘annual income’ criterion is arbitrary and violates Article 14 of the constitution.
- Second proviso to clause (g) of S.17(1) is repugnant to good conscience and morality. A free citizen would be subjected to ‘responsibility’ without any ‘power’ of a public servant – ‘liability’ without rights and ‘culpability’ without an overt act is prepositions. The proviso should be deleted.
- On the matter of covering the private sector, proposal is that PCA may be amended appropriately to include ‘Where any private body, corporation or profit seeking entity receives from any public authority any concession or dispensation, including but not restricted to licences, subsidies, contracts, orders, quotas, allocations, clearances, grants, etc, that is in violation of the law or of any prevailing rules, it would be deemed to have indulged in corrupt practices unless it

can show that it was unreasonable to expect the corporation to know that a law or rule had been violated’.

- Corporate Corruption
 - a) Provide for adequate punitive power in Lokpal Bill and the PC Act to address corporate corruption.
 - b) Definition of corruption be enlarged as per the recommendations of Fourth Report of Second ARC.
 - c) Increase the punishment for such offences including collusive bribery on the lines of recommendations of Fourth Report of the Second ARC.
- Corruption by Private Party and Issue of recovery
 - (a) Fourth Report of the Second Administrative Reforms Commission has a unique suggestion in the form of a civil recovery law for fraud, which seeks to recover 5 times the amount of loss to the govt. exchequer caused by private parties. This suggestion models itself on the unique law in the USA, called the false claims Act/Lincoln Law. Not only does this law make the private party which has committed the fraudulent act disgorge 3 times the damage to the exchequer, but also legal costs, and the costs of investigation. In this law, public servants cannot be tried; only private parties that knowingly over-bill the govt. or deny revenue to the govt, or make false statements/certification to achieve the same end. It is not a criminal, but a civil statute, so it does not require mens rea or quid pro quo; only a ‘preponderance of evidence’, that the defendant acted ‘knowingly’ to defraud the govt. Since the objective of the law is not to prove criminal guilt, but to make civil recoveries, and deter other fraudulent actions, this reduction in the burden of proof makes sense. The law was borne amidst heightened corruption during the American civil war, and due to its success, has been made stronger today with amendments and supporting legislation. One of the key aspects of this law is the concept of quit am. This concept allows private citizens to approach a civil court and file claims on behalf of the govt. If the fraud is proven, the citizen/ whistleblowers stand to gain upto 30% of the recoveries.

- (b) The five times recovery of loss should be combined with banning of any business with any aim of the Govt. of India for a period of five years. If the company being investigated and tried in a civil court, is co-operative & admits to wrong-doing as the civil suit is initiated, it should be allowed to settle for damages not less than three times the loss to the exchequer and can escape the ban on business. Such civil recovery procedures become thereby equal to the civil service/parliamentary disciplinary procedures as an intermediary punishment whether or not a case is made for criminal offence under the PCA. Furthermore, any violations of agreements with the govt. in terms of acquisition of land/granting of subsidized govt. land/Govt. subsidies, such as Pvt. Hospitals that have obtained subsidized land and not treated poor patients for free should also be subject to recoveries/damages under our version of the False Claims Act.
- Windfall Profits Tax Act :- In the UK, when North Sea oil was privatized, there was a windfall profit to the private company because of unexpected rise in global oil prices. Though the transaction was transparent and not tainted by corruption, a law was enacted to recover windfall profits from monopoly and use of natural resources, which are the nation's asset. A similar law could be enacted to recover windfall profits on account of monopoly like mines and minerals, or scarce and irreplaceable spectrum. In such a law, the citizens could be empowered to fight qui-tam suits as in case of False Claims Act. Such a legal provision, along with mandatory competitive bidding for allocation of scarce national resources will significantly curb corruption.

14.4 The DoPT's comments in this regard is :-

“....As regards the corruption by Corporate/MNCs and paid news of both print and electronic media are concerned, it is stated that the scope of the Lokpal is to enquire into the complaints of the alleged corruption against certain public functionaries. If MNCs and Media are also to be covered under the Lokpal, in that case, the definition of the public servant would be required to be modified to include such entities. In order to tackle corruption by private parties, which include MNC and media, Ministry of Home Affairs, in consultation with the States, is already examining amendment to the IPC. However, Clause 17(3) of the Bill provide that the Lokpal may inquire into any act or conduct of any person other than those referred to in sub-section (1) of Clause 17, is such person is associated with the allegation of corruption under the Prevention of Corruption Act, 1988. The Government has also introduced Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations, Bill, 2011 in the Lok Sabha. As far as the conduct of MPs on the floor

of the House is concerned, they are already subject to Ethics Committee of the respective House, and it would be desirable if the matter is left to the respective House for appropriate action in this regard. For Media and Press, it is felt that a separate mechanism, perhaps under the Press Council of India, may be required. The NGOs receiving Government funds or donations are covered.....

.....It is felt that the organisations who are receiving grants etc. from the Government should be covered. Similarly, the NGOs which are getting donations from the public, are also getting tax relief, thereby, they are also indirectly funded by the Government, it is felt that those organisations which are set up other than for religious purposes, and are receiving public donations, should come within the ambit of the Lokpal"

14.5 The comments of CVC in this regard are :-

".....While most of our anti-corruption efforts are focused more on the demand side of corruption i.e. punishing the public servants (the receiver of bribes) there is a need to effectively address the equally culpable supply side (the bribe-givers) of corruption. United Nations Convention Against Corruption (UNCAC) and the Anti-corruption laws in most of the countries focused more on penalising active bribery i.e. payment of bribes, largely involving the private sector. The U.K. Bribery Act, 2010 as well as the Foreign Corrupt Practices Acts of the USA has strong provisions to punish companies who not only involve in corrupt practices but also companies failing to prevent corruption. Therefore, there is a need to introduce strong regulatory framework for preventing and punishing corporate corruption. Lok Pal could be best suited to address such supply side corporate corruption and suitable amendments to the Lok Pal Bill and the PC Act should be made expeditiously....."

14.6 Shri Pratap Bhanu Mehta, in his written memorandum, has stated:-

".....The State has to balance two competing considerations. On the one hand, it has to ensure that any organization that is funded by the State is subject to proper accountability. On the other hand, it must not make civil society subject to pervasive State scrutiny and control in a way that impinges on their autonomy.

In this light while 17(f) seems reasonable. 17(g) gives State a very wide latitude. It would be advisable to retain 17(f) and drop (17) g.

17 (g) is also discriminatory. It allows the State to scrutinize any organization that receives public donations. But at the same time, it exempts private companies that might "charge" for conducting the very same activity.

17 (g) also would apply to political parties. It is not clear if is desirable to treat political parties as if they are the State.

The sense in which a private citizen or an NGO can be corrupt needs to be defined. Offences in the Prevention of Corruption Act relate to taking or abetting the taking of gratification. What counts as an offence for a private citizen of NGO? Embezzlement etc. are covered by a variety of laws. For example, there is a real danger that in case of research organizations for instance, the State could simply rule that a particular position taken by a research organization constitutes an act of corruption merely on account of who funded it. This worry may also apply to institutions covered under 17 (f). So in the absence of any clear definition of corruption for in the case of private citizens, there is real danger of the Act posing a threat to valuable freedoms in civil society.

In light of the above --- and for other practical considerations --- it will be advisable to keep NGO's out of the purview of the Lokpal. They are subject to other accountability mechanisms....."

III. SUMMARY OF DEPOSITION GIVEN BY THE WITNESSES

14.7 Dr. Jayaprakash Narayan stated as under:-

".....Then, Mr. Chairman, there are issues relating to corporates and NGOs. We cannot ignore them altogether. There are, obviously, some philosophical issues and also practical issues. The philosophical issue being rights cannot exist against non-governmental organizations, individuals or corporates.

The second class of corruption is "collusive corruption." It is broadly defined as collusion between a public servant and a private entity or an individual to defraud the public exchequer or the public resources. It may be mines, it may be land or it may be some other natural resource. Therefore, this distinction must be kept in mind. In those cases, we argued that penalty must be substantially higher and more importantly, the burden of proof must be shifted. If there is a prima facie evidence, it is for the party accused to prove that there was no collusion. In fact, even in case of the Prevention of Corruption Act, the Supreme Court argued that once a property is accumulated, there is a prima facie evidence. It is for the corrupt public servant to prove that that was not corruptly acquired. Therefore, the burden of proof must be shifted. I know that there will be some concern from many jurists and others because in this country, we have taken the burden of proof issue very seriously. Therefore, if corporates come under this umbrella of collusive corruption and shifting the burden of proof, that will take care of the problem."

14.8 He further stated:

".....Then, about NGOs and civil society organizations, I believe, corruption is not limited to those in Government alone. There are plenty outside who are equally culpable and, therefore, wherever a civil society organization takes any substantial assistance of the Government – Mr. Chairman, I am emphasizing the words 'substantial assistance from the Government' – then they must be definitely brought under the Prevention of Corruption Act.

Sir, it is time that the NGOs are made accountable on issues like from where they receive their money, how do they utilize that money etc. If they want to be a part of India's governance, and, they have become a part of India's governance, then, they must share the accountability with other institutions of governance"

14.9 Shri Shekhar Singh (NCPRI) was of the following view:-

".....Let us retain what is in the Prevention of Corruption Act, which says that any NGO which gets Government funding comes under the purview. But we have gone further. We have said it at the end of our note, that we must amend the Prevention of Corruption Act and bring both the corporate sector and the NGO by doing the following. And what we have suggested is that section 12 of the Prevention of Corruption Act talks about abetment to an offence under the Prevention of Corruption Act. What we have suggested is that every time an NGO or a corporate sector gets a licence, an order, a clearance or any sort of dispensation from the Government,

which is in violation of the rules or laws, it would be assumed that corrupt practices have been indulged in and would, therefore, be considered an abetment....."

14.10 One of the Members of the Committee stated thus:-

".....इन्हीं को सपोर्ट करते हुए मैं यह कहना चाहता हूँ कि भ्रष्टाचार की गंगोत्री तब से बढ़ी है, जब से प्राइवेट सैक्टर को सब जगहों पर खोला गया है। चूंकि गवर्नमेंट सैक्टर में जब तक मामला था, तब तक किसी न किसी रूप में वह कंट्रोल होता रहता था, लेकिन जब से प्राइवेट सैक्टर खुल गया है, तो आपने flood gate खोल दिया, अब आप खिड़की को बंद करके नहीं रख सकते हैं। अब धीरे-धीरे गवर्नमेंट सैक्टर खत्म होता जा रहा है। जो 90 परसेंट है, वह तो गवर्नमेंट से बाहर का है। मुझे आज तक आश्चर्य हो रहा है कि ये जो corporate houses हैं, जहां सबसे ज्यादा करप्शन है, जहां एक पैसे के बदले में हजार करोड़ रुपए से कम की बात नहीं होती है, तो आप इसमें कारपोरेट हाउसेज को जोड़ने का काम क्यों नहीं करते, मीडिया को जोड़ने का काम क्यों नहीं करते?....."

14.11 The following observation was made by another Member of the Committee:-

".....The second question is that the entire draft that you have mentioned appears to be that politicians at all levels, as also the bureaucracy, alone are responsible for corruption. Now, politicians and the bureaucracy on the one hand and excluding them is the entire civil society. This is absolutely fallacious for the very simple reason that, after all, wherefrom is the bureaucracy coming. The bureaucracy is coming from amongst the civil society. Who are contesting the elections? Wherefrom the Ministers, the Prime Minister are coming? So, why is there distinction between the civil society and the so-called non civil society, namely, the bureaucracy and the Parliamentarians or the legislators or the Ministers alone? This is a kind of trade off. If civil society is not corrupt, wherefrom the Ministers are bringing the money to get into corruption? If civil society is not involved in corruption, wherefrom the bureaucracy is bringing the money?....."

14.12 Shri Prashant Bhushan, while appearing before the Committee, stated thus:-

".....करप्शन की definition अगर आप Prevention of Corruption Act में देखें, उसमें कहा गया है कि यदि इसमें कोई सरकारी संस्था या सरकारी अधिकारी involved है तो उसी को corruption माना है। इसका यह मतलब नहीं है कि कोई निजी संस्था या कोई निजी आदमी fraud नहीं कर सकता, cheating नहीं कर सकता, तो लोग fraud भी करते हैं, cheating भी करते हैं और क्रिमिनल मिस एप्रोप्रिएशन भी करते हैं। उसको Prevention of Corruption Act में corruption नहीं माना गया है, unless की वह किसी सरकारी संस्था या सरकारी अधिकारी को घूस देते हैं या भ्रष्ट करते हैं। जहां तक सरकारी अधिकारी जिस corruption में involved है, यानी कि अगर कोई प्राइवेट

कम्पनी या कोई NGO किसी सरकारी अधिकारी या संस्था को भ्रष्ट करता है, तो वह तो लोकपाल के दायरे में ही आएगा।

.....अगर कोई प्राइवेट संस्था या एन.जी.ओ., किसी दूसरे आदमी, मान लीजिए की कोई प्राइवेट संस्था है, उसका जो ट्रेजरर है या मैनेजर है, उसने उस संस्था के पैसे का गबन कर लिया तो इसको करप्शन नहीं कहा जाता, इसको फ्रॉड या मिस-एप्रोप्रिएशन कहा जाता है। क्योंकि इसमें सरकार इनवोल्व नहीं है, इसलिए इसके लिए जो नॉर्मल सरकारी संस्था है, पुलिस या और कोई जो भी संस्था है, वह उसकी तहकीकात कर सकती है।....."

14.13 A Member of the Committee said thus :-

".....जब कोई टेंडर प्रोसेसिंग में आता है, तो उसके लिए जो सरकारी पैसा लेगा, उसको सजा मिलेगी और टेंडरिंग प्रोसेस में जो कॉर्पोरेट हाउस इनवोल्व्ड है, उसको सजा नहीं मिलेगी।....."

14.14 Shri J.B. Mohapatra, while deposing before the Committee, said:

"..... Third proviso to clause 17 says that religious trusts, associations of persons, or societies are not be regarded as public servants for this purpose. Now, proviso below clause 17(1)(g) says that religious trusts are not be proceeded against under the Lokpal Act. Now, look at clause 17(3), it says that any person other than mentioned in clause 17(1) can be proceeded against. There is a contradiction and my view is that if religious trusts are exempt from the Lokpal Bill, tomorrow, other charitable institutions like hospitals, education institutions, etc. will also come. When the CRPC, CPC or the Income Tax Act do not exonerate these kinds of religious charities from being proceeded against, why give an exemption in the Lokpal Bill?....."

14.15 Speaking on this issue, the representative of PRS Legislative Research opined as follows:-

".....I would just like to point out that clause 17 (1) (g) says that the Bill includes not only NGOs, it also includes any association of persons. This would include companies; it would include unregistered groups, etc., which have obtained donations from the public. The Bill also deems all officers, Directors, etc. or such groups as public servants. If we look back at certain other laws, the Offences and Prevention of Corruption Act, 1988, we will find that they are restricted to taking of gratification, which is bribe, by a public servant in his official capacity. To me, it is not clear, how an officer of a private trust or a society can be accused of corruption. He can be accused of embezzlement; he can be accused of various other crimes, but how does such a person, who is taking donation from the public, actually, causes loss to the exchequer, which is what we narrowly define as 'corruption'. If we look at the IPC, 'public servant' is defined in section 21. There are 11 different categories of persons which are included in the definition. If you look at them together, it, essentially, includes any person who is in the service or pay of the Government or a local authority, a corporation established by law or a Government company and receives a

fee or commission for the performance of public duties. So, in some sense, if we take the IPC as a guidance to determine who should be determined a public servant, one could conclude that any one who performs the function of the State, directly or indirectly, and is compensated by the exchequer for performing a public duty is the person that section 21 of the IPC covers as 'public servant'; it does not cover any one else. Under the RTI Act too, the definition of 'public authority' includes the NGOs which receive Government funding; it does not include other donations....."

14.16 The representatives of ABVP, while tendering oral evidence before the Committee, stated :-

बाकी क्लॉज 17 (एफ) में ट्रस्ट के बारे में या एन0जी0ओज0 के बारे में लिखा गया है। उस में पहला नंबर है सरकार द्वारा सहायता प्राप्त संस्थाएं, उस का हम समर्थन करते हैं। उसे रखा जाना चाहिए और उस के बारे में जो भी amount of grant सरकार तय करेगी, वह उसी समय तय किया जा सकता है। हम इस में दो और प्रकार के एन0जी0ओज0 को जोड़ना चाहते हैं - एक, जो विदेशों से धन प्राप्त करते हैं। दूसरे, जो कॉर्पोरेट और निजी कंपनियों से donations लेते हैं। भले ही छोटा donation न रखें इसलिए मैं सुझाव के तौर पर कह रहा हूँ कि जो सालाना 5 करोड़ से ज्यादा donation लेते हैं। बड़े-बड़े एन0जी0ओज0 हैं जो सरकार के निर्णयों को प्रभावित करते हैं। यह मुद्दा बहुत महत्वपूर्ण है। इसलिए जब तक हम निर्णयों को प्रभावित करने वाले economic sources को catch नहीं करेंगे तब तक करप्सन नहीं रुक सकता है। इसलिए कॉर्पोरेट कंपनियों व निजी क्षेत्र से donation लेने वाली संस्थाओं के लिए 5 करोड़ से ऊपर लेने वाली संस्थाओं की लिमिट रखें और उन को इस में जरूर शामिल किया जाना चाहिए। बाकी लोकपाल बिल में जो अन्य छोटे-मोटे ट्रस्ट और दुनियाभर के लोगों को शामिल किया गया है, मुझे लगता है कि उस प्रावधान को हटा देना चाहिए। केवल तीन प्रकार के ही ट्रस्ट इस में रखे जाने चाहिए - जो सरकारी donation लेने वाले हैं, विदेशों से धन लेने वाले हैं और प्राइवेट कंपनियों से एक निश्चित amount से अधिक लेने वाले हैं। बाकी इस का दायरा नहीं बढ़ाना चाहिए अन्यथा फिर यह कोई काम ही नहीं कर पाएगा और इस का misuse ही होने की संभावना है।

IV ANALYSIS AND DISCUSSION

14.16A A large number of Members, cutting across party lines, felt that the proposed Bill on the Lokpal pending before this Committee would, be a partial and incomplete measure since it did not police and regulate in respect of corruption, large segments of society, especially private NGOs, corporate entities and media. It was felt that for the last six decades, the focus had been only on policing and regulating the political classes and, to a lesser extent, the bureaucracy, in respect of issues relating to corruption. It was strongly believed that a substantial slice of society should not be

excluded from such regulatory purview and that the entire gamut of "private corruption" in the sense of corruption not involving the political class or bureaucrats with all its attendant features and facets, is also required to be dealt with by an effective legal regime.

- 14.17 There is no doubt that corruption is neither the exclusive preserve nor the special privilege nor the unique entitlement of only the political or bureaucratic classes. Nor any one can justify exclusionary holy cows, supposedly immunized, exempted or put outside the purview of a new and vigorous anti-corruption monitoring, investigation and prosecution regime as the proposed new Lokpal Bill seeks to create. If corruption is rampant in a country like India, it permeates and pervades every nook and cranny of society and is certainly not restricted to the political or bureaucratic classes. Indeed, while no specific statistical data are available, it may not be at all inconceivable that, in quantification terms, the degree of corruption in the non-political/non-bureaucratic private sector, in the aggregate, is far higher than in the realm of political and bureaucratic classes alone. Therefore, in principle, non-application of the proposed Lokpal Bill to all such classes does not appear to be justifiable.
- 14.18 In this connection, the very recent UK Bribery Act, 2010, is both interesting and instructive. Drafted in a completely non-legalistic manner, format and language, this Act seeks to criminalize corruption everywhere and anywhere, i.e. in the public and private sectors in UK, in Governmental and non-Governmental sectors, by UK citizens abroad, by non-UK citizens acting in UK and in the entire gamut of private and individual transactions in addition to covering dealings in the private sector, intra-private sector, intra-public sector, in Government and private interface and in every other nook and cranny of society.
- 14.19 Despite the above and despite the simplicity and attractiveness of an all inclusive approach, the latter must yield to exigencies of logistics, operational efficacy and pragmatism. Since this is the nation's first experiment with a Lokpal institution, it would amount to starry-eyed idealism to recommend the blanket inclusion of every segment of society under the jurisdiction of an omnipotent and omniscient Lokpal. Such comprehensive inclusion is entirely understandable and may be logically more justifiable in principle, but, in the final opinion of the Committee, must await several years of evolution of the Lokpal institution and a corpus of experiential and practical lessons as also the wisdom of a future generation of Parliamentarians.

14.20 As far as the proposed dispensation is concerned, the only available dividing and demarcating line between the complete inclusion and partial exclusion of entities from the jurisdiction of the Lokpal would have to be some test of Government ownership and/or control and/or size of the entity concerned. In this regard, clauses 17 (1) (f) and (g) of the Lokpal Bill, 2011 are relevant. Clause 17 (1) (f) applies the Lokpal jurisdiction mainly to office-bearers of every society, A.o.P. or trust, registered or not, but wholly or partially financed or aided by the Government, subject to being above some specified annual income minima. Clause 17 (1) (g), similarly, applies the Lokpal to office-bearers of every society, A.o.P. or trust, receiving donations from the public, again subject to an annual income minima to be specified by the Central Government.

14.20 AAfter deep consideration, the Committee believes and recommends that these clauses should be merged and expanded to provide for the following coverage/jurisdiction of the Lokpal:

- a) The Lokpal jurisdiction should apply to each and every institution/entity, by whatever name called, owned or controlled by the Central Government, subject, however, to an exclusionary minima, where the ownership or control of the Central Government de minimis. Such minima would have to be specified and the power of such specification should be given to the Central Government by notification;
- b) Additionally, all entities/institutions, by whatever name called, receiving donations from the public above a certain minima, liable to be specified by the Central Government, should be included, as also all entities/institutions receiving donations from foreign sources in the terms and context of the Foreign Contribution Regulation Act (FCRA) in excess of Rs.10 lakh per year, should be covered, whether or not, controlled by the Government. This is largely as per existing clause 17 (1) (g), except for the addition of the foreign donation recipient facet;
- c) It should be clarified that this coverage shall apply, as also stated above, to every entity and institution, by whatever name called, be it corporate, society, trust, A.o.P., partnership, sole proprietorship, LLP or any other, registered or not. It should also be made clear that the approach is functional or ownership or size based and not based on nomenclature;

d) It is thus clear that corporates, media or NGOs should and would be covered only to the above extent and not otherwise.

14.21 Despite the foregoing elaborations and ‘lament’ regarding exclusion of large slices of society from the Lokpal regime, it must not be forgotten that all persons, whether private, individual, and totally non-Governmental, are already necessarily covered as abettors, co-conspirators, inciters and givers or recipients or bribes in terms of clause 17 (3) of the Lokpal Bill, 2011. It may, however, be further clarified suitably in inclusive and not exhaustive terms in clause 17 (3) that the phrase ‘if such person is associated with the allegation of corruption,’ should include abettors, bribe-givers, bribe-takers, conspirators and all other persons, directly or indirectly, involved in the act or omission relating to corruption within which all other persons and entities in clause 17 are subsumed. The word "associated" presently used is too general and vague.

14.21A The Committee further recommends that clause 17 (3) should be explicitly clarified to the effect that the abettor, conspirator or person associated, in any manner, directly or indirectly, with the corruption allegation, shall not only be included but be fully liable to investigation, prosecution and punishment and that the proviso to clause 17 (3) shall be limited only to proposed action to be taken ‘in case of a person serving in the affairs of a State’ and not qua anyone else.

V. REASONS AND RECOMMENDATIONS

14.22 There is no doubt that corruption is neither the exclusive preserve nor the special privilege nor the unique entitlement of only the political or bureaucratic classes. Nor can anyone justify exclusionary holy cows, supposedly immunized, exempted or put outside the purview of a new and vigorous anti-corruption monitoring, investigation and prosecution regime as the proposed new Lokpal Bill seeks to create. If corruption is rampant in a country like India, it permeates and pervades every nook and cranny of society and is certainly not restricted to the political or bureaucratic classes. Indeed, while no specific statistical data are available, it may not be at all inconceivable that, in quantum terms, the degree of corruption in the non-political/non-bureaucratic private sector, in the aggregate, is far higher than in the realm of political and bureaucratic classes alone. Therefore, in principle, non-application of the proposed Lokpal Bill to all such classes does not appear to be justifiable.

- 14.23** In this connection, the very recent UK Bribery Act, 2010, is both interesting and instructive. Drafted in a completely non-legalistic manner, format and language, this Act seeks to criminalize corruption everywhere and anywhere, i.e. in the public and private sectors in UK, in Governmental and non-Governmental sectors, by UK citizens abroad, by non-UK citizens acting in UK and in the entire gamut of private and individual transactions in addition to covering dealings in the private sector, intra-private sector, intra-public sector, in Government and private interface and in every other nook and cranny of society.
- 14.24** Despite the above and despite the simplicity and attractiveness of an all inclusive approach, the latter must yield to exigencies of logistics, operational efficacy and pragmatism. Since this is the nation's first experiment with a central Lokpal institution, it would amount to starry-eyed idealism to recommend the blanket inclusion of every segment of society under the jurisdiction of an omnipotent and omniscient Lokpal. Such comprehensive inclusion is entirely understandable and may be logically more justifiable in principle, but, in the final opinion of the Committee, must await several years of evolution of the Lokpal institution and a corpus of experiential and practical lessons as also the wisdom of a future generation of Parliamentarians.
- 14.25** As far as the proposed dispensation is concerned, the only available dividing and demarcating line between the complete inclusion and partial exclusion of entities from the jurisdiction of the Lokpal would have to be some test of Government ownership and/or control and/or size of the entity concerned. In this regard, clauses 17 (1) (f) and (g) of the Lokpal Bill, 2011 are relevant. Clause 17 (1) (f) applies the Lokpal jurisdiction mainly to office-bearers of every society, A.o.P. or trust, registered or not, but wholly or partially financed or aided by the Government, subject to being above some specified annual income minima. Clause 17 (1) (g), similarly, applies the Lokpal to office-bearers of every society, A.o.P. or trust, receiving donations from the public, again subject to an annual income minima to be specified by the Central Government.
- 14.25.A** After deep consideration, the Committee believes and recommends that these clauses should be merged and expanded to provide for the following coverage/jurisdiction of the Lokpal:
- (a) The Lokpal jurisdiction should apply to each and every institution/entity, by whatever name called, owned or controlled by the Central

Government, subject, however, to an exclusionary minima, where the ownership or control of the Central Government *de minimis*. Such minima would have to be specified and the power of such specification should be given to the Central Government by notification;

- (b) Additionally, all entities/institutions, by whatever name called, receiving donations from the public above a certain minima, liable to be specified by the Central Government should be included. In addition, as also all entities/institutions receiving donations from foreign sources in the terms and context of the Foreign Contribution Regulation Act (FCRA) in excess of Rs.10 lakh per year, should be covered, whether or not, controlled by the Government. This is largely as per existing clause 17 (1) (g), except for the addition of the foreign donation recipient facet;
- (c) It should be clarified that this coverage shall apply, as also stated above, to every entity and institution, by whatever name called, be it corporate, society, trust, A.o.P., partnership, sole proprietorship, LLP or any other, registered or not. It should also be made clear that the approach is functional or ownership based or size based and not based on nomenclature;
- (d) It is thus clear that corporates, media or NGOs should and would be covered only to the above extent and not otherwise.

14.26 Despite the foregoing elaborations and 'lament' regarding exclusion of large slices of society from the Lokpal regime, it must not be forgotten that all persons, whether private, individual, and totally non-Governmental, are already necessarily covered as abettors, co-conspirators, inciters and givers or recipients or bribes in terms of clause 17 (3) of the Lokpal Bill, 2011. It may, however, be further clarified suitably in inclusive and not exhaustive terms in clause 17 (3) that the phrase "if such person is associated with the allegation of corruption", should include abettors, bribe-givers, bribe-takers, conspirators and all other persons, directly or indirectly, involved in the act or omission relating to corruption within which all other persons and entities in clause 17 are subsumed. The word "associated" presently used is too general and vague.

14.26.A The Committee further recommends that clause 17 (3) should be explicitly clarified to the effect that the abettor, conspirator or person associated, in any manner, directly or indirectly, with the corruption allegation, shall not

only be included but be fully liable to investigation, prosecution and punishment and that the proviso to clause 17 (3) shall be limited only to proposed action to be taken 'in case of a person serving in the affairs of a State' and not qua anyone else.

CHAPTER-15

SUPPORT STRUCTURES FOR LOKPAL: WHISTLE BLOWERS, PHONE TAPPERS AND LEGAL AID/ ASSISTANCE ISSUES

I. INTRODUCTION AND BACKGROUND

15.1 Three issues have been clubbed together in this chapter. Two of them – whistleblower protection and special phone tapping power for the Lokpal – find no mention in the Lokpal Bill, 2011. The issue of legal assistance/ aid is provided for in clause 56 of the 2011 Bill. Certain quarters, especially Team Anna have advocated insertion of whistleblower protection for complainants in respect of Lokpal jurisdiction and for empowering the Lokpal to tap phones without the need of any prior reference to or prior authorization from any other entity. Finally, some quarters have also opposed the provision of what they consider to be automatic legal aid to alleged corrupt accused under the Lokpal jurisdiction

15.2. Phone tapping

II SUMMARY OF SUGGESTIONS/ OBSERVATIONS RECEIVED THROUGH WRITTEN MEMORANDA

- Phone tapping / interceptions etc. shall be done only with the permission of Home Secretary to safeguard privacy of citizens.
- Presently, almost 32 investigative and intelligence agencies have powers to tap telephones. However, they need permission from Home Secretary to do that. Lokpal will be an independent agency. If it were to obtain permission from Home secretary, the information would get leaked and the entire operation would become in fructuous. Moreover, that would also compromise the functional autonomy of the Lokpal. Therefore, we propose that Lokpal Bench should have powers to allow phone tapping rather than they having to obtain permission from Home Secretary.
- For the purposes of investigation of offences related to acts of corruption, the appropriate Bench of the Lokpal shall be deemed to be designated authority under Section 5 of the Indian Telegraph Act empowered to approve interception and monitoring of messages of data or voice transmitted through telephones, internet or any other medium as covered under the Indian Telegraph Act read with

Information and Technology Act 2000 and as per rules and regulations made under the Indian Telegraph Act 1885.

- Recorded conversion, sting operation etc. should be made admissible.
- No need for special powers to intercept telephones since even Deputy SP can do that by recording his reason in station diary kept in ACB units.

III SUMMARY OF DEPOSITIONS GIVEN BY THE WITNESSES

15.2 A. While placing his views before the Committee, Shri Prashant Bhushan stated thus:

"..... Today, under the rules made under the Indian Telegraph Act, it is only the Home Secretary which has the power to grant permission to tap telephone. The power to tap telephone is an essential power of investigation, particularly investigation for corruption. Very often, the evidence for detecting that corruption is taking place comes only from tapped telephone conversations. Unless the Lokpal has independent power, it cannot depend on the Government or the Home Secretary to allow tapping of telephones. This Lokpal is being constituted as a very high-level authority. Therefore, of course, the permission to tap should be given by the bench. Therefore, the amendment that we are suggesting is, not by any officer of the Lokpal but only by a bench of the Lokpal. The bench can permit the tapping. This bench is a far safer authority than the Home Secretary apart from being independent. Therefore, we have said, "For the purpose of investigation of offences related to acts of corruption, the appropriate bench of the Lokpal shall be deemed to be the designated authority under section 5 of the Indian Telegraph Act empowered to approve interception and monitoring of messages of data or voice transmitted through telephones, etc....."

15.2.B. Shri Arvind Kejriwal stated as under:-

".....A wrong impression is being created as if a new power is being sought to be given to tap telephones, जैसे कि हम कोई नयी पावर देने की बात कर रहे हैं। लोकपाल के पास टेलीफोन को टैप करने की पावर तो होगी ही under other laws, लेकिन आज उन्हें होम सेक्रेट्री से परमिशन लेनी पड़ेगी। होम सेक्रेट्री से परमिशन लेने का मतलब यह है कि सारी चीजों का खुलासा हो गया। There is a conflict of interest; वहाँ से information सब को divulge हो जाएगी। इसलिए यह independent होना चाहिए। हम कोई नयी पावर देने की बात नहीं कर रहे हैं, बल्कि हम केवल यह suggest कर रहे हैं कि rather than permission being given by the Home Secretary, the permission should be given by the bench of the Lokpal....."

15.3 Protection of whistleblowers

II SUMMARY OF SUGGESTIONS/ OBSERVATIONS RECEIVED THROUGH WRITTEN MEMORANDA

- Anonymous complaints should be investigated indiscreetly and if found substantial, should be proceeded further.

- Whistleblowers' Bill needs to be revamped and made applicable to all institutions.
- In case of anonymous complaints, in case of verifiable & specific information about misconduct/corruption, the case shall not be rejected.
- Lokpal, being an independent body, should have a duty to provide protection to whistleblowers against physical and professional victimization.
- False Claims Act :- In the US, an innovative law has been in operation for long. In its modern form, the False Claims Act is a federal law that empowers any citizen or whistle-blower to file a suit in a federal court for any loss sustained by the government in any public procurement or contract or service delivery. The loss could be in terms of price even if the price was determined by competitive bidding (for instance, the bid price being higher than that offered to the best customer by the company or supplier), or quality, or environmental or social damage. Such a qui-tam litigation by those who are not affiliated with the government to file suits on behalf of the government can be pursued by the Attorney General, or the litigator himself. The Court is empowered in a summary civil procedure to compute the loss suffered by the exchequer or the public, and has the authority to impose a penalty of three times the loss suffered. The qui-tam litigator receives a portion (usually 15 – 25 percent) of any recovered damages. Claims under the law have typically involved healthcare, military, or other government spending programmes. The government has recovered nearly \$ 22 billion under the False Claims Act between 1987 (after significant 1986 amendments) and 2008. Hundreds of citizens and organizations are thus empowered and incentivized to fight against corruption. Such a law should be considered for enactment in India with appropriate institutional mechanisms to make the law operational.

15.4. The proponents of Jan Lokpal Bill, in their written note submitted to the Committee, has proposed the following amendment in the instant Bill:

- (1) "Whistleblower" means any person, who provides information about corruption in a public authority or is a witness or victim in that case or who faces the threat of
 - (i) professional harm, including but not limited to illegitimate transfer, denial of promotion, denial of appropriate perquisites, departmental proceedings, discrimination or
 - (ii) physical harm, or

- (iii) is actually subjected to any harm; because of either making a complaint to the Lokpal under this Act, or for filing an application under the Right to Information Act, 2005 or by any other legal action aimed at preventing or exposing corruption or mal-governance.
- (2) Any public official or any other person having information of any corruption in any public authority would be encouraged to send the information confidentially to the Lokpal; and it shall be the duty of the Lokpal to get an inquiry made into such information and if necessary get an investigation made under the Prevention of Corruption Act.
- (3) It shall be the duty of the Lokpal to provide full protection to whistle blowers from any physical harm or administrative harassment. Identity of such whistle blowers shall also be protected if the whistle blower so desires.
- (4) For achieving this objective it shall be competent for the Lokpal to give suitable direction to any security agencies for providing security as well as to any other authority to ensure that no harassment is caused to such whistle blower.
- (5) Orders under this section shall be passed expeditiously and in any case within a month of receipt of complaint. Immediate action will be taken in cases involving a threat of physical victimization.
- (6) The investigations in complaints by whistleblowers facing physical or professional victimization shall be fast tracked and completed within three months of receipt of the same."

III SUMMARY OF DEPOSITIONS GIVEN BY THE WITNESSES

15.4 A. Shrimati Anjali Bhardwaj opined as under:

".....Sir, I will just put forth what NCPRI has proposed on the Whistleblower Protection Bill because we feel that this is very closely linked to the whole issue of corruption and people who are blowing whistle on corruption. We have already deposed before the Standing Committee which was dealing with the whistleblower protection issue. Quite a few of the suggestions that we had put forth were already included by the Standing Committee. But there are just two things which I want to flag which have not really been included. The first one is, expanding the definition of a whistleblower. अभी जो मौजूदा provisions हैं, अभी पार्लियामेंट के सामने जो Whistleblower Protection Bill है, उसमें केवल आर्गनाइजेशन के अंदर जो Whistleblowers हैं, उनके प्रोटेक्शन की बात है। हमें यह लगता है कि जिस तरह से RTI users जो करप्शन को एक्सपोज करने के लिए RTI एप्लीकेशंस डाल रहे हैं, उनको धमकियां मिली हैं और कई जगहों

पर उन पर हमले भी हुए हैं तथा पिछले 2 सालों में 18 लोगों से ज्यादा लोगों की मौतें हो चुकी हैं। We feel that they should also be included under the ambit of the Whistleblower Protection Bill. It should, therefore, not just be limited to people working in organizations, it should also extend to common citizens.

Sir, I will just put forth what NCPRI has proposed on the Whistleblower Protection Bill because we feel that this is very closely linked to the whole issue of corruption and people who are blowing whistle on corruption. We have already deposed before the Standing Committee which was dealing with the whistleblower protection issue. Quite a few of the suggestions that we had put forth were already included by the Standing Committee. But there are just two things which I want to flag which have not really been included. The first one is, expanding the definition of a whistleblower. अभी जो मौजूदा provisions हैं, अभी पार्लियामेंट के सामने जो Whistleblower Protection Bill है, उसमें केवल आर्गनाइजेशन के अंदर जो Whistleblowers हैं, उनके प्रोटेक्शन की बात है। हमें यह लगता है कि जिस तरह से RTI users जो करप्शन को एक्सपोज करने के लिए RTI एप्लीकेशंस डाल रहे हैं, उनको धमकियां मिली हैं और कई जगहों पर उन पर हमले भी हुए हैं तथा पिछले 2 सालों में 18 लोगों से ज्यादा लोगों की मौतें हो चुकी हैं। We feel that they should also be included under the ambit of the Whistleblower Protection Bill. It should, therefore, not just be limited to people working in organizations, it should also extend to common citizens.

The second point is that we feel that wherever a complainant, who is trying to expose corruption, or is making a complaint on the issue of corruption, is being threatened, that issue must be dealt with by the Government on a priority basis. In fact, one of the suggestions that has come up in the Central Information Commission is that wherever an information seeker is being targeted, then, the Government will take every step possible to in fact, put out that information immediately in the public domain on its own, and that, we feel, should be something of a principle that could be adopted in the Whistleblowers' Protection Bill as well....."

15.4.B. Shri Prashant Bhushan stated as follows:-

".....Then, as regards victimization of a whistleblower or a witness, for example, if a Government Servant for mala fide reasons deliberately suspends a whistleblower, an officer who is a whistleblower who makes a complaint to the Lokpal saying that this corruption is going on in his department and that whistleblower is suspended by the person who is involved in that corruption, then, that victimization should also be considered to be an act of corruption.

Then, the next amendment is about whistleblower protection. This is also very important, actually. It is said that whistleblower protection के लिए there is some Bill in the offing. There is a proposed Bill on Whistleblower Protection. You see, what we feel is that so far as the whistleblower protection for corruption is concerned, where the complaints are being made to the Lokpal, the power to protect that person, that whistleblower must vest with the Lokpal. मतलब यह है कि अगर उस को कोई complaint

आती है, from some whistleblower, और उस complainant को, उस whistleblower को victimize किया जाता है, either by physical threats or by administrative harassment, उस को suspend कर दिया जाता है, वगैरह तब उसे प्रोटेक्ट करने की पावर लोकपाल के पास होनी चाहिए। That means, he should have the power to give him physical protection and to protect him from administrative harassment....."

15.4.C. Shri Arvind Kejriwal opined as follows :

"..... मैं इस में बहुत strongly request करूंगा कि जो whistleblower का दूसरा बिल आ रहा है, if this Committee can recommend withdrawal of that Bill because उस बिल में सी0वी0सी0 को अथॉरिटी बनाया है for whistleblower protection. अब सी0वी0सी0 के पास किसी को प्रोटेक्ट करने की न तो रिसोर्सस हैं, न पावर्स हैं। The CVC is an advisory body....."

15.4.D. Smt. Kiran Bedi was of the following opinion:-

"..... अगर यह Whistleblower को कानून में डाल दिया जाए, तो इससे बहुत करप्शन खत्म हो जाएगी, क्योंकि डिपार्टमेंट के अंदरूनी व्यक्ति को जितना मालूम होता है कि उसका डिपार्टमेंट क्या कर रहा है, इतना बाहर के आदमी को नहीं मालूम होता। An insider has much more information and authentic information and would even have evidence of the note sheets, of the orders, of the conversations which you never know. Now with this reward scheme, including the whistleblower and giving them protection under the Lokpal, would be very effective in prevention, not only in detection, in prevention. This section reads like that. 'Any public official or any other person having information of any corruption in any public authority would be encouraged to send the information confidentiality to the Lokayukta and it shall be the duty of the Lokayukta to get an inquiry made into such information and if necessary get investigation made under the Prevention of Corruption Act, 1988. Lokayukta may issue necessary orders to provide protection to the whistleblowers from any physical harm or administrative harassment. Identity of such whistleblowers shall also be protected if the whistleblower so desires. For achieving this objective, it shall be competent for the Lokayukta to give suitable direction to the Government for providing security as well as to other authorities to ensure no harassment is caused to such whistleblowers. Orders under this section shall be passed expeditiously; it is a time limit of fifteen days. Investigation complaints by whistleblowers facing physical or professional victimization..' underlining the words, 'professional victimization', 'shall be fast tracked and completed within three months of the receipt.' जिस दिन लोकपाल में यह क्लॉज आ गया, अंदर के डिपार्टमेंट में करप्शन उस दिन से बंद हो जाएगी, या बड़े डर के होगी, एवीडेंस आ जाएगा, प्रोटेक्शन मिलेगी और करप्शन में प्रिवेंशन आएगी।"

Legal aid provisions

II SUMMARY OF SUGGESTIONS/ OBSERVATIONS RECEIVED THROUGH WRITTEN MEMORANDA

- The provision for giving legal assistance under clause 56 against a person against whom a complaint has been made and there being no provision for providing defence assistance to the complainant is arbitrary and will encourage corruption.
- It has been suggested that where the accused is finally found guilty of any of the charges made against him by the special court provided for in the Act, and subject to further appeals, the accused would be required to refund the total cost of the assistance so provided. In exceptional circumstances where the Lokpal so determines that the recovery of such dues might result in unwarranted hardship to the accused or his family, the amount can be adjusted against confiscation of property as specified under sections 33 and 34.

IV ANALYSIS AND DISCUSSION:-

- 15.6 The Committee has deliberated upon the so called Whistleblower Bill 2010 (known more fully as the Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2011) and submitted a detailed report in this regard on August 10, 2011. That report is under the active consideration of the Government of India for eventual transformation into appropriate legislation. The Committee believes that the concern for providing appropriate protection, physical and otherwise, to complainants or whistleblowers, is reasonable and legitimate, since apprehensions in respect of life, liberty, standard of living, job safety and security of self and family would constitute the greatest deterrent to free and frank disclosure of wrong doing.
- 15.7 However, as explained herein below in the next section, there may be no need to enact a separate law or to make elaborate provisions in the proposed Lokpal Bill, in view of the recommendations already made in respect of the pending Bill in respect of whistleblowers.
- 15.8 The Committee notes that there is an elaborate existing procedure, now operative for many years, with periodic improvements and refinements, in respect of the power, authorization, manner and mode of phone tapping. The Committee notes the existing checks and balances which have been operative for many years since phone tapping has been a power frequently exercised by diverse authorities for the last several years, well before the Lokpal regime was contemplated in the contemporary context. Phone tapping has, thus being used, by agencies as diverse as CBI, Enforcement Directorate,

Directorate of Revenue Intelligence and host of other agencies. None of them, however, have had a power to decide to do so on their own, which is now being sought for the new proposed Lokpal. The Committee's recommendations in the next section are based on this awareness.

- 15.9 The Committee notes the language and terms of clause 56 and especially the phrase "legal assistance". The Committee's interpretation of clause 56 is different, from not only that of Team Anna, but also several interpretations given at various times in the press. The Committee's recommendations in this regard in the next section also constitute a clarification of the interpretative confusion in regard to clause 56.

V. REASONS AND RECOMMENDATIONS

- 15.10 As regards the whistleblower issue, this Committee has made a detailed recommendation on the subject on August 10, 2011 in respect of the Bill referred to it. That Bill and the Committee's recommendation are under the active decision making process of the Government of India for eventual translation into law.**

- 15.11 The Committee recommends that the Whistleblowers Bill (Bill No. 97 of 2010) referred to the Committee, with the changes already recommended by the Committee in respect of that Bill (in the Committee's report dated August 10, 2011), be implemented into law simultaneously and concurrently with the Lokpal Bill. In that case, only one provision needs to be inserted in the Lokpal Bill to the effect that safeguards and machinery provided elaborately in the proposed Whistleblowers Bill, as opined upon by the Committee, would be applicable, mutatis mutandis to the Lokpal Bill. In particular, the Committee notes that clauses 10, 11, 12 and 13 of the aforesaid Whistleblowers Bill, provide a fairly comprehensive fasciculus of provisions providing safeguards against victimization, protection of witnesses and other persons, protection of identity of complainant and power to pass interim orders. The Whistleblowers Bill also sets up a competent authority and provides for several other related provisions to make the functioning of that authority efficacious and to enhance the efficiency, potency and vigour of the safeguards intended to be provided to a whistleblower. The proposed provision in the Lokpal Bill should act as a cross referencing, breach of which should activate the related/ applicable provisions of the**

Whistleblower Bill and render them applicable to all Lokpal proceedings, as if set out in the Lokpal Bill, 2011.

- 15.12 Naturally, one of the main adaptations of the Whistleblowers Bill for Lokpal proceedings would be that the competent authority in respect of Lokpal covered persons and offences would be the Lokpal and references in the Whistleblowers Bill to CVC or other entities would be rendered inoperative for purposes of Lokpal personnel and officers.
- 15.13 If, however, the aforesaid Whistleblower Bill, along with the recommendations of this Committee in that regard, are not enacted into law by the Government of India, co-terminously and simultaneously with the Lokpal Bill, then this Committee recommends the creation of some safeguards, in substance and essence, by the addition of a whole new chapter and certain provisions in the proposed Lokpal Bill. However, those provisions in the Lokpal Bill would be largely an adaptation of the same provisions of the Whistleblowers Bill, especially clauses 10 to 13 of the Whistleblowers Bill, while, as explained above, making the Lokpal the competent authority for such whistleblower issues.
- 15.14 As regards phone tapping, the Committee emphasizes and underlines the basic reality that phone tapping by regulatory and policing agencies has been prevalent in India for several years and the rules and regulations in that regard have undergone periodic refinement and amendment. Currently the regime of phone tapping is governed by Indian Telegraph Act and Rules read with the judgments of the Supreme Court inter alia in People Union for Civil Liberties Vs. Union of India (1997) 1 SCC 301. The Committee believes that there is no reason, sufficiently strong, to suggest that this substantive law should be altered in respect of Lokpal proceedings.
- 15.15 Phone tapping has been resorted to, inter alia, by agencies as diverse as CBI, Enforcement Directorate, Directorate of Revenue Intelligence and others, under the aforesaid regime of the Act., Rules and the Supreme Court mandated principles. In all such cases, the Committee is not aware of any situation where any of these agencies are entitled to suo motu, on their own, without separate authorization, and in secrecy, initiate or continue phone tapping. There is, therefore, no reason as to why the proposed Lokpal institution should also not be subjected to the same regime and mechanism. To provide for inherent and separate power in the Lokpal institution in this regard, would also create an

excessive and undesirable concentration of powers, would frequently involve a conflict of interest between preliminary inquiry, investigation and prosecution and would disturb the equilibrium of all investigative agencies for the past several years with established practices in respect of phone tapping issues. Indeed, the Committee notes that in other parts of this Report (Chapter 12), the CBI is the principal investigating agency and, therefore, its powers of phone tapping must continue as they exist today.

15.16 As regards legal aid/ assistance, the Committee concludes that clause 56 as framed does not intend to and should not be read to be a mandate for provision of automatic legal aid for every accused in a Lokpal proceeding. Clause 56, by any fair reading, and in the opinion of this Committee, is only intended to provide legal assistance by way of legal representation to the accused in any case before the Lokpal eg:- a preliminary inquiry. Firstly, the Committee does not read this to mean automatic monetary or fiscal assistance or by way of lawyers' fees for the accused. Secondly, the Committee believes that this was intended to and recommended so that it should be explicitly clarified that it permits the use of, or appearance by a legal practitioner, where the accused asks for one in Lokpal proceedings eg:- a preliminary inquiry. In any event, elsewhere in this Report we have recommended deletion of the concept of hearing an accused during preliminary inquiry. If that is done away with, no issue would arise of legal practitioners appearing. In any case, they are entitled to appear in all later stages including trial. Finally, it should be clarified that clause 56 does not intend to abrogate or dilute or attenuate any other provision of law under where, by virtue of those provisions of law, the accused may be entitled to a monetary/ fiscal legal aid or assistance.

CHAPTER – 16

THE LOKPAL MISCELLANY : RESIDUAL ISSUES

I. INTRODUCTION

- 16.1. As we come to the end, a number of ostensibly unconnected issues are dealt with in this Chapter. Neither their lack of connection to each other nor the use of the words ‘miscellany or residual’ should diminish or undermine their significance. However, since memoranda and witnesses have not spoken with any degree of particularisation on many of these specific issues, this introductory section is followed straightaway by the section on reasons and recommendations.
- 16.2. These issues include the necessity of specifying that the special judge adjudicating Lokpal offences should have powers to deal with and conduct adjudication under all other statutes; the scope and coverage, if any, in respect of offences done by a former public servant as opposed to serving public servant; issues relating to form and manner of removal of Lokpal and the form and manner of initiating suo motu complaints by the Lokpal institution and so on and so forth.

II. REASONS AND RECOMMENDATIONS

- 16.3. **Although it is implicit in the Lokpal Bill, 2011, the Committee believes that to obviate all doubts and to prevent any jeopardy to ongoing trials, the proposed Lokpal should have a specific provision categorically applying Section 4 (3) of the POCA to Lokpal proceedings, to enable the special judge or Lokpal judge to try any other offence, where connected, other than those covered by the Lokpal Act.**
- 16.4. **Clause 17 (1) in most of its sub-clauses, including (b), (c), (d) and so on, specifically refers to a current/serving as also a former public servant (e.g. Minister, MP, bureaucrat, etc. both past and present).**
- 16.5. **The Committee has seen the substantive provisions of POCA and it appears to be clear that the POCA, which shall continue to be the substantive law applicable to Lokpal trials and proceedings, seeks to render culpable and punish only official acts done by public servants. Be that as it may, the Committee is of the opinion that a specific provision should be inserted in Clause 17 clarifying and specifying that reference to present and former public servants only means that they can be prosecuted whether in or not in office, but only for**

acts/omissions done while they were in office and not for allegedly fresh acts/omissions after ceasing to hold office.

- 16.6.** The Committee finds that clause 8 and especially clause 8 (1) of the Lokpal Bill, 2011 has struck the right balance and does not need any fundamental changes. It is intended to strengthen the independence and autonomy of the Lokpal by not making it easy to initiate complaints against Lokpal for the Lokpal's removal. The Committee, however, recommends an addition to clause 8 (1)(iii), to allay and obviate the apprehension expressed in some quarters, that the process to remove the Lokpal cannot be initiated, under the sub-clause, if the President (which essentially means the Central Government) refuses to refer the complaint against the Lokpal. The Committee feels that this apprehension would be adequately taken care of by providing in clause 8 (1)(iii) that where the President does not refer a citizen's complaint against the Lokpal to the Apex Court, the President (i.e. the Central Government) shall be obliged to record reasons for the same and to furnish those reasons to the complainant within a maximum period of 3 months from the date of receipt of the complaint. The Committee feels that this process, including the transparency involved in recording these reasons and the attendant judicial review available to the complainant to challenge such reason/refusal, contains an adequate check and balance on this subject.
- 16.6A** Additionally, the Committee recommends that Clause 8 (1) (iv) be added in the existing Lokpal Bill, 2011 to provide, specifically, that anyone can directly approach the apex court in respect of a complaint against the Lokpal (institution or individual member) and that such complaint would go through the normal initial hearing and filter as a preliminary matter before the normal bench strength as prescribed by the Supreme Court Rules but that, if the matter is admitted and put for final hearing, the same shall be heard by an apex court bench of not less than 5 members. It is but obvious that other consequential changes will have to be made in the whole of Section 8 to reflect the addition of the aforesaid Clause 8 (1) (iv).
- 16.7.** Clause 21 of the Lokpal Bill, 2011 needs a relook. In its present form, it appears to empower the Lokpal Chairperson to intervene and transfer any pending case from one Bench to another, which appears to include the power of transfer even while a case is under consideration of the Lokpal bench on the merits. This uncircumscribed power would seriously impair the objectivity and autonomy of

Lokpal Benches, especially at the stage of preliminary inquiry which is a crucial filtering mechanism. It also appears to be inconsistent with normal principles of jurisprudence which seriously frown upon interference even by the Chief Justice in a pending judicial matter before another Bench. The way out would be to delete this provision and to provide for transfer only in exceptional cases where, firstly, strong credible allegations are brought to the forefront in respect of the functioning of any particular Lokpal Bench and secondly, the decision to transfer is taken by not only the entire Lokpal institution sitting together, but also including the Members of the Bench from which the matter is sought to be transferred.

16.8 As regards punishment under the Prevention of Corruption Act for a person convicted of different offences relating to corruption, it is noteworthy that the Prevention of Corruption Act prescribes, as it now stands, punishment not less than six months which may extend to five years for various offences involving public servant taking gratification in Sections 7, 8, 9, 10 and also Section 11 which deals with public servant obtaining valuable thing without consideration. Section 12 of POCA dealing with the abetment prescribes the same as six months to five years range of punishment. On the other hand, for offences of criminal misconduct by public servant, the prescribed punishment is not less than one year, extendable upto seven years in Section 13 while Section 14 prescribes punishment of not less than two years extendable to seven years. Section 15 prescribes the punishment for offences referred to in clause C or clause D of 5.13(i) which has no lower limit but a maximum of three years. Additionally, all these provisions empower the imposition of fine.

16.9 Diverse representations from diverse quarters have suggested an enhancement of punishment, with diverse prescriptions of quantum of sentence, including life imprisonment. After deep consideration, the Committee finds it prudent to strike a balanced, reasonable middle ground. A sudden, dramatic and draconian enhancement is, in the opinion of the Committee, undesirable. The Committee cannot ignore the inherent fallibility of mankind and if fallibility is inherent in every system, draconian and extreme punishment, even in a few cases of wrongful conviction, would be undesirable.

16.9A Taking a holistic view, the Committee is of the opinion that:

- (a) In the cases of Sections 7, 8, 9 and the like, the range from six months to five years should be substituted by imprisonment not less than three years which may extend to not more than seven years.**
- (b) In the Sections 13 and 14 category of cases providing for a range to one year to seven years, the Committee suggests enhancement, in the case of Section 13 offences, to a minimum of four years and a maximum of ten years while for Section 14, the Committee suggests a minimum of five years and a maximum of ten years.**
- (c) For Section 12 which presently prescribes six months to five years, the aforesaid of minimum three and maximum of seven years shall apply whereas for Section 15 which presently prescribes zero to three years, the range should be very minimum from two to maximum five years.**
- (d) Additionally, wherever applicable, there should be a general provision, cutting across Sections, creating a power of full confiscation of assets, proceeds, receipts and benefits, by whatever name called, arising from corruption by the accused. This provision should be properly drafted in a comprehensive manner to cover diverse situations of benefit in cash or kind, which, to the maximum extent possible, should fully be liable to confiscation.**

16.10. Although this issue has been discussed in other parts of this Report, for the sake of clarity, the Committee clarifies that there should be 3 specific and important time limits in the final enactment viz. firstly, the period of 30 days extendable once by a further period of 60 days for preliminary inquiry by the Lokpal; secondly, for completion of investigation by the investigating agency, within 6 months with one further extension of 3 months and thirdly, for completion of trials, within one year with one further extension of 6 months.

16.11. The Committee finds no basis for and no reason to retain the last proviso to clause 17 (1)(g) which appears to be overbroad and altogether exempts from the Lokpal Bill 2011 any entity, simply because it is constituted as a new religious entity or meant to be constituted as an entity for religious purposes. This proviso should be deleted, otherwise this exception would virtually swallow up the entire rule found in the earlier parts of clause 17.

16.12 As regards clause 51 of the Lokpal Bill 2011, the Committee recommends that the intent behind the clause be made clear by way of an Explanation to be added to the effect that the clause is not intended to provide any general exemption and that "good faith" referred to in clause 52 shall have the same meaning as provided in section 52 of the IPC.

CHAPTER - 17

AFTERWORD: REASONS AND RECOMMENDATIONS AT A GLANCE

Committee Proceedings and Timelines

1. In a nut shell, therefore, this Committee could become legally operational only w.e.f. September 23, 2011 and has completed hearing witnesses on 4th November, 2011. It had its total deliberations including Report adoption spread over 14 meetings, together aggregating 40 hours within the space of ten weeks commencing from September 23, 2011 and ending December 7, 2011. [Para 2.6.]
2. Though not specific to this Committee, it is an established practice that all 24 Parliamentary Standing Committees automatically lapse on completion of their one year tenure and are freshly constituted thereafter. This results in a legal vacuum, each year, of approximately two to three weeks and occasionally, as in the present case, directly affects the urgent and ongoing business of the Committee. The Committee would respectfully request Parliament to reconsider the system of automatic lapsing. Instead, continuity in Committees but replacement of Members on party-wise basis would save time. [Para 2.7.]

The Concept of Lokpal: Evolution and Parliamentary History

3. A proposal in this regard was first initiated in the Lok Sabha on April 3, 1963 by the Late Dr. LM Singhvi, MP². While replying to it, the then Law Minister observed that though the institution seemed full of possibilities, since it involved a matter of policy, it was for the Prime Minister to decide in that regard³. Dr. LM Singhvi then personally communicated this idea to the then Prime Minister, Pandit Jawahar Lal Nehru who in turn, with some initial hesitation, acknowledged that it was a valuable idea which could be incorporated in our institutional framework. On 3rd November, 1963, Hon'ble Prime Minister made a statement

² Lok Sabha Debates dated 3rd April, 1963, vol. XVI, P.7556-7558

³ *ibid.*, P.7590-92

in respect of the possibilities of this institution and said that the system of Ombudsman fascinated him as the Ombudsman had an overall authority to deal with the charges of corruption, even against the Prime Minister, and commanded the respect and confidence of all⁴. [Para 3.3]

4. Thereafter, to give effect to the recommendations of the First Administrative Reforms Commission, eight Bills were introduced in the Lok Sabha from time to time. However, all these Bills lapsed consequent upon the dissolution of the respective Lok Sabhas, except in the case of the 1985 Bill which was subsequently withdrawn after its introduction. A close analysis of the Bills reflects that there have been varying approaches and shifting foci in scope and jurisdiction in all these proposed legislations. The first two Bills viz. of 1968 and of 1971 sought to cover the entire universe of bureaucrats, Ministers, public sector undertakings, Government controlled societies for acts and omissions relating to corruption, abuse of position, improper motives and mal-administration. The 1971 Bill, however, sought to exclude the Prime Minister from its coverage. The 1977 Bill broadly retained the same coverage except that corruption was subsequently sought to be defined in terms of IPC and Prevention of Corruption Act. Additionally, the 1977 Bill did not cover maladministration as a separate category, as also the definition of “public man” against whom complaints could be filed did not include bureaucrats in general. Thus, while the first two Bills sought to cover grievance redressal in respect of maladministration in addition to corruption, the 1977 version did not seek to cover the former and restricted itself to abuse of office and corruption by Ministers and Members of Parliament. The 1977 Bill covered the Council of Ministers without specific exclusion of the Prime Minister.

The 1985 Bill was purely focused on corruption as defined in IPC and POCA and neither sought to subsume mal-administration or mis-conduct generally nor

⁴ His initial hesitation to this idea was probably due to the Scandinavian origin of the nomenclature of the institution. In a lighter vein, he happened to ask Dr. L.M. Singhvi “To what zoo does this animal belong” and asked Shri Singhvi to indigenize the nomenclature of the institution. Dr. L.M. Singhvi then coined the term Lokpal / Lokayukta to modify the institution of Ombudsman to the Indian context (as related by Dr. L.M. Singhvi to the Chairman of this Committee). Also referred to by Mr. Arun Jaitley M.P. during the Parliament Debate on 27th August 2011. He started the debate in the Upper House thus:-“Now, ‘Ombudsman’ was a Scandinavian concept and, coincidentally, on 3rd April, 1963, then an Independent young Member of the Lok Sabha, Dr. L.M. Singhvi, in the course of his participation in a debate for having an Ombudsman in India, attempted to find out what the Indian equivalent could be, and this word ‘Lokpal’ was added to our vocabulary, the Hindi vocabulary, by Dr. L.M. Singhvi who translated this word.”

bureaucrats within its ambit. Moreover, the 1985 Bill impliedly included the Prime Minister since it referred to the office of a Minister in its definition of “public functionary”.

The 1989 Bill restricted itself only to corruption, but corruption only as specified in the POCA and did not mention IPC. It specifically sought to include the Prime Minister, both former and incumbent.

Lastly, the last three versions of the Bill in 1996, 1998 and 2001, all largely;

- (a) focused only on corruption;
- (b) defined corruption only in terms of POCA;
- (c) defined “public functionaries” to include Prime Minister, Ministers and MPs;
- (d) did not include bureaucrats within their ambit. [Para 3.5]

5. Though the institution of Lokpal is yet to become a reality at the Central level, similar institutions of Lokayuktas have in fact been setup and are functioning for many years in several States. In some of the States, the institution of Lokayuktas was set up as early as in 1970s, the first being Maharashtra in 1972. Thereafter, State enactments were enacted in the years 1981 (M.P.), 1983 (Andhra Pradesh and Himachal Pradesh), 1984 (Karnataka), 1985 (Assam), 1986 (Gujarat), 1995 (Delhi), 1999 (Kerala), 2001 (Jharkhand), 2002 (Chhatisgarh) and 2003 (Haryana). At present, Lokayuktas are in place in 17 States and one Union Territory. However, due to the difference in structure, scope and jurisdiction, the effectiveness of the State Lokayuktas vary from State to State. It is noteworthy that some States like Gujarat, Karnataka, Bihar, Rajasthan and Andhra Pradesh have made provisions in their respective State Lokayuktas Act for suo motu investigation by the Lokpal. In the State Lokayukta Acts of some States, the Lokayukta has been given the power for prosecution and also power to ensure compliance of its recommendations. However, there is a significant difference in the nature of provisions of State Acts and in powers from State to State. Approximately nine States in India have no Lokayukta at present. Of the

States which have an enactment, four States have no actual appointee in place for periods varying from two months to eight years. [Para 3.8]

Citizens' Charter and Grievance Redressal Mechanism

6. **The Committee believes that while providing for a comprehensive Grievance Redressal Mechanism is absolutely critical, it is equally imperative that this mechanism be placed in a separate framework which ensures speed, efficiency and focus in dealing with citizens' grievances as per a specified Citizens' Charter. The humongous number of administrative complaints and grievance redressal requests would critically and possibly fatally jeopardize the very existence of a Lokpal supposed to battle corruption. At the least, it would severally impair its functioning and efficiency. Qualitatively, corruption and mal-administration fall into reasonably distinct watertight and largely non-overlapping, mutually exclusive compartments. The approach to tackling such two essentially distinct issues must necessarily vary in content, manpower, logistics and structure. The fact that this Committee recommends that there must be a separate efficacious mechanism to deal with Grievance Redressal and Citizens' Charter in a comprehensive legislation other than the Lokpal Bill does not devalue or undermine the vital importance of that subject. [Para 4.15]**
7. **Consequently the Committee strongly recommends the creation of a separate comprehensive enactment on this subject and such a Bill, if moved through the Personnel/Law Ministry and if referred to this Standing Committee, would receive the urgent attention of this Committee. Indeed, this Committee, in its 29th Report on "Public Grievance Redressal Mechanism", presented to Parliament in October, 2008 had specifically recommended the enactment of such a mechanism. [Para 4.16]**

8. To emphasize the importance of the subject of Citizens' Charter and to impart it the necessary weight and momentum, the Committee is of the considered opinion that any proposed legislation on the subject:

- (i) should be urgently undertaken and be comprehensive and all inclusive;**
- (ii) such enactment should, subject to Constitutional validity, also be applicable for all States as well in one uniform legislation;**
- (iii) must provide for adequate facilities for proper guidance of the citizens on the procedural and other requirements while making requests.**
- (iv) must provide for acknowledgement of citizen's communications within a fixed time frame;**
- (v) must provide for response within stipulated time frame;**
- (vi) must provide for prevention of spurious or lame queries from the department concerned to illegally/unjustifiably prolong/extend the time limit for response;**
- (vii) must provide for clearly identifiable name tags for each employee of different Government departments;**
- (viii) must provide for all pending grievances to be categorized subject-wise and notified on a continually updated website for each department;**
- (ix) must provide for a facilitative set of procedures and formats, both for complaints and for appeals on this subject - along the lines of the Information Commissioners system set up under the RTI;**
- (x) must, in the event that the proposed Central law does not cover states, make strong recommendations to have similar enactments for grievance redressal/citizen charter at each State level;**
- (xi) may provide for exclusionary or limited clauses in the legislation to the effect that Citizen Charter should not include services involving constraints of supply e.g. power, water, etc. but should include subjects where there is no constraint involved e.g. birth certificates, decisions, assessment orders. These two are qualitatively different categories and reflect an important and reasonable distinction deserving recognition without which Government departments will be burdened with the legal**

obligation to perform and provide services or products in areas beyond their control and suffering from scarcity of supply. [Para 4.17]

9. The Committee strongly feels that the harmonious synchronization of the RTI Act and of the Citizens' Charter and Public Grievances Redressal Mechanism will ensure greater transparency and accountability in governance and enhance the responsiveness of the system to the citizens' needs/expectations/grievances. [Para 4.18]
10. Lastly, the Committee wishes to clarify that the conclusion of the Hon'ble Union Minister for Finance on the Floor of the House quoted in Para 1.8 above of the Report does not intend to direct or mandate or bind or oblige this Committee to provide for a Citizen's Charter within the present Lokpal Bill alone. The Committee reads the quoted portion in para 1.8 above to mean and agree in principle to provide for a Citizen's Charter/Grievance Redressal system but not necessarily and inexorably in the same Lokpal Bill. Secondly, the reference to 'appropriate mechanism' in para 1.8 above further makes it clear that there must be a mechanism dealing with the subject but does not require it to be in the same Lokpal Bill alone. Thirdly, the reference in para 1.8 above to the phrase 'under Lokpal' is not read by the Committee to mean that such a mechanism must exist only within the present Lokpal Bill. The Committee reads this to mean that there should be an appropriate institution to deal with the subject of Citizen's Charter/Grievance redressal which would be akin to the Lokpal and have its features of independence and efficacy, but not that it need not be the very same institution i.e. present Lokpal. Lastly, the Committee also takes note of the detailed debate and divergent views of those who spoke on the Floor of both Lok Sabha and Rajya Sabha on this issue and concludes that no binding consensus or resolution to the effect that the Grievances Redressal/Citizen's Charter mechanism must be provided in the same institution in the present Lokpal Bill, has emerged [Para 4.19]
11. Contextually, the issues and some of the suggestions in this Chapter may overlap with and should, therefore, be read in conjunction with Chapter 13 of this report. Though the Committee has already opined that the issue of grievance redressal should be dealt with in a separate legislation, the Committee hereby

also strongly recommends that there should be a similar declaration either in the same Chapter of the Lokpal or in a separate Chapter proposed to be added in the Indian Constitution, giving the same constitutional status to the citizens grievances and redressal machinery.[Para 4.20]

12. This recommendation to provide the proposed Citizen Charter and Grievances Redressal Machinery the same Constitutional status as the Lokpal also reflects the genuine and deep concern of this Committee about the need, urgency, status and importance of a citizen's charter/grievance machinery. The Committee believes that the giving of the aforesaid constitutional status to this machinery would go a long way in enhancing its efficacy and in providing a healing touch to the common man. Conclusions and recommendations in this regard made in para 13.12 (j) and (k) should be read in conjunction herein.[Para 4.21]
13. Furthermore, the Committee believes that this recommendation herein is also fully consistent with the letter and spirit of para 1.8 above viz. the conclusions of the Minister of Finance in the Lower House recorded in para 1.8 above. [Para 4.22]

The Prime Minister : Full Exclusion Versus Degrees of Inclusion

14. The issue of the Prime Minister's inclusion or exclusion or partial inclusion or partial exclusion has been the subject of much debate in the Committee. Indeed, this has occupied the Committee's deliberations for at least three different meetings. Broadly, the models / options which emerged are as follows:
 - (a) The Prime Minister should be altogether excluded, without exception and without qualification.
 - (b) The Prime Minister should altogether be included, without exception and without qualification (though this view appears to be that of only one or two Members).
 - (c) The Prime Minister should be fully included, with no exclusionary caveats but he should be liable to action / prosecution only after demitting office.

- (d) **The Prime Minister should be included, with subject matter exclusions like national security, foreign affairs, atomic energy and space. Some variants and additions suggested included the addition of “national interest” and “public order” to this list of subject matter exclusions.**
 - (e) **One learned Member also suggested that the Prime Minister be included but subject to the safeguard that the green signal for his prosecution must be first obtained from either both Houses of Parliament in a joint sitting or some variation thereof. [Para 5.22]**
- 15. **It may be added that so far as the deferred prosecution model is concerned, the view was that if that model is adopted, there should be additional provisions limiting such deferment to one term of the Prime Minister only and not giving the Prime Minister the same benefit of deferred prosecution in case the Prime Minister is re-elected. [Para 5.23]**
- 16. **In a nut shell, as far as the overwhelming number of Members of the Committee are concerned, it was only three models above viz. as specified in paras (a), (c) and (d) in para 5.17 above which were seriously proposed. [Para 5.24]**
- 17. **Since the Committee finds that each of the views as specified in paras (a), (c) and (d) in para 5.17 above had reasonably broad and diverse support without going into the figures for or against or into the names of individual Members, the Committee believes that, in fairness, all these three options be transmitted by the Committee as options suggested by the Committee, leaving it to the good sense of Parliament to decide as to which option is to be adopted. [Para 5.25]**
- 18. **It would be, therefore, pointless in debating the diverse arguments in respect of each option or against each option. In fairness, each of the above options has a reasonable zone of merit as also some areas of demerit. The Committee believes that the wisdom of Parliament in this respect should be deferred to and the Committee, therefore, so opines. [Para 5.26]**

Members of Parliament: Vote, Speech and Conduct within the House

19. **The Committee strongly feels that constitutional safeguards given to MPs under Article 105 are sacrosanct and time-tested and in view of the near unanimity in the Committee and among political parties on their retention, there is no scope for interfering with these provisions of the Constitution. Vote, conduct or speech within the House is intended to promote independent thought and action, without fetters, within Parliament. Its origin, lineage and continuance is ancient and time-tested. Even an investigation as to whether vote, speech or conduct in a particular case involves or does not involve corrupt practices, would whittle such unfettered autonomy and independence within the Houses of Parliament down to vanishing point. Such immunity for vote, speech or conduct within the Houses of Parliament does not in any manner leave culpable MPs blameless or free from sanction. They are liable to and, have, in the recent past, suffered severe parliamentary punishment including expulsion from the Houses of Parliament, for alleged taking of bribes amounting to as little as Rs. 10,000/- for asking questions on the floor of the House. It is only external policing of speech, vote or conduct within the House that Article 105 frowns upon. It leaves such speech, vote and conduct not only subject to severe intra-parliamentary scrutiny and action, but also does not seek to affect corrupt practices or any other vote, speech or conduct outside Parliament. There is absolute clarity and continued unanimity on the necessity for this limited immunity to be retained. Hence, speculation on constitutional amendment in this regard is futile and engenders interminable delay.[Para 6.19]**
20. **Consequently, the existing structure, mechanism, text and context of clauses 17 (1) (c) and 17 (2) in the Lokpal Bill 2011 should be retained.[Para 6.20]**

Lokpal and State Lokayuktas: Single Enactment and Uniform Standards

21. **The Committee finds merit in the suggestion for a single comprehensive federal enactment dealing with Lokpal and State Lokayuktas. The availability of uniform standards across the country is desirable; the prosecution of public servants based upon widely divergent standards in neighboring states is an obvious anomaly. The Committee has given its earnest attention to the**

constitutional validity of a single enactment subsuming both the Lokpal and Lokayukta and concludes that such an enactment would be not only desirable but constitutionally valid, inter alia because,

- (a) The legislation seeks to implement the UN Convention on Corruption ratified by India.**
- (b) Such implementing legislation is recognized by Article 253 and is treated as one in List III of the 7th Schedule.**
- (c) It gets additional legislative competence, inter-alia, individually or jointly under Entries 1, 2 and 11A of List-III.**
- (d) A direct example of provision for National Human Rights Commission and also for State Human Rights Commissions in the same Act is provided in the Protection of the Human Rights Act 1986 seeking to implement the UN Convention for the Protection of Human Rights.**
- (e) Such Parliamentary legislation under Article 253, if enacted, can provide for repealing of State Lokayukta Acts; subject, however, to the power of any State to make State specific amendments to the federal enactments after securing Presidential assent for such State specific amendments.[Para 7.26]**

22. Additionally, it is recommended that the content of the provisions dealing with State Lokayuktas in the proposed central/ federal enactment must be covered under a separate chapter in the Lokpal Bill. That may be included in one or more chapters possibly after Chapter II and before Chapter III as found in the Lokpal Bill 2011. The entire Lokpal Bill 2011 would have to incorporate necessary changes and additions, mutatis mutandis, in respect of the State Lokayukta institutions. To give one out of many examples, the Selection Committee would be comprised of the State Chief Minister, the Speaker of the Lower House of the State, the Leader of Opposition in the Lower House, the Chief Justice of the High Court and a joint nominee of the State Election Commissioner, the State Auditor General and State PSC Chairman or, where one or more of such institutions is absent in the State, a joint nominee of comparable institutions having statutory status within the State.[Para 7.27]

23. All these State enactments shall include the Chief Minister within their purview. The Committee believes that the position of the State Chief Minister is not identical to that of the Prime Minister. The arguments for preventing instability and those relating to national security or the image of the country do not apply in case of a Chief Minister. Finally, while Article 356 is available to prevent a vacuum for the post of Chief Minister, there is no counterpart constitutional provision in respect of the federal Government.[Para 7.28]
24. Article 51 (c) of the Directive Principles of State Policy enjoining the federation to “foster respect for international law and treaty obligations.....” must also be kept in mind while dealing with implementing legislations pursuant to international treaties, thus providing an additional validating basis for a single enactment.[Para 7.29]
25. The Committee recommends that the Lokpal Bill 2011 may be expanded to include several substantive provisions which would be applicable for Lokayuktas in each State to deal with issues of corruption of functionaries under the State Government and employees of those organizations controlled by the State Government, but that, unlike the Lokpal, the state Lokayuktas would cover all classes of employees.[Para 7.30]
26. The Committee recommends that if the above recommendation is implemented the Lokpal Bill 2011 may be renamed as “Lokpal and Lokayuktas Bill 2011”[Para 7.31]
27. The Committee believes that the recommendations, made herein, are fully consistent with and implement, in letter and spirit, the conclusions of the Minister of Finance on the floor of the Houses in respect of establishment of Lokayuktas in the States, as quoted in para 1.8 above. The Committee is conscious of the fact that the few States which have responded to the Secretariat’s letter sent to each and every State seeking to elicit their views, have opposed a uniform Central federal Lokpal and Lokayukta Bill and, understandably and expectedly, have sought to retain their powers to enact State level Lokayukta Acts. The Committee repeats and reiterates the reasons given hereinabove, in support of the desirability of one uniform enactment for both Lokpal and Lokayuktas. The Committee also reminds itself that if such a

uniform Central enactment is passed, it would not preclude States from making any number of State specific amendments, subject to prior Presidential assent, as provided in the Indian Constitution. The Committee, therefore, believes that it has rightly addressed the two issues which arise in this respect viz. the need and desirability for a uniform single enactment and, secondly, if the latter is answered in the affirmative, that such a uniform enactment is Constitutionally valid and permissible.[Para 7.32]

28. Since this report, and especially this chapter, recommends the creation of a uniform enactment for both Central and State Lokayuktas, it is reiterated that a whole separate chapter (or, indeed, more than one chapter) would have to be inserted in the Lokpal Bill of 2011 providing for State specific issues. Secondly, this would have to be coupled with mutatis mutandis changes in other parts of the Act to accommodate the fact that the same Act is addressing the requirement of both the federal institution and also the State level institution.[Para 7.33]
29. Furthermore, each and every chapter and set of recommendations in this report should also be made applicable, mutatis mutandis, by appropriate provisions in the Chapter dealing with State Lokayuktas. [Para 7.34]
30. Although it is not possible for this Committee to specifically list the particularised version of each and every amendment or adaptation required to the Lokpal Bill, 2011 to subsume State Lokayuktas within the same enactment, it gives below a representative non-exhaustive list of such amendments/adaptations, which the Government should suitably implement in the context of one uniform enactment for both Lokpal and Lokayuktas. These include :
 - (a) Clause 1 (2) should be retained even for the State Lokayukta provisions since State level officers could well be serving in parts of India other than the State concerned as also beyond the shores of India.
 - (b) The Chief Minister must be included within the State Lokayukta on the same basis as any other Minister of the Council of Ministers at the State level. Clause 2 of the 2011 Bill must be amended to include Government servants at the State level. The competent authority in each case would

also accordingly change e.g. for a Minister of the Council of Minister, it would be the Chief Minister; for MLAs, it would be the presiding officer of the respective House and so on and so forth. The competent authority for the Chief Minister would be the Governor.

- (c) As regards Clause 3, the only change would be in respect of the Chairperson, which should be as per the recommendation made for the Lokpal.
- (d) As regards the Selection Committee, the issue at the Lokayukta level has already been addressed above.
- (e) References in the Lokpal context to the President of India shall naturally have to be substituted at the Lokayukta level by references to the Governor of the State.
- (f) The demarcation of the criminal justice process into five broad areas from the initiation of complaint till its adjudication, as provided in Chapter 12, should also apply at the State Lokayukta level. The investigative agency, like the CBI, shall be the anti-corruption unit of the State but crucially, it shall be statutorily made independent by similar declarations of independence as already elaborated in the discussion in Chapter 12. All other recommendations in Chapter 12 can and should be applied *mutatis mutandis* for the Lokayukta.
- (g) Similarly, all the recommendations in Chapter 12 in respect of departmental inquiry shall apply to the Lokayukta with changes made, *mutatis mutandis*, in respect of State bodies. The State Vigilance Commission/machinery would, in such cases, discharge the functions of the CVC. However, wherever wanting, similar provisions as found in the CVC Act buttressing the independence of the CVC shall be provided.
- (h) The recommendations made in respect of elimination of sanction as also the other recommendations, especially in Chapter 12, relating to Lokpal, can and should be applied *mutatis mutandis* in respect of Lokayukta.

- (i) Although no concrete fact situation exists in respect of a genuine multi-State or inter-State corruption issue, the Committee opines that in the rare and unusual case where the same person is sought to be prosecuted by two or more State machineries of two or more Lokayuktas, there should be a provision entitling the matter to be referred by either of the States or by the accused to the Lokpal at the federal level, to ensure uniformity and to eliminate turf wars between States or jurisdictional skirmishes by the accused.
- (j) As already stated above, the coverage of the State Lokayukta, unlike the Lokpal, would extend to all classes of employees, including employees of state owned or controlled entities. [Para 7.35]

Lower Bureaucracy: Degrees of Inclusion

31. The Committee, therefore, recommends
- (a) That for the Lokpal at the federal level, the coverage should be expanded to include Group A and Group B officers but not to include Group C and Group D.
 - (b) The provisions for the State Lokayuktas should contain similar counterpart reference, for purposes of coverage, of all similar categories at the State level which are the same or equivalent to Group A and Group B for the federal Lokpal. Though the Committee was tempted to provide only for enabling power for the States to include the State Lokayuktas to include the lower levels of bureaucracy like groups 'C' and 'D' at the State level, the Committee, on careful consideration, recommends that all the groups, including the lower bureaucracy at the State level and the groups equivalent with 'C' and 'D' at the State level should also be included within the jurisdiction of State Lokayuktas with no exclusion. Employees of state owned or controlled entities should also be covered.
 - (c) The Committee is informed by the DoPT that after the Sixth Pay Commission Report, Group-D has been/will be transposed and sub-

merged fully in Group-C. In other words, after the implementation of the Sixth Pay Commission Report, which is already under implementation, Group-D will disappear and there will be only Group-C as far as the Central Government employees are concerned.

- (i) Consequently, Group-C, which will shortly include the whole of Group-D will comprise a total number of approximately 30 lakhs (3 million) employees. Though the figures are not fully updated, A+B classes recommended for inclusion by this Committee would comprise just under 3 lakhs employees. With some degree of approximation, the number of Railway employees from group A to D inclusive can be pegged at about 13½ lakhs (as on March 2010). If Central Government PSUs are added, personnel across all categories (Group A, B, C and D as existing) would be approximately an additional 15 lakhs employees. Post and Telegraph across all categories would further number approximately 4½ lakhs employees. Hence the total, on the aforesaid basis (which is undoubtedly an approximation and a 2010 figure) for Group A to D (soon, as explained above, to be only Group-C) + Railways + Central PSUs + Post and Telegraph would be approximately 63 lakhs, or at 2011 estimates, let us assume 65 lakhs i.e. 6.5 million.
- (ii) On a conservative estimate of one policing officer per 200 employees (a ratio propounded by several witnesses including Team Anna), approximately 35000 employees would be required in the Lokpal to police the aforesaid group of Central Government employees (including, as explained above, Railways, Central PSUs, P&T etc.). This policing is certainly not possible by the proposed nine member Lokpal. The Lokpal would have to spawn a bureaucracy of at least 35000 personnel who would, in turn, be recruited for a parallel Lokpal bureaucracy. Such a mammoth bureaucracy, till it is created, would render the Lokpal unworkable. Even after it is created, it may lead to a huge parallel bureaucracy which would set in train its own set of consequences, including arbitrariness, harassment and unfair and illegal action by the same bureaucracy which, in the ultimate analysis would be nothing but a set of similar

employees cutting across the same A, B and C categories. As some of the Members of the Committee, in a lighter vein put it, one would then have to initiate a debate on creating a super Lokpal or a Dharampal for the policing of the new bureaucracy of the Lokpal institution itself.

- (ii) The Committee also notes that as far as the Lokpal institution is concerned, it is proposed as a new body and there is no such preexisting Lokpal bureaucracy available. In this respect, there is a fundamental difference between the Lokpal and Lokayuktas, the latter having functioned, in one form or the other in India for the last several decades, with a readily available structure and manpower in most parts of India.
- (iii) If, from the above approximate figure of 65 lakhs, we exclude C and D categories (as explained earlier, D will soon become part of C) from Central Government, Railways, PSUs, Post and Telegraph etc., the number of A and B categories employees in these departments would aggregate approximately 7.75 lakhs. In other words, the aggregate of C and D employees in these classes aggregate approximately 57 or 58 lakhs. The Committee believes that this figure of 7.75 or 8 lakhs would be a more manageable, workable and desirable figure for the Lokpal institution, at least to start with.
- (iv) The impression that inclusion of Group 'A' and B alone involves exclusion of large sections of the bureaucracy, must be dispelled. Though in terms of number, the aggregation of Groups 'C' and 'D' is an overwhelming percentage of total Central Government employees, Groups 'A' and B include the entire class above the supervisory level. Effectively, this means that virtually all Central Government employees at the Section Officer level and above would be included. It is vital to emphasize that this demarcation has to be viewed in functional terms, since it gives such categories significant decision making power in contra-distinction to mere numbers and necessarily subsumes a major chunk of medium and big ticket corruption.

- (v) Another misconception needs to be clarified. There is understandable and justifiable anger that inclusion of Group C and D would mean exclusion of a particular class which has tormented the common man in different ways over the years viz. Tehsildar, Patwari and similarly named or equivalent officers. Upon checking, the Secretariat has clarified that these posts are State Government posts under gazette notification notified by the State Government and hence the earlier recommendation of this Committee will enable their full inclusion.
- (vi) We further recommend that for the hybrid category of Union Territories, the same power be given as is recommended above in respect of State Lokayuktas. The Committee also believes that this is the appropriate approach since a top heavy approach should be avoided and the inclusionary ambit should be larger and higher at the state level rather than burdening the Lokpal with all classes of employees.
- (vii) As of now, prior to the coming into force of the Lokpal Act or any of the recommendations of this report, Group C and D officers are not dealt with by the CVC. Group C & D employees have to be proceeded against departmentally by the appropriate Department Head, who may either conduct a departmental enquiry or file a criminal corruption complaint against the relevant employee through the CBI and/or the normal Police forces. The Committee now recommends that the entire Group C & D, (later only Group C as explained above) shall be brought specifically under the jurisdiction of the CVC. In other words, the CVC, which is a high statutory body of repute and whose selection process includes the Leader of the Opposition, should be made to exercise powers identical to or at least largely analogous, in respect of these class C and class D employees as the Lokpal does for Group A and B employees. The ultimate Lokpal Bill/Act should thus become a model for the CVC, in so far as Group C & D employees are concerned. If that requires large scale changes in the CVC Act, the same should be carried out. This would considerably strengthen the existing regime of policing, both departmentally and in terms of

anti-corruption criminal prosecutions, all Group C & D employees and would not in any manner leave them either unpoliced or subject to a lax or ineffective regime of policing.

- (viii) Furthermore, this Committee recommends that there would be broad supervisory fusion at the apex level by some appropriate changes in the CVC Act. The CVC should be made to file periodical reports, say every three months, to the Lokpal in respect of action taken for these class C and D categories. On these reports, the Lokpal shall be entitled to make comments and suggestions for improvement and strengthening the functioning of CVC, which in turn, shall file, appropriate action taken reports with the Lokpal.**
- (ix) Appropriate increase in the strength of the CVC manpower, in the light of the foregoing recommendations, would also have to be considered by the Government.**
- (x) The Committee also feels that this is the start of the Lokpal institution and it should not be dogmatic and inflexible on any of the issues. For a swift and efficient start, the Lokpal should be kept slim, trim, effective and swift. However, after sometime, once the Lokpal institution has stabilized and taken root, the issue of possible inclusion of Group C classes also within the Lokpal may be considered. This phase-wise flexible and calibrated approach would, in the opinion of this Committee, be more desirable instead of any blanket inclusion of all classes at this stage.**
- (xi) Another consideration which the Committee has kept in mind is the fact that if all the classes of higher, middle and lower bureaucracy are included within the Lokpal at the first instance itself, in addition to all the aforesaid reasons, the CVC's role and functioning would virtually cease altogether, since the CVC would have no role in respect of any class of employee and would be reduced, at best, to a vigilance clearance authority. This would be undesirable in the very first phase of reforms, especially since the CVC is a high statutory authority in this country which has, over the last half century, acquired a certain institutional identity and stability along with**

conventions and practices which ought not to be uprooted in this manner.

- (d) All provisions for prior sanction / prior permission, whether under the CrPC or Prevention of Corruption Act or DSPE Act or related legislation must be repealed in respect of all categories of bureaucrats / government servants, whether covered by the Lokpal or not, and there should consequently be no requirement of sanction of any kind in respect of any class or category of officers at any level in any Lokpal and Lokayukta or, indeed, CVC proceedings (for non Lokpal covered categories). In other words, the requirement of sanction must go not only for Lokpal covered personnel but also for non-Lokpal covered personnel i.e. class 'C' and 'D' (Class D, as explained elsewhere, will eventually be submerged into Class 'C'). The sanction requirement, originating as a salutary safeguard against witch hunting has, over the years, as applied by the bureaucracy itself, degenerated into a refuge for the guilty, engendering either endless delay or obstructing all meaningful action. Moreover, the strong filtering mechanism at the stage of preliminary inquiry proposed in respect of the Lokpal, is a more than adequate safeguard, substituting effectively for the sanction requirement.
- (e) No doubt corruption at all levels is reprehensible and no doubt corruption at the lowest levels does affect the common man and inflicts pain and injury upon him but the Committee, on deep consideration and reconsideration of this issue, concluded that this new initiative is intended to send a clear and unequivocal message, first and foremost, in respect of medium and big ticket corruption. Secondly, this Committee is not oblivious to the fact that jurisdiction to cover the smallest Government functionary at the peon and driver level (class C largely covers peons, assistants, drivers, and so on, though it does also cover some other more "powerful" posts) may well provide an excuse and a pretext to divert the focus from combating medium and big ticket corruption to merely catching the smaller fry and building up an impressive array of statistical prosecutions and convictions without really being able to root out the true

malaise of medium and big ticket corruption which has largely escaped scrutiny and punishment over the last 60 years.

- (f) The Committee also believes that the recommendations in respect of scope of coverage of the lower bureaucracy, made herein, are fully consistent with the conclusions of the Minister of Finance on the floor of the Houses, as quoted in para 1.8 above of this Report. Firstly, the lower bureaucracy has been, partly, brought within the coverage as per the recommendations above and is, thus, consistent with the essence of the conclusion contained in para 1.8 above. Secondly, the Committee does not read para 1.8 above to meet an inevitable and inexorable mandate to necessarily subsume each and every group of civil servant (like Group 'C' or Group 'D', etc.). Thirdly, the in principle consensus reflected in para 1.8 would be properly, and in true letter and spirit, be implemented in regard to the recommendations in the present Chapter for scope and coverage of Lokpal presently. Lastly, it must be kept in mind that several other recommendations in this Report have suggested substantial improvements and strengthening of the provisions relating to policing of other categories of personnel like C and D, inter alia, by the CVC and/or to the extent relevant, to be dealt with as Citizens' Charter and Grievance Redressal issues.[Para 8.18]

False Complaints and Complainants: Punitive Measures

- 32.. It cannot be gainsaid that after the enormous productive effort put in by the entire nation over the last few months for the creation of a new initiative like the Lokpal Bill, it would not and cannot be assumed to be anyone's intention to create a remedy virtually impossible to activate, or worse in consequence than the disease. The Committee, therefore, starts with the basic principle that it must harmoniously balance the legitimate but competing demands of prevention of false, frivolous complaints on the one hand as also the clear necessity of ensuring

that no preclusive bar arises which would act as a deterrent for genuine and *bona fide* complaints.[Para 9.6]

33. The Committee sees the existing provisions in this regard as disproportionate, to the point of being a deterrent.[Para 9.7]

34. The Committee finds a convenient analogous solution and therefore adopts the model which the same Committee has adopted in its recently submitted report on Judicial Standards and Accountability Bill, 2010 presented to the Rajya Sabha on August 30, 2011.[Para 9.8]

35. In para 18.8 of the aforesaid Report, the Committee, in the context of Judicial Standards and Accountability Bill, 2010 said : "The Committee endorses the rationale of making a provision for punishment for making frivolous or vexatious complaints. The Committee, however, expresses its reservation over the prescribed quantum of punishment both in terms of imprisonment which is up to 5 years and fine which is up to 5 lakh rupees. The severe punishment prescribed in the Bill may deter the prospective complainants from coming forward and defeat the very rationale of the Bill. In view of this, the Committee recommends that Government should substantially dilute the quantum of the punishment so as not to discourage people from taking initiatives against the misbehaviour of a judge. In any case, it should not exceed the punishment provided under the Contempt of Court Act. The Government may also consider specifically providing in the Bill a proviso to protect those complainants from punishment / penalty who for some genuine reasons fail to prove their complaints. The Committee, accordingly, recommends that the Bill should specifically provide for protection in case of complaints made 'in good faith' in line with the defence of good faith available under the Indian Penal Code."
[Para 9.9]

36. Consequently, in respect of the Lokpal Bill, the Committee recommends that, in respect of false and frivolous complaints, :

(a) The punishment should include simple imprisonment not exceeding six months;

(b) The fine should not exceed Rs.25000; and

- (c) **The Bill should specifically provide for protection in case of complaints made in good faith in line with the defence of good faith available under the Indian Penal Code under Section 52 IPC.[Para 9.10]**

The Judiciary: To Include or Exclude

37. The Committee recommends:

- (i) **The Judiciary, comprising 31 odd judges of the Apex Court, 800 odd judges of the High Courts, and 20,000 odd judges of the subordinate judiciary are a part of a separate and distinct organ of the State. Such separation of judicial power is vitally necessary for an independent judiciary in any system and has been recognized specifically in Article 50 of the Indian Constitution. It is interesting that while the British Parliamentary democratic system, which India adopted, has never followed the absolute separation of powers doctrine between the Legislature and the Executive, as, for example, found in the US system, India has specifically mandated under its Constitution itself that such separation must necessarily be maintained between the Executive and the Legislature on the one hand and the Judiciary on the other.**
- (ii) **Such separation, autonomy and necessary isolation is vital for ensuring an independent judicial system. India is justifiably proud of a vigorous (indeed sometimes over vigorous) adjudicatory judicial organ. Subjecting that organ to the normal process of criminal prosecution or punishment through the normal courts of the land would not be conducive to the preservation of judicial independence in the long run.**
- (iii) **If the Judiciary were included simpliciter as suggested in certain quarters, the end result would be the possible and potential direct prosecution of even an apex Court Judge before the relevant magistrate exercising the relevant jurisdiction. The same would apply to High Court**

Judges. This would lead to an extraordinarily piquant and an untenable situation and would undermine judicial independence at its very root.

- (iv) Not including the Judiciary under the present Lokpal dispensation does not in any manner mean that this organ should be left unpoliced in respect of corruption issues. This Committee has already proposed and recommended a comprehensive Judicial Standards and Accountability Bill which provides a complete in-house departmental mechanism, to deal with errant judicial behavior by way of censure, warning, suspension, recommendation or removal and so on within the judicial fold itself. The Committee deprecates the criticism of the Judicial Standards and Accountability Bill as excluding issues of corruption for the simple reason that they were never intended to be addressed by that Bill and were consciously excluded.**
- (v) As stated in para 21 of the report of this Committee on the Judicial Standards and Accountability Bill, to this report, the Committee again recommends, in the present context of the Lokpal Bill, that the entire appointment process of the higher judiciary needs to be revamped and reformed. The appointment process cannot be allowed and should not be allowed to continue in the hands of a self-appointed common law mechanism created by judicial order operating since the early 1990s. A National Judicial Commission must be set up to create a broad-based and comprehensive model for judicial appointments, including, if necessary, by way of amendment of Articles 124 and 217 of the Indian Constitution. Without such a fundamental revamp of the appointment process at source and at the inception, all other measures remain purely ex-post facto and curative. Preventive measures to ensure high quality judicial recruitment at the entrance point is vital.**
- (vi) It is the same National Judicial Commission which has to be entrusted with powers of both transfer and criminal prosecution of judges for corruption. If desired, by amending the provisions of the Constitution as they stand today, such proposed National Judicial Commission may also be given the power of dismissal / removal. In any event, this mechanism of**

the National Judicial Commission is essential since it would obviate allegations and challenges to the validity of any enactment dealing with judges on the ground of erosion or impairment of judicial independence. Such judicial independence has been held to be part of the basic structure of the Indian Constitution and is therefore unamendable even by way of an amendment of the Indian Constitution. It is for this reason that while this Committee is very categorically and strongly of the view that there should be a comprehensive mechanism for dealing with the trinity of judicial appointments, judicial transfers and criminal prosecution of judges, it is resisting the temptation of including them in the present Lokpal Bill. The Committee, however, exhorts the appropriate departments, with all the power at its command, to expeditiously bring a Constitutional Amendment Bill to address the aforesaid trinity of core issues directly impinging on the judicial system today viz. appointment of high quality and high caliber judges at the inception, non-discriminatory and effective transfers and fair and vigorous criminal prosecution of corrupt judges without impairing or affecting judicial independence.

- (vii) The Committee finds no reason to exclude from the conclusions on this subject, the burgeoning number of quasi-judicial authorities including tribunals as also other statutory and non-statutory bodies which, where not covered under category 'A' and 'B' bureaucrats, exercise quasi-judicial powers of any kind. Arbitrations and other modes of alternative dispute resolution should also be specifically covered in this proposed mechanism. They should be covered in any eventual legislation dealing with corruption in the higher judiciary. The Committee notes that a large mass of full judicial functions, especially from the High Courts has, for the last 30 to 40 years, been progressively hived off to diverse tribunals exercising diverse powers under diverse statutory enactments. The Committee also notes that apart from and in addition to such tribunals, a plethora of Government officials or other persona designata exercise quasi judicial powers in diverse situations and diverse contexts. Whatever has been said in respect of the judiciary in this chapter should, in the considered opinion of this Committee, be made applicable, with

appropriate modifications in respect of quasi-judicial bodies, tribunals and persons as well. [Para 10.21]

The Lokpal: Search and Selection

38. To ensure flexibility, speed and efficiency on the one hand and representation to all organs of State on the other, the Committee recommends a Selection Committee comprising:-

- (a) The Prime Minister of India- as Head of the Executive.**
- (b) The Speaker Lok Sabha, as Head of the Legislature.**
- (c) The Chief Justice of India-as Head of the Judiciary.**
- (d) The leader of the Opposition of the Lower House.**
- (e) An eminent Indian, selected as elaborated in the next paragraph.**

N.B.: functionaries like the Chairman and Leader of the Opposition of the Upper House have not been included in the interests of compactness and flexibility. The Prime Minister would preside over the Selection Committee. [Para 11.18]

39. The 5th Member of the Selection Committee in (e) above should be a joint nominee selected jointly by the three designated Constitutional bodies viz., the Comptroller and Auditor General of India, the Chief Election Commissioner and the UPSC Chairman. This ensures a reasonably wide and representative degree of inputs from eminent Constitutional bodies, without making the exercise too cumbersome. Since the other Members of the Selection Committee are all ex-officio, this 5th nominee of the aforesaid Constitutional bodies shall be nominated for a fixed term of five years. Additionally, it should be clarified that he should be an eminent Indian and all the diverse criteria, individually, jointly or severally, applicable as specified in Clause 4 (1) (i) of the Lokpal Bill 2011 should

be kept in mind by the aforesaid three designated Constitutional nominators.[Para 11.19]

40. There should, however, be a proviso in Clause 4(3) to the effect that a Search Committee shall comprise at least seven Members and shall ensure representation 50 per cent to Members of SC's and/or STs and/or Other Backward Classes and/or Minorities and/or Women or any category or combination thereof. Though there is some merit in the suggestion that the Search Committee should not be mandatory since, firstly, the Selection Committee may not need to conduct any search and secondly, since this gives a higher degree of flexibility and speed to the Selection Committee, the Committee, on deep consideration, finally opines that the Search Committee should be made mandatory. The Committee does so, in particular, in view of the high desirability of providing representation in the Search Committee as stated above which, this Committee believes, cannot be effectively ensured without the mandatory requirement to have a Search Committee. It should, however, be clarified that the person/s selected by the Search Committee shall not be binding on the Selection Committee and secondly, that, where the Selection Committee rejects the recommendations of the Search Committee in respect of any particular post, the Selection Committee shall not be obliged to go back to the Search Committee for the same post but would be entitled to proceed directly by itself. [Para 11.20]
41. Over the years, there has been growing concern in India that the entire mass of statutory quasi judicial and other similar tribunals, bodies or entities have been operated by judicial personnel i.e. retired judges, mainly of the higher judiciary viz. the High Courts and the Supreme Court.[Para 11.20(A)]
42. There is no doubt that judicial training and experience imparts not only a certain objectivity but a certain technique of adjudication which, intrinsically and by training, is likely to lead to greater care and caution in preserving principles like fair play, natural justice, burden of proof and so on and so forth. Familiarity with case law and knowledge of intricate legal principles, is naturally available in retired judicial personnel of the higher judiciary.[Para11.20(B)]
43. However, when a new and nascent structure like Lokpal is being contemplated, it is necessary not to fetter or circumscribe the discretion of the appointing

authority. The latter is certainly entitled to appoint judges to the Lokpal, and specific exclusion of judges is neither contemplated nor being provided. However, to consider, as the Lokpal Bill 2011 does, only former Chief Justices of India or former judges of the Supreme Court as the Chairperson of the Lokpal would be a totally uncalled for and unnecessary fetter. The Committee, therefore, recommends that clause 3(2) be suitably modified not to restrict the Selection Committee to selecting only a sitting or former Chief Justice of India or judge of the Supreme Court as Chairperson of the Lokpal.[Para 11.20(C)]

44. A similar change is not suggested in respect of Members of the Lokpal and the existing provision in clause 3 (2) (b) read with clause 19 may continue. Although the Committee does believe that it is time to consider tribunals staffed by outstanding and eminent Indians, not necessarily only from a pool of retired members of the higher judiciary, the Committee feels **hamstrung** by the Apex Court decision in L. Chandra Kumar v. Union of India 1997 (3) SCC 261 which has held and has been interpreted to hold that statutory tribunals involving adjudicatory functions must not sit singly but must sit in benches of two and that at least one of the two members must be a judicial member. Hence, unless the aforesaid judgment of the Apex Court in L. Chandra Kumar v. Union of India is reconsidered, the Committee refrains from suggesting corresponding changes in clause 3 (2) (b) read with clause 19, though it has been tempted to do so.[Para 11.20(D)]

45. There is merit in the suggestion that clause 3 (4) of the Lokpal Bill 2011 be further amended to clarify that a person shall not be eligible to become Chairperson or Member of Lokpal if:

- (a) He/ she is a person convicted of any offence involving moral turpitude;
- (b) He/ she is a person less than 45 years of age, on date of assuming office as Chairperson or Member of Lokpal;
- (c) He/ she has been in the service of any Central or State Government or any entity owned or controlled by the Central or State Government and has vacated office either by way of resignation, removal or retirement within the period of 12 months prior to the date of appointment as Chairperson or Member of Lokpal.[Para 11.20(E)]

46. In clause 9 (2), the existing provision should be retained but it should be added at the end of that clause, for the purpose of clarification, that no one shall be eligible for re-appointment as Chairperson or Member of the Lokpal if he has already enjoyed a term of five years.[Para 11.20(F)]
47. The Committee has already recommended appropriate representation on the Search Committee, to certain sections of society who have been historically marginalized. The Committee also believes that although the institution of Lokpal is a relatively small body of nine members and specific reservation cannot and ought not to be provided in the Lokpal institution itself, there should be a provision added after clause 4 (5) to the effect that the Selection Committee and the Search Committee shall make every endeavour to reflect, on the Lokpal institution, the diversity of India by including the representation, as far as practicable, of historically marginalized sections of the society like SCs/ STs, OBCs, minorities and women. [Para 11.20(G)]
48. As regards clause 51 of the Lokpal Bill, 2011, the Committee recommends that the intent behind the clause be made clear by way of an Explanation to be added to the effect that the clause is not intended to provide any general exemption and that "good faith" referred to in clause 52 shall have the same meaning as provided in section 52 of the IPC.[Para 11.20(H)]

The Trinity of the Lokpal, CBI and CVC: In Search of an Equilibrium

49. (A) Whatever is stated hereinafter in these recommendations is obviously applicable only to Lokpal and Lokayukta covered personnel and offences/ misconduct, as already delineated in this Report earlier, inter alia, in Chapter 8 and elsewhere.
- (B) For those outside (A) above, the existing law, except to the extent changed, would continue to apply. (Para 12.32]

50. This Chapter, in the opinion of the Committee, raises an important issue of the quality of both investigation and prosecution; the correct balance and an apposite equilibrium of 3 entities (viz. Lokpal, CBI and CVC) after creation of the new entity called Lokpal; harmonious functioning and real life operational efficacy of procedural and substantive safeguards; the correct balance between initiation of complaint, its preliminary screening/ inquiry, its further investigation, prosecution, adjudication and punishment; and the correct harmonization of diverse provisions of law arising from the Delhi Special Police Establishment Act, the CVC Act, the proposed Lokpal Act, the IPC, CrPC and the Prevention of Corruption Act. It is, therefore, a somewhat delicate and technical task. [Para 12.33]
51. The stages of criminal prosecution of the Lokpal and Lokayukta covered persons and officers can be divided broadly into 5 stages, viz. (a) The stage of complaint, whether by a complainant or suo motu, (b) the preliminary screening of such a complaint, (c) the full investigation of the complaint and the report in that respect, (d) prosecution, if any, on the basis of the investigation and (e) adjudication, including punishment, if any.[Para 12.34]
52. The Committee recommends that the complaint should be allowed to be made either by any complainant or initiated suo motu by the Lokpal. Since, presently, the CBI also has full powers of suo motu initiation of investigation, a power which is frequently exercised, it is felt that that the same power of suo motu proceedings should also be preserved for both the CBI and the Lokpal, subject, however, to overall supervisory jurisdiction of the Lokpal over the CBI, including simultaneous intimation and continued disclosure of progress of any inquiry or investigation by the CBI to the Lokpal, subject to what has been elaborated in the next paragraph.[Para 12.35]
53. Once the complaint, through any party or suo motu has arisen, it must be subject to a careful and comprehensive preliminary screening to rule out false, frivolous and vexatious complaints. This power of preliminary inquiry must necessarily vest in the Lokpal. However, in this respect, the recommendations of the Committee in para 12.36(I) should be read with this para. This is largely covered in clause 23 (1) of the Lokpal Bill, 2011. However, in this respect, the

Lokpal would have to be provided, at the inception, with a sufficiently large internal inquiry machinery. The Lokpal Bill, 2011 has an existing set of provisions (Clauses 13 and 14 in Chapter III) which refers to a full-fledged investigation wing. In view of the structure proposed in this Chapter, there need not be such an investigation wing but an efficacious inquiry division for holding the preliminary inquiry in respect of the complaint at the threshold. Preliminary inquiry by the Lokpal also semantically distinguishes itself from the actual investigation by the CBI after it is referred by the Lokpal to the CBI. The pattern for provision of such an inquiry wing may be similar to the existing structure as provided in Chapter III of the Lokpal Bill 2011 but with suitable changes made, *mutatis mutandis*, and possible merger of the provisions of Chapter VII with Chapter III.[Para 12.36]

54. The Committee is concerned at the overlap of terminology used and procedures proposed, between preliminary inquiry by the Lokpal as opposed to investigation by the investigating agency, presently provided in Clause 23 of the Lokpal Bill. The Committee, therefore, recommends:

- (a) that only two terms be used to demarcate and differentiate between the preliminary inquiry to be conducted by the Lokpal, *inter-alia*, under Chapters VI and VII read with Clause 2(1)(e) as opposed to an investigation by the investigating agency which has been proposed to be the CBI in the present report. Appropriate changes should make it clear that the investigation (by the CBI as recommended in this report), shall have the same meaning as provided in Clause 2 (h) of the Cr.P.C whereas the terms “inquiry” or “preliminary investigation” should be eschewed and the only two terms used should be “preliminary inquiry” (by the Lokpal) on the one hand & “investigation” (by the CBI), on the other.
- (b) the term preliminary inquiry should be used instead of the term inquiry in clause 2(1)(e) and it should be clarified therein that it refers to preliminary inquiry done by the Lokpal in terms of Chapters VI and VII of the Lokpal Bill, 2011 and does not mean or refer to the inquiry mentioned in Section 2(g) of the Cr.P.C.

(c) the term “investigation” alone should be used while eschewing terms like “preliminary investigation” and a similar definitional provision may be inserted after Clause 2(1)(e) to state that the term investigation shall have the same meaning as defined in Clause 2(h) of the Cr.P.C.

(d) Similar changes would have to be made in all other clauses in the Lokpal Bill, 2011, one example of which includes Clause-14.[Para 12.36(A)]

55. There are several parts of Clause 23 of the 2011 Bill, including Clauses 23(4), 23(5), 23(6), 23(9) and 23(11) which require an opportunity of being heard to be given to the public servant during the course of the preliminary inquiry i.e. the threshold proceedings before the Lokpal in the sense discussed above. After deep consideration, the Committee concludes that it is unknown to criminal law to provide for hearing to the accused at the stage of preliminary inquiry by the appropriate authority i.e. Lokpal or Lokayukta in this case. Secondly, the preliminary inquiry is the stage of verification of basic facts regarding the complaint, the process of filtering out false, frivolous, fictitious and vexatious complaints and the general process of seeing that there is sufficient material to indicate the commission of cognizable offences to justify investigation by the appropriate investigating agency. If the material available in the complaint at the stage of its verification through the preliminary inquiry is fully disclosed to the accused, a large part of the entire preliminary inquiry, later investigation, prosecution and so on, may stand frustrated or irreversibly prejudiced at the threshold. Thirdly, and most importantly, the preliminary inquiry is being provided as a threshold filter in favour of the accused and is being entrusted to an extremely high authority like the Lokpal, created after a rigorous selection procedure. Other agencies like the CBI also presently conduct preliminary inquiries but do not hear or afford natural justice to the accused during that process. Consequently the Committee recommends that all references in Clause 23 or elsewhere in the Lokpal Bill, 2011 to hearing of the accused at the preliminary inquiry stage should be deleted.[Para 12.36(B)]

56. Since the Committee has recommended abolition of the personal hearing process before the Lokpal during the preliminary inquiry, the Committee deems it fit

and proper to provide for the additional safeguard that the decision of the Lokpal at the conclusion of the preliminary inquiry to refer the matter further for investigation to the CBI, shall be taken by a Bench of the Lokpal consisting of not less than 3 Members which shall decide the issue regarding reference to investigation, by a majority out of these three.[Para 12.36.(BB)]

57. Naturally it should also be made clear that the accused is entitled to a full hearing before charges are framed. Some stylistic additions like referring to the charge sheet “if any” (since there may or may not be a chargesheet) may also be added to Clause 23(6). Consequently, Clauses like 23(7) and other similar clauses contemplating proceedings open to public hearing must also be deleted. [Para 12.36(C)]
58. Clause 23(8) would have to be suitably modified to provide that the appropriate investigation period for the appropriate investigating agency i.e. CBI in the present case, should normally be within six months with only one extension of a further six months, for special reasons. Reference in Clause 23(8) to “inquiry” creates highly avoidable confusion and it should be specified that the meanings assigned to inquire and investigate should be as explained above.[Para 12.36(D)]
59. The Committee also believes that there may be several exigencies during the course of both preliminary inquiry and investigation which may lead to a violation of the 30 days or six months periods respectively specified in Clause 27(2) and 23(8). The Committee believes that it cannot be the intention of the law that where acts and omissions by the accused create an inordinate delay in the preliminary inquiry and / or other factors arise which are entirely beyond the control of the Lokpal, the accused should get the benefit or that the criminal trial should terminate. For that purpose it is necessary to insert a separate and distinct provision which states that Clauses 23(2), 23(8) or other similar time limit clauses elsewhere in the Lokpal Bill, 2011, shall not automatically give any benefit or undue advantage to the accused and shall not automatically thwart or terminate the trial. [Para 12.36(E)]
60. Clause 23(10) also needs to be modified. Presently, it states in general terms the discretion to hold or not to hold preliminary inquiry by the Lokpal for reasons to be recorded in writing. However, this may lead to allegations of pick and choose

and of arbitrariness and selectivity. The Committee believes that Clause 23(10) should be amended to provide for only one definition viz., that preliminary inquiry may be dispensed with only in trap cases and must be held in all other cases. Even under the present established practice, the CBI dispenses with preliminary inquiry only in a trap case for the simple reason that the context of the trap case itself constitutes preliminary verification of the offence and no further preliminary inquiry is necessary. Indeed, for the trap cases, Section 6 A (ii) of the Delhi Special Police Establishment Act, 1946 also dispenses with the provision of preliminary inquiries. For all cases other than the trap cases, the preliminary inquiry by the Lokpal must be a non dispensable necessity.[Para 12.36(F)]

61. Clause 23(11) also needs to be modified / deleted since, in this Report, it is proposed that it is the CBI which conducts the investigation which covers and includes the process of filing the charge sheet and closure report. [Para 12.36(G)]
62. Similarly Clause 23 (12) (b) would have to be deleted, in view of the conclusion hereinabove regarding the absence of any need to provide natural justice to the accused at the stage of preliminary inquiry. Clause 23(14) is also unusually widely worded. It does not indicate as to whom the Lokpal withhold records from. Consequently that cannot be a general blanket power given to the Lokpal to withhold records from the accused or from the investigating agency. Indeed, that would be unfair, illegal and unconstitutional since it would permit selectivity as also suppress relevant information. The clause, therefore, needs to be amended.[Para 12.36(H)]
63. The case of the Lokpal initiating action suo motu, requires separate comment. In a sense, the preliminary inquiry in the case of a Lokpal suo motu action becomes superfluous since the same body (i.e. Lokpal) which initiates the complaint, is supposed to do a preliminary inquiry. This may, however, not be as anomalous as it sounds since even under the present structure, the CBI, or indeed the local police, does both activities ie suo motu action as also preliminary screening/ inquiry. The Committee was tempted to provide for another body to do preliminary inquiry in cases where the Lokpal initiates suo motu action, but in fact no such body exists and it would create great multiplicity and logistical

difficulty in creating and managing so many bodies. Hence the Committee concludes that in cases of suo motu action by Lokpal, a specific provision must provide that that part of the Lokpal which initiates the suo motu proposal, should be scrupulously kept insulated from any part of the preliminary inquiry process following upon such suo motu initiation. It must be further provided that the preliminary inquiry in cases of suo motu initiation must be done by a Lokpal Bench of not less than five Members and these should be unconnected with those who do the suo motu initiation.[Para 12.36(I)]

64. These recommendations also prevent the Lokpal from becoming a single institution fusing unto itself the functions of complainant, preliminary inquirer, full investigator and prosecutor. It increases objectivity and impartiality in the criminal investigative process and precludes the charge of creating an unmanageable behemoth like Lokpal, while diminishing the possibility of abuse of power by the Lokpal itself.[Para 12.37]

65. These recommendations also have the following advantages:

- (i) The CBI's apprehension, not entirely baseless, that it would become a Hamlet without a Prince of Denmark if its Anti-Corruption Wing was hived off to the Lokpal, would be taken care of.
- (ii) It would be unnecessary to make CBI or CVC a Member of the Lokpal body itself.
- (iii) The CBI would not be subordinate to the Lokpal nor its esprit de corps be adversely affected; it would only be subject to general superintendence of Lokpal. It must be kept in mind that the CBI is an over 60 year old body, which has developed a certain morale and esprit de corps, a particular culture and set of practices, which should be strengthened and improved, rather than merely subsumed or submerged within a new or nascent institution, which is yet to take root. Equally, the CBI, while enhancing its autonomy and independence, cannot be left on auto pilot.
- (iv) The CVC would retain a large part of its disciplinary and functional role for non Lokpal personnel and regarding misconduct while not being

subordinate to the Lokpal. However, for Lokpal covered personnel and issues, including the role of the CBI, the CVC would have no role.

- (v) **Mutatis mutandis statutory changes in the Lokpal Bill, the CVC and the CBI Acts and in related legislation, is accordingly recommended. [Para 12.38]**

66. After the Lokpal has cleared the stage for further investigation, the matter should proceed to the CBI. This stage of the investigation must operate with the following specific enumerated statutory principles and provisions:

- (A) On the merits of the investigation in any case, the CBI shall not be answerable or liable to be monitored either by the Administrative Ministry or by the Lokpal. This is also fully consistent with the established jurisprudence on the subject which makes it clear that the merits of the criminal investigation cannot be gone into or dealt with even by the superior courts. However, since in practise it has been observed in the breach, it needs to be unequivocally reiterated as a statutory provision, in the proposed Lokpal Act, a first in India.**
- (B) The CBI shall, however, continue to be subject to the general supervisory superintendence of the Lokpal. This shall be done by adding a provision as exists today in the CVC Act which shall now apply to the Lokpal in respect of the CBI. Consequently, the whole of the Section 8 (1) (not Section 8 (2)) of the CVC Act should be included in the Lokpal Bill to provide for the superintendence power of the Lokpal over the CBI.[Para 12.39]**

67. Correspondingly, reference in Section 4 of the Delhi Special Police Establishment Act to the CVC would have to be altered to refer to the Lokpal. [Para 12.40]

68. At this stage, the powers of the CBI would further be strengthened and enhanced by clarifying explicitly in the Lokpal Bill that all types of prior sanctions/terms or authorizations, by whatever name called, shall not be applicable to Lokpal covered persons or prosecutions. Consequently, the provisions of Section 6 (A) of the Delhi Special Police Establishment Act, Section 19 of the Prevention of Corruption Act and Section 197 of the IPC or any other provision of the law,

wherever applicable, fully or partially, will stand repealed and rendered inoperative in respect of Lokpal and Lokayukta prosecutions, another first in India. Clause 27 of the Lokpal Bill, 2011 is largely consistent with this but the Committee recommends that it should further clarify that Section 6 A of the DSPE Act shall also not apply in any manner to proceedings under the proposed Act. The sanction requirement, originating as a salutary safeguard against witch hunting has, over the years, as applied by the bureaucracy itself, degenerated into a refuge for the guilty, engendering either endless delay or obstructing all meaningful action. Moreover, the strong filtering mechanism at the stage of preliminary inquiry proposed in respect of the Lokpal, is a more than adequate safeguard, substituting effectively for the sanction requirement. Elsewhere, this Report recommends that all sanction requirements should be eliminated even in respect of non Lokpal covered personnel. [Para 12.41]

69. The previous two paragraphs if implemented, would achieve genuine and declared statutory independence of investigation for the first time for the CBI.[Para 12.42]
70. The main investigation, discussed in the previous few paragraphs, to be conducted by the CBI, necessarily means the stage from which it is handed over to the CBI by the Lokpal, till the stage that the CBI files either a chargesheet or a closure report under Section 173 of the CrPC. However, one caveat needs to be added at this stage. The CBI's chargesheet or closure report must be filed after the approval by the Lokpal and, if necessary, suitable changes may have to be made in this regard to Section 173 Cr PC and other related provisions.[Para 12.43]
71. The aforesaid independence of the CBI is reasonable and harmonizes well with the supervisory superintendence of the Lokpal in the proposed Lokpal Bill, which is now exercised by CVC under Section 8 (1) of the CVC Act. The Committee recommends the above provision, suitably adapted to be applicable in the relationship between the Lokpal and the CBI. [Para 12.44]
72. The next stage of the criminal process would go back to the Lokpal with full powers of prosecution on the basis of the investigation by the CBI. The following points in this respect are noteworthy:

- **Clause 15 in Chapter IV of the Lokpal Bill, 2011 already contains adequate provisions in this regard and they can, with some modifications, be retained and applied.**
- **The Committee's recommendations create, again for the first time, a fair demarcation between independent investigation and independent prosecution by two distinct bodies, which would considerably enhance impartiality, objectivity and the quality of the entire criminal process.**
- **It creates, for the first time in India, an independent prosecution wing, under the general control and superintendence of the Lokpal, which, hopefully will eventually develop into a premium, independent autonomous Directorate of Public Prosecution with an independent prosecution service (under the Lokpal institution). The Committee also believes that this structure would not in any manner diminish or dilute the cooperative and harmonious interface between the investigation and prosecution processes since the former, though conducted by the CBI, comes under the supervisory jurisdiction of the Lokpal.[Para 12.45]**

- 73. The next stage is that of adjudication and punishment, if any, which shall, as before, be done by a special Judge. The Committee considers that it would be desirable to use the nomenclature of 'Lokpal Judge' (or Lokayukta Judge in respect of States) under the new dispensation. However, this is largely a matter of nomenclature and existing provisions in the Lokpal Bill, 2011 in Chapter IX are adequate, though they need to be applied, with modifications. [Para 12.46]**
- 74. The aforesaid integrates all the stages of a criminal prosecution for an offence of corruption but still leaves open the issue of departmental proceedings in respect of the same accused.[Para 12.47]**
- 75. The Committee agrees that for the Lokpal covered personnel and issues, it would be counter-productive, superfluous and unnecessary to have the CVC to play any role in departmental proceedings. Such a role would be needlessly duplicative and superfluous. For such matters, the Lokpal should be largely empowered to do all those things which the CVC presently does, but with some significant changes, elaborated below.[Para 12.48]**

76. **Clauses 28 and 29 of the Lokpal Bill are adequate in this regard but the following changes are recommended:**

- (i) The Lokpal or Lokayukta would be the authority to recommend disciplinary proceedings for all Lokpal or Lokayukta covered persons.**
- (ii) The CVC would exercise jurisdiction for all non Lokpal covered persons in respect of disciplinary proceedings.**
- (iii) The CBI would similarly continue to exercise its existing powers under the CVC's superintendence for all non Lokpal personnel and proceedings.**
- (iv) Departmental action must, as the law today stands, comply with the over arching mandate of Article 311 of the Indian Constitution. Dissatisfaction or objection to the practical operation of Article 311, fully understandable and indeed justifiable, does not permit or impel us to ignore the existence of Article 311, until altered. If there is consensus outside the Committee on amending Article 311, it must be amended as elaborated and recommended by the Committee in paragraph 12.49. However, absent such a consensus, the passage of the Lokpal Bill need not be held up on that account and hence the present report makes recommendations on the basis of the continuance of Article 311. If, however, it is amended as per paragraph 12.49, the proposed Lokpal Act can easily be modified to reflect such changes.**
- (v) It may also be remembered that the Lokpal itself does not conduct the departmental proceedings. For the law to provide for Lokpal to conduct the entire departmental proceedings itself, would be to put a humungous and unworkable burden on the institution.**
- (vi) Therefore, the power to take departmental action whether in the case of bureaucrats or in the case of Ministers as provided in Clauses 28 and 29 of the Lokpal Bill 2011, are largely appropriate.**
- (vii) The Committee is informed that suspension of a delinquent officer during his criminal prosecution is virtually automatic in practice. However, the Committee feels the need to emphasize that a specific provision be added in Chapter VII making it clear that once any bureaucrat (viz. group A or group B officer) as covered in the proposed Lokpal Bill is under investigation and the Lokpal makes a recommendation that such a person**

be suspended, such suspension should mandatorily be carried out unless, for reasons to be recorded in writing by a majority out of a group of 3 persons not below the rank of Ministers of State belonging to the Ministries of Home, Personnel and the relevant administrative Ministry of the delinquent officer, opine to the contrary. Such suspension on Lokpal recommendation does not violate Article 311 in any manner. Refusal by the aforesaid Committee of three provides a check and balance qua possibly unreasonable Lokpal recommendations. The reference is to three high functionaries of three Ministries and not to the Administrative Ministry alone since it is frequently found in practise that the Administrative Ministry's responses alone may seek to preserve the status quo on account of vested interests arising from the presence of the delinquent officer in that Administrative Ministry.

- (viii) There cannot be a counterpart suspension provision in respect of MPs or Ministers or the like, but an explicit clause may be added to the existing Clause 29 that the Presiding Officer of the relevant House in the case of MPs and Prime Minister in the case of a member of the Council of Ministers shall record a note in writing indicating the action being taken in regard to the Lokpal's recommendations or the reasons for not taking such action.
- (ix) Wherever otherwise applicable, in respect of the details of the departmental inquiry, the provisions of Article 311 would, unless altered and subject to Paras D above and 12.49 below, continue to apply.[Para 12.49]

77. The Committee strongly pleads and recommends that the provisions of Article 311 require a close and careful relook to ensure that reasonable protection is given to bureaucrats for the independent and fair discharge of their functions but that the enormous paraphernalia of procedural rules and regulations which have become a major obstacle in the taking of genuine and legitimate departmental action against delinquent officers, be eliminated. The Committee notes with concern and with growing apprehension that serious and high level / big ticket corruption has increased exponentially since Independence at all levels in the Lokpal proposed categories of personnel. In particular, bureaucratic

corruption has been relatively ignored or underplayed in the context of the excessive media and civil society focus on political corruption, coupled with the doctrine of civil service anonymity, which this country imported from our former colonial masters. Hence, the substantial modification of Article 311 or, indeed, its replacement by a much lesser statutory (not constitutional counterpart) should be taken up and implemented at the earliest. It may be added that what requires to be looked into is not the mere text of Article 311 but the context which has grown around it, through an undesirably large number of statutory and non-statutory rules, procedures and regulations coupled with huge common law jurisprudence over the last 6 decades. It is universally believed that the aforesaid has, in practice, converted Article 311, from a reasonable and salutary safeguard to a haven for those indulging in mal-administration and/ corruption with no fear of consequences and the certainty of endless delay. The fact that Article 311 had been given constitutional and not mere statutory status is also responsible for its largely unchanged character over the last six plus decades.[Para 12.50]

78. Though not strictly within the purview of the Lokpal Bill 2011 itself, the Committee also recommends that CVC's advice in respect of departmental action to be taken by the relevant department in case of non-Lokpal covered personnel must, by a suitable amendment to the CVC Act, be made binding to the extent that, unless for reasons to be recorded by a majority out of the same joint group as aforesaid, comprising 3 persons not below the rank of Ministers of State belonging respectively to the Ministries of Home Affairs, Personnel and the Administrative Ministry to which the delinquent officer belongs, states that CVC advice be not followed, such CVC advice shall be binding. [Para 12.51]
79. The Committee has deliberated long and hard on whether it can or should go to the extent of suggesting changes in the selection procedure of the CBI chief. Presently, the CBI chief is appointed by the Government on the recommendation of a Committee consisting of the CVC as Chairperson, Vigilance Commissioner, Secretary, Government of India in the Ministry of Home Affairs and Secretary of the Administrative Ministry (in this case the Ministry of Personnel) [see Section 4A of the Delhi Special Police Establishment Act, 1946]. Section 8 (2) of

the 1946 Act further provides for a mandatory input in the selection of a new Director to be made by the outgoing Director and also enjoins upon the Committee, in Section 8 (3), to make recommendations for a panel of officers on the basis of seniority, integrity and experience in the investigation of anti-corruption cases, necessarily belonging to the Indian Police Services. [Para 12.52]

80. Interestingly, Section 4 C of the same 1946 Act provides for the same Committee to make recommendations for all appointments as also extension or curtailment of tenure of all officers above the level of Superintendent of Police in the CBI. [Para 12.53]
81. It is thus clear that it is not correct to suggest that the Central Government has absolute discretion in appointing the CBI Director. After the Vineet Narain vs. Union of India judgment* by the Apex Court, significant changes were brought into the Delhi Special Police Establishment Act, 1946. In 2003 (by Act 45 of 2003) providing for the aforesaid independent and autonomous regime for selection and appointment of CBI Director. The Central Vigilance Commissioner who heads the selection and recommendation process is itself a high statutory authority under a separate enactment called the Central Vigilance Commission Act of 2003 which, in turn in Section 4, obliges the Government to appoint the CVC on the basis of a recommendation of a high powered Committee comprising the Prime Minister, the Home Minister and the leader of opposition in the Lok Sabha. It is, therefore, erroneous to brush aside the existing system as merely involving absolute power/discretion to select Government favourites as CBI Director. [Para 12.54]
82. Furthermore, the Committee believes that it would neither be proper nor desirable for the Committee to go into and suggest fundamental statutory alterations to the procedure for selection and appointment of CBI Director, which appears, nowhere, directly or indirectly, to be a subject referred for the consideration of this Committee. Collateral recommendations of this nature by a side wind should, in the opinion of this Committee, be avoided, especially since

* 1996(2) SCC 199.

significant statutory changes have been brought in with respect to the appointment of the CBI Director less than 8 years ago. [Para 12.55]

Constitutional Status: If, How and How Much

83. The Committee, therefore, recommends:-

- (a) The institution of Lokpal must be given constitutional status by inserting into the Constitution by way of constitutional amendment certain basic principles about the Lokpal and leaving the details in the new proposed statute on which this Committee is opining.
- (b) One practical, reasonable and legally valid model would be for the Government to consider the model and set of provisions asked for by the Committee and presented in the evidence to the Committee as a draft constitutional amendment by two former Chief Justices of India. That draft is enclosed herewith as Annexure 'F' and is self-explanatory.
- (c) This constitutional amendment does not require ratification by not less than half of the State Legislatures since it does not seek to make any change in any of the provisions listed in the second proviso to Article 368 (2) of the Indian Constitution.
- (d) The constitutional amendment should, as reflected in the enclosed Annexure 'F' be a set of basic principles for the Lokpal as also provide for the basic set up of the Lokayuktas. Both these provisions, proposed in the enclosed draft, propose Part XVA and Articles 329(C) and 329(D), as enabling, empowering and permissive provisions and authorize and empower the appropriate legislature to make proper laws, mutatis mutandis, for Lokpal at the Centre and for Lokayuktas at the State.
- (e) Such a constitutional status would not only considerably enhance the stature, legal and moral authority of the Lokpal institution but would make interference and tinkering in these basic principles not subject to the vicissitudes of ordinary or transient majorities. Over a period of time, it is likely that these principles would develop into a set of immutable

principles and, possibly, even become part of basic structure of the Constitution rendering the existence of the Lokpal and its basic features un-amendable even by a constitutional amendment.

- (f) Apprehensions regarding delay are misplaced. The constitutional amendment bill would be much shorter than the statutory bill for the new proposed Lokpal and can be passed on the same day and at the same time as the latter, though by a different majority. It is inconceivable that while parties are in favour of the institution of Lokpal in principle, as a statutory body, parties would not agree with equal alacrity for the passage of a constitutional amendment bill.
- (g) The suggestion that the entire statutory bill should be transposed as a constitutional amendment into the Constitution is untenable and impracticable. That would eliminate flexibility and would require a constitutional amendment for the smallest future change. Moreover, the Constitution does not and is not intended to provide for nitty gritty operational details. It should be and is intended to be a declaration of general and basic principles which, in turn, enable and empower formal legislation, which in turn would take care of the details.
- (h) An easy or casual repeal of the entire Lokpal scheme would not be possible once it is constitutionally entrenched.
- (i) Similarly, there would be no option for the federal or State Legislatures not to have a Lokpal or a Lokayukta at all since the constitutional mandate would be to the contrary.
- (j) Contextually, the issues and some of the suggestions in this Chapter may overlap with and should, therefore, be read in conjunction with Chapter 7 of this report. Though the Committee has already opined in Chapter 4 of this Report here that the issues of grievance redressal should be dealt with in a separate legislation, the Committee hereby also strongly recommends that there should be a similar declaration either in the same Chapter of the Lokpal or in a separate Chapter proposed to be added in the Indian Constitution, giving the same constitutional status to the citizens grievances and redressal machinery.

- (k) This recommendation also reflects the genuine and deep concern of this Committee about the need, urgency, status and importance of a citizen's charter/grievance machinery and the Committee believes that the giving of the aforesaid constitutional status to this machinery would go a long way in enhancing its efficacy and in providing a healing touch to the common man.
- (l) Furthermore, the Committee believes that this recommendation herein is also fully consistent with the letter and spirit of para 1.8 above viz. the conclusions of the Minister of Finance in the Lower House recorded in para 1.8 above. [Para 13.12]

The Jurisdictional Limits of Lokpal: Private NGOs, Corporates and Media

84. There is no doubt that corruption is neither the exclusive preserve nor the special privilege nor the unique entitlement of only the political or bureaucratic classes. Nor can anyone justify exclusionary holy cows, supposedly immunized, exempted or put outside the purview of a new and vigorous anti-corruption monitoring, investigation and prosecution regime as the proposed new Lokpal Bill seeks to create. If corruption is rampant in a country like India, it permeates and pervades every nook and cranny of society and is certainly not restricted to the political or bureaucratic classes. Indeed, while no specific statistical data are available, it may not be at all inconceivable that, in quantum terms, the degree of corruption in the non-political/non-bureaucratic private sector, in the aggregate, is far higher than in the realm of political and bureaucratic classes alone. Therefore, in principle, non-application of the proposed Lokpal Bill to all such classes does not appear to be justifiable.[Para 14.22]
85. In this connection, the very recent UK Bribery Act, 2010, is both interesting and instructive. Drafted in a completely non-legalistic manner, format and language, this Act seeks to criminalize corruption everywhere and anywhere, i.e. in the public and private sectors in UK, in Governmental and non-Governmental sectors, by UK citizens abroad, by non-UK citizens acting in UK and in the

entire gamut of private and individual transactions in addition to covering dealings in the private sector, intra-private sector, intra-public sector, in Government and private interface and in every other nook and cranny of society.[Para 14.23]

86. Despite the above and despite the simplicity and attractiveness of an all inclusive approach, the latter must yield to exigencies of logistics, operational efficacy and pragmatism. Since this is the nation's first experiment with a central Lokpal institution, it would amount to starry-eyed idealism to recommend the blanket inclusion of every segment of society under the jurisdiction of an omnipotent and omniscient Lokpal. Such comprehensive inclusion is entirely understandable and may be logically more justifiable in principle, but, in the final opinion of the Committee, must await several years of evolution of the Lokpal institution and a corpus of experiential and practical lessons as also the wisdom of a future generation of Parliamentarians.[Para 14.24]

87. As far as the proposed dispensation is concerned, the only available dividing and demarcating line between the complete inclusion and partial exclusion of entities from the jurisdiction of the Lokpal would have to be some test of Government ownership and/or control and/or size of the entity concerned. In this regard, clauses 17 (1) (f) and (g) of the Lokpal Bill, 2011 are relevant. Clause 17 (1) (f) applies the Lokpal jurisdiction mainly to office-bearers of every society, A.o.P. or trust, registered or not, but wholly or partially financed or aided by the Government, subject to being above some specified annual income minima. Clause 17 (1) (g), similarly, applies the Lokpal to office-bearers of every society, A.o.P. or trust, receiving donations from the public, again subject to an annual income minima to be specified by the Central Government.[Para 14.25]

88. After deep consideration, the Committee believes and recommends that these clauses should be merged and expanded to provide for the following coverage/jurisdiction of the Lokpal:

(a) The Lokpal jurisdiction should apply to each and every institution/entity, by whatever name called, owned or controlled by the Central Government, subject, however, to an exclusionary minima, where the ownership or control of the Central Government *de minimis*. Such minima

would have to be specified and the power of such specification should be given to the Central Government by notification;

- (b) Additionally, all entities/institutions, by whatever name called, receiving donations from the public above a certain minima, liable to be specified by the Central Government should be included. In addition, as also all entities/institutions receiving donations from foreign sources in the terms and context of the Foreign Contribution Regulation Act (FCRA) in excess of Rs.10 lakh per year, should be covered, whether or not, controlled by the Government. This is largely as per existing clause 17 (1) (g), except for the addition of the foreign donation recipient facet;
- (c) It should be clarified that this coverage shall apply, as also stated above, to every entity and institution, by whatever name called, be it corporate, society, trust, A.o.P., partnership, sole proprietorship, LLP or any other, registered or not. It should also be made clear that the approach is functional or ownership based or size based and not based on nomenclature;
- (d) It is thus clear that corporates, media or NGOs should and would be covered only to the above extent and not otherwise.[Para 14.25.A]

89. Despite the foregoing elaborations and 'lament' regarding exclusion of large slices of society from the Lokpal regime, it must not be forgotten that all persons, whether private, individual, and totally non-Governmental, are already necessarily covered as abettors, co-conspirators, inciters and givers or recipients or bribes in terms of clause 17 (3) of the Lokpal Bill, 2011. It may, however, be further clarified suitably in inclusive and not exhaustive terms in clause 17 (3) that the phrase "if such person is associated with the allegation of corruption", should include abettors, bribe-givers, bribe-takers, conspirators and all other persons, directly or indirectly, involved in the act or omission relating to corruption within which all other persons and entities in clause 17 are subsumed. The word "associated" presently used is too general and vague.[Para 14.26]

90. The Committee further recommends that clause 17 (3) should be explicitly clarified to the effect that the abettor, conspirator or person associated, in any manner, directly or indirectly, with the corruption allegation, shall not only be

included but be fully liable to investigation, prosecution and punishment and that the proviso to clause 17 (3) shall be limited only to proposed action to be taken 'in case of a person serving in the affairs of a State' and not qua anyone else.[Para 14.26.A]

Support Structure for the Lokpal: Whistle Blowers, Phone Tappers and Legal Aid/ Assistance Issues

91. As regards the whistleblower issue, this Committee has made a detailed recommendation on the subject on August 10, 2011 in respect of the Bill referred to it. That Bill and the Committee's recommendation are under the active decision making process of the Government of India for eventual translation into law.[Para 15.10]

92. The Committee recommends that the Whistleblowers Bill (Bill No. 97 of 2010) referred to the Committee, with the changes already recommended by the Committee in respect of that Bill (in the Committee's report dated August 10, 2011), be implemented into law simultaneously and concurrently with the Lokpal Bill. In that case, only one provision needs to be inserted in the Lokpal Bill to the effect that safeguards and machinery provided elaborately in the proposed Whistleblowers Bill, as opined upon by the Committee, would be applicable, mutatis mutandis to the Lokpal Bill. In particular, the Committee notes that clauses 10, 11, 12 and 13 of the aforesaid Whistleblowers Bill, provide a fairly comprehensive fasciculus of provisions providing safeguards against victimization, protection of witnesses and other persons, protection of identity of complainant and power to pass interim orders. The Whistleblowers Bill also sets up a competent authority and provides for several other related provisions to make the functioning of that authority efficacious and to enhance the efficiency, potency and vigour of the safeguards intended to be provided to a whistleblower. The proposed provision in the Lokpal Bill should act as a cross referencing, breach of which should activate the related/ applicable provisions of the Whistleblower Bill and render them applicable to all Lokpal proceedings, as if set out in the Lokpal Bill, 2011.[Para 15.11]

93. Naturally, one of the main adaptations of the Whistleblowers Bill for Lokpal proceedings would be that the competent authority in respect of Lokpal covered persons and offences would be the Lokpal and references in the Whistleblowers Bill to CVC or other entities would be rendered inoperative for purposes of Lokpal personnel and officers.[Para 15.12]
94. If, however, the aforesaid Whistleblower Bill, along with the recommendations of this Committee in that regard, are not enacted into law by the Government of India, co-terminously and simultaneously with the Lokpal Bill, then this Committee recommends the creation of some safeguards, in substance and essence, by the addition of a whole new chapter and certain provisions in the proposed Lokpal Bill. However, those provisions in the Lokpal Bill would be largely an adaptation of the same provisions of the Whistleblowers Bill, especially clauses 10 to 13 of the Whistleblowers Bill, while, as explained above, making the Lokpal the competent authority for such whistleblower issues.[Para 15.13]
95. As regards phone tapping, the Committee emphasizes and underlines the basic reality that phone tapping by regulatory and policing agencies has been prevalent in India for several years and the rules and regulations in that regard have undergone periodic refinement and amendment. Currently the regime of phone tapping is governed by Indian Telegraph Act and Rules read with the judgments of the Supreme Court inter alia in People Union for Civil Liberties Vs. Union of India (1997) 1 SCC 301. The Committee believes that there is no reason, sufficiently strong, to suggest that this substantive law should be altered in respect of Lokpal proceedings.[Para 15.14]
96. Phone tapping has been resorted to, inter alia, by agencies as diverse as CBI, Enforcement Directorate, Directorate of Revenue Intelligence and others, under the aforesaid regime of the Act., Rules and the Supreme Court mandated principles. In all such cases, the Committee is not aware of any situation where any of these agencies are entitled to suo motu, on their own, without separate authorization, and in secrecy, initiate or continue phone tapping. There is, therefore, no reason as to why the proposed Lokpal institution should also not be

subjected to the same regime and mechanism. To provide for inherent and separate power in the Lokpal institution in this regard, would also create an excessive and undesirable concentration of powers, would frequently involve a conflict of interest between preliminary inquiry, investigation and prosecution and would disturb the equilibrium of all investigative agencies for the past several years with established practices in respect of phone tapping issues. Indeed, the Committee notes that in other parts of this Report (Chapter 12), the CBI is the principal investigating agency and, therefore, its powers of phone tapping must continue as they exist today. [Para 15.15]

97. As regards legal aid/ assistance, the Committee concludes that clause 56 as framed does not intend to and should not be read to be a mandate for provision of automatic legal aid for every accused in a Lokpal proceeding. Clause 56, by any fair reading, and in the opinion of this Committee, is only intended to provide legal assistance by way of legal representation to the accused in any case before the Lokpal eg:- a preliminary inquiry. Firstly, the Committee does not read this to mean automatic monetary or fiscal assistance or by way of lawyers' fees for the accused. Secondly, the Committee believes that this was intended to and recommended so that it should be explicitly clarified that it permits the use of, or appearance by a legal practitioner, where the accused asks for one in Lokpal proceedings eg:- a preliminary inquiry. In any event, elsewhere in this Report we have recommended deletion of the concept of hearing an accused during preliminary inquiry. If that is done away with, no issue would arise of legal practitioners appearing. In any case, they are entitled to appear in all later stages including trial. Finally, it should be clarified that clause 56 does not intend to abrogate or dilute or attenuate any other provision of law under where, by virtue of those provisions of law, the accused may be entitled to a monetary/ fiscal legal aid or assistance.[Para 15.16]

The Lokpal Miscellany: Residual Issues

- 98. Although it is implicit in the Lokpal Bill, 2011, the Committee believes that to obviate all doubts and to prevent any jeopardy to ongoing trials, the proposed Lokpal should have a specific provision categorically applying Section 4 (3) of the POCA to Lokpal proceedings, to enable the special judge or Lokpal judge to try any other offence, where connected, other than those covered by the Lokpal Act. [Para 16.3]**
- 99. Clause 17 (1) in most of its sub-clauses, including (b), (c), (d) and so on, specifically refers to a current/serving as also a former public servant (e.g. Minister, MP, bureaucrat, etc. both past and present). [Para 16.4]**
- 100. The Committee has seen the substantive provisions of POCA and it appears to be clear that the POCA, which shall continue to be the substantive law applicable to Lokpal trials and proceedings, seeks to render culpable and punish only official acts done by public servants. Be that as it may, the Committee is of the opinion that a specific provision should be inserted in Clause 17 clarifying and specifying that reference to present and former public servants only means that they can be prosecuted whether in or not in office, but only for acts/omissions done while they were in office and not for allegedly fresh acts/omissions after ceasing to hold office.[Para 16.5]**
- 101. The Committee finds that clause 8 and especially clause 8 (1) of the Lokpal Bill, 2011 has struck the right balance and does not need any fundamental changes. It is intended to strengthen the independence and autonomy of the Lokpal by not making it easy to initiate complaints against Lokpal for the Lokpal's removal. The Committee, however, recommends an addition to clause 8 (1)(iii), to allay and obviate the apprehension expressed in some quarters, that the process to remove the Lokpal cannot be initiated, under the sub-clause, if the President (which essentially means the Central Government) refuses to refer the complaint against the Lokpal. The Committee feels that this apprehension would be adequately taken care of by providing in clause 8 (1)(iii) that where the President does not refer a citizen's complaint against the Lokpal to the Apex Court, the President (i.e. the Central Government) shall be obliged to record reasons for the same and to furnish those reasons to the complainant within a maximum period of 3 months from the date of receipt of the complaint. The Committee feels that**

this process, including the transparency involved in recording these reasons and the attendant judicial review available to the complainant to challenge such reason/refusal, contains an adequate check and balance on this subject.[Para 16.6]

- 102. Additionally, the Committee recommends that Clause 8 (1) (iv) be added in the existing Lokpal Bill, 2011 to provide, specifically, that anyone can directly approach the apex court in respect of a complaint against the Lokpal (institution or individual member) and that such complaint would go through the normal initial hearing and filter as a preliminary matter before the normal bench strength as prescribed by the Supreme Court Rules but that, if the matter is admitted and put for final hearing, the same shall be heard by an apex court bench of not less than 5 members. It is but obvious that other consequential changes will have to be made in the whole of Section 8 to reflect the addition of the aforesaid Clause 8 (1) (iv). [Para 16.6A]**
- 103. Clause 21 of the Lokpal Bill, 2011 needs a relook. In its present form, it appears to empower the Lokpal Chairperson to intervene and transfer any pending case from one Bench to another, which appears to include the power of transfer even while a case is under consideration of the Lokpal bench on the merits. This uncircumscribed power would seriously impair the objectivity and autonomy of Lokpal Benches, especially at the stage of preliminary inquiry which is a crucial filtering mechanism. It also appears to be inconsistent with normal principles of jurisprudence which seriously frown upon interference even by the Chief Justice in a pending judicial matter before another Bench. The way out would be to delete this provision and to provide for transfer only in exceptional cases where, firstly, strong credible allegations are brought to the forefront in respect of the functioning of any particular Lokpal Bench and secondly, the decision to transfer is taken by not only the entire Lokpal institution sitting together, but also including the Members of the Bench from which the matter is sought to be transferred.[Para 16.7]**
- 104. As regards punishment under the Prevention of Corruption Act for a person convicted of different offences relating to corruption, it is noteworthy that the Prevention of Corruption Act prescribes, as it now stands, punishment not less than six months which may extend to five years for various offences involving**

public servant taking gratification in Sections 7, 8, 9, 10 and also Section 11 which deals with public servant obtaining valuable thing without consideration. Section 12 of POCA dealing with the abetment prescribes the same as six months to five years range of punishment. On the other hand, for offences of criminal misconduct by public servant, the prescribed punishment is not less than one year, extendable upto seven years in Section 13 while Section 14 prescribes punishment of not less than two years extendable to seven years. Section 15 prescribes the punishment for offences referred to in clause C or clause D of 5.13(i) which has no lower limit but a maximum of three years. Additionally, all these provisions empower the imposition of fine. [Para 16.8]

105. Diverse representations from diverse quarters have suggested an enhancement of punishment, with diverse prescriptions of quantum of sentence, including life imprisonment. After deep consideration, the Committee finds it prudent to strike a balanced, reasonable middle ground. A sudden, dramatic and draconian enhancement is, in the opinion of the Committee, undesirable. The Committee cannot ignore the inherent fallibility of mankind and if fallibility is inherent in every system, draconian and extreme punishment, even in a few cases of wrongful conviction, would be undesirable. [Para 16.9]

106. Taking a holistic view, the Committee is of the opinion that:

- (a) In the cases of Sections 7, 8, 9 and the like, the range from six months to five years should be substituted by imprisonment not less than three years which may extend to not more than seven years.
- (b) In the Sections 13 and 14 category of cases providing for a range to one year to seven years, the Committee suggests enhancement, in the case of Section 13 offences, to a minimum of four years and a maximum of ten years while for Section 14, the Committee suggests a minimum of five years and a maximum of ten years.
- (c) For Section 12 which presently prescribes six months to five years, the aforesaid of minimum three and maximum of seven years shall apply whereas for Section 15 which presently prescribes zero to three years, the range should be very minimum from two to maximum five years.

(d) Additionally, wherever applicable, there should be a general provision, cutting across Sections, creating a power of full confiscation of assets, proceeds, receipts and benefits, by whatever name called, arising from corruption by the accused. This provision should be properly drafted in a comprehensive manner to cover diverse situations of benefit in cash or kind, which, to the maximum extent possible, should fully be liable to confiscation. [Para 16.9A]

107. Although this issue has been discussed in other parts of this Report, for the sake of clarity, the Committee clarifies that there should be 3 specific and important time limits in the final enactment viz. firstly, the period of 30 days extendable once by a further period of 60 days for preliminary inquiry by the Lokpal; secondly, for completion of investigation by the investigating agency, within 6 months with one further extension of 3 months and thirdly, for completion of trials, within one year with one further extension of 6 months.[Para 16.10]

108. The Committee finds no basis for and no reason to retain the last proviso to clause 17 (1)(g) which appears to be overbroad and altogether exempts from the Lokpal Bill 2011 any entity, simply because it is constituted as a new religious entity or meant to be constituted as an entity for religious purposes. This proviso should be deleted, otherwise this exception would virtually swallow up the entire rule found in the earlier parts of clause 17.[Para 16.11]

109. As regards clause 51 of the Lokpal Bill 2011, the Committee recommends that the intent behind the clause be made clear by way of an Explanation to be added to the effect that the clause is not intended to provide any general exemption and that "good faith" referred to in clause 52 shall have the same meaning as provided in section 52 of the IPC. [Para 16.12]

MINUTES

OF

DISSENT

(i) MINUTES OF DISSENT SUBMITTED BY- SHRI BALAVANT ALIAS BAL APTE, SHRI KIRTI AZAD, SHRI D.B. CHANDRE GOWDA, SHRI HARIN PATHAK, SHRI ARJUN RAM MEGHWAL and SHRI MADHUSUDAN YADAV:

We are in receipt of the draft report discussed on 30/11/2011 on the Lokpal Bill. We have perused the report and there are several substantial questions on which we are unable to agree. We are therefore placing our opinion on those provisions of the report and the bill for your kind consideration. Since the Final Report has not been circulated, the contents of this note should be treated as our Final opinion.

1. On inclusion of the Prime Minister in the Lokpal:

The draft recommendation presented to the Standing Committee does not give a tentative opinion with regard to the inclusion of Prime Minister within the jurisdiction of the Lokpal. The Lokpal is a procedural law. The substantive laws, be it in the Indian Penal Code or Prevention of Corruption Act do not grant any immunity to the Prime Minister from the provisions of penal law. The Code of Criminal Procedure also does not grant any immunity to the Prime Minister from the provisions of the penal law. Thus the procedural law, such as the Lokpal Bill cannot grant to the Prime Minister or any individual immunity from punishment under the substantive penal laws. If such immunity is considered and granted the same may offend the mandate of equality contained in Article 14 of the Constitution. The Prime Minister must be held accountable before the Lokpal in relation to his conduct. We are not in agreement to the suggestion that if a Prime Minister is held guilty of corruption, the nation must continue to accept him and hold him accountable only after he ceases to be a Prime Minister. However, the discharged of the authority like the Prime Minister, in relation to sensitive function of national security and public order could be excluded from the provision of the Lokpal. This would be in consonance with the Bill presented by the NDA government. No immunity would be available in relation to commercial transactions.

2. Citizens' Charter and grievances redressal mechanism:

The draft placed before the Standing Committee has recommended that a Grievances Redressal mechanism should be provide for in order to ensure that neither red-tapism nor delay on account of collateral motives hurts the interest of the citizens. The draft has recommended that this mechanism should be placed in a separate framework and that the proposed Lokpal should not be overloaded with the work of administering this mechanism. We are of the opinion that providing such mechanism is absolutely necessary. It should be ensured that such a mechanism is provided for in the present proposed law itself. The linkage between the Lokpal and the Grievance Redressal Mechanism could also be maintained by providing for an appeal against the competent authority dealing with orders and grievances arising out of the redressal mechanism. A second appeal on limited questions could be provided for the Lokpal itself. The enforceability of Citizens' Charter and Grievance Redressal Mechanism could thus converge under the authority of the Lokpal itself. This would also be in accordance with the Finance Minister's 'Sense of the House' statement that "This House agrees in principal on the Citizen's Charter, Lower Bureaucracy be brought under Lokpal through appropriate mechanism..."

3. Members of the Parliament...vote, speech and conduct within the House:

The conduct of MPs within the House can only be investigated by the House and the authorities constituted in the House itself. Each House is the master of its own discipline and privileges. Thus, it would not be appropriate to allow an outside agency, including the Lokpal to investigate the conduct of the MPs within the House itself. To this extent, we are in agreement with the recommendations of the Standing Committee. However, we are of the considered opinion that the conduct of MPs which takes place physically and geographically outside the House and amounts to an actionable conduct can be investigated as per the Law of the land. There can be no immunity provided to the MPs not to have their conduct outside the House investigated.

4. Provision of State Lokayuktas in this Act:

It needs to be carefully examined whether dealing with Services of the State could be provided for by a central legislation. List II Entry 41 deals with the state public services. It is a subject in the State List. If Constitutionally permitted, we may in this regard have a law under Article 253 or pass an enabling provision under Article 252 in order to provide uniformity throughout the country. In either case this could be done by a Central legislation.

5. Lower Bureaucracy:

The earlier draft has suggested that Gr. C&D staff should be kept out of the ambit of the Lokpal. It has been agreed that all Public servants holding civil post in government should be covered under the Bill. This is in consonance with our view and the 'sense of the House' conveyed by the Finance Minister.

6. False and Frivolous complaints:

The Committee has rightly disagreed with the draft bill which provide for exemplary punishment of five years and/or fine of Rs.5 lakhs in the event of a false and frivolous complaint. The committee has directed that the imprisonment for false and frivolous complaints should not exceed six months. The fine should not exceed Rs.25,000/-. The authority to prosecute for a false and frivolous complaint should be with the Lokpal. We are of the opinion that we cannot deter away people from filing complaints because of fear of a very high punishment/penalty. Proportionality has to be maintained between the crime and the punishment proposed to be imposed. Thus a punishment of a period not exceeding 30 days and/or false fine of Rs.25,000/- should be enough to deal with the false and frivolous complaint.

7. Judiciary:

The Committee has rightly suggested that Higher Judiciary should be kept out of the provisions of the Lokpal. The manner in which the Lokpal has to be constituted cannot be an appropriate mechanism to deal with the judiciary. We agree with the suggestion contained with the draft that a National Judicial Commission be appointed in order to deal with the complaints of misdemeanor against Judges. We further feel that a National Judicial Commission should be the competent authority to deal with matters of both judicial appointments and complaints. There should be a National Judicial Commission, which should comprise of the following:

1. The Chief Justice of India.
2. Two senior most judges of the Supreme Court
3. Minister of Law and Justice of Union Council of Ministers.

4. Leader of Opposition, in the House of the people.
5. Two imminent citizens nominated by a collegium comprising of the Prime Minister, the Chief Justice of India and the Leader of the Opposition in the House of the people.
6. The Chief Justice of the High Court to be a member whenever appointments or complaints in relation to that High Court are to be investigated.

This would require a Constitutional Amendment. The Amendment in this regard can be introduced in Parliament in this session.

8. The Lokpal....Search & Selection:

We have considered the appointment mechanism suggested by the Committee. We are unable to agree with the appointment mechanism suggested in the draft report. In our view, the mechanism should comprise of a Selection Committee consisting of the

1. Prime Minister of India
2. A Minister in the Union Council of Ministers, nominated by the PM.
3. Leader of the Opposition, in the House of the people.
4. Leader of the Opposition, in the Council of States
5. Two judges of the Supreme Court nominated by the CJI in consultation with the Collegium of five(5) Senior Judges of the Supreme Court.
6. Central Vigilance Commissioner.

We are unable to agree to the suggestion made in the draft report that it is not mandatory to have a Search Committee. It is extremely important that a Search Committee should be appointed to undertake the spadework in selecting the very best of people to be appointed to Lokpal institution.

There should be at least five members of the Search Committee. It should be headed by an eminent person in order to ensure that the best names are recommended by the Search Committee for the consideration of the Selection Committee.

The Search Committee shall consists of persons possessing an unblemished record. These persons could be persons who have been Chief Justice of India, Comptroller and Auditor General of India, Chief Election Commissioner, Chief Vigilance Commissioner, Cabinet Secretary, Judges of the Supreme Court, Chief Justice of the High Court etc. We would further suggest that the process of short listing of the Lokpal Institution must be a transparent process inviting nominations and publishing the details about the proposed names on the internet. While constituting the Search Committee, due regard shall be given to ensure that historically and socially marginalized sections are represented.

9. The Trinity of Lokpal, CVC and CBI: In search of an Equilibrium:

The CBI is an important limb of the anti-corruption set-up in the Government for investigating and punishing corrupt public servants. The CBI has experience of decades and has evolved as an institution. It has expertise in the matter of gathering evidence in relation to crimes and in investigating the crime as also in prosecuting the criminals. We believe that in recent years the CBI has seriously compromised itself as an institution because it is under the control of the Central Government. We are, therefore, of the opinion that for efficient

handling of the anti-corruption mechanism and maintenance of independent and autonomous character of the CBI as an institution, it is essential that the following steps are to be taken:

- (i) The appointment of the CBI Director is made by the Government of India. This appointment is made under the Delhi Special Police Establishment Act. The independence and autonomous character of the institution depends directly on the personality of the Director. The appointment of the Director of the CBI will have to be taken out of the purview of the Central Government of the day. Thus the appointment of the Director of CBI should be made by a Statutory Collegium which is created by amending the said Act under which the CBI functions. The said collegium should comprises of - the Prime Minister, Leader of the Opposition in the House of the people and *the Chairperson*, Lokpal. It shall be the responsibility of this Collegium to ensure that the best available police officials are appointed at the senior level in the CBI.
- (ii) The Department of Personnel will only be an administrative interface of the Central Government dealing with the autonomous CBI. It shall be responsible for answering questions in the Parliament.
- (iii) In order to ensure that the CBI functions professionally and independently, an additional safeguard should be provided by delinking the investigating wing of the CBI from the prosecuting wing of the CBI. The Director of Prosecution of the CBI should be an independent official and not merely an officer on deputation from the Ministry of Law as at present in the practice. The appointment of the Director of the Prosecution should be made by the same Collegium, which will appoint the Director of the CBI. The Director of the Prosecution should be an officer of the rank of a Special Director in the CBI. The Director of Prosecution shall appoint the CBI Prosecutors who shall take instructions from him. They shall be entitled to independently appraise the evidence and not follow blindly the instructions from the investigative wing of the CBI.
- (iv) The CBI shall report the progress of the cases referred to it by the Lokpal. The CBI must function independently of Central Government as an independent and autonomous agency. The Lokpal shall be entitled to conduct preliminary inquiries and if it is of the opinion that a corrupt public servant needs to be investigated further, it shall refer the matter to the CBI, who shall investigate the same in accordance with the provisions of Code of Criminal Procedures. For the purposes of conducting preliminary enquiries, the Lokpal shall be entitled to create a staff competent to discharge this job.
- (v) The Lokpal should be entitled to perform the function in relation to the CBI which were earlier being performed under Section 8(1) (a) & 8(1)(b) of 'The Central Vigilance Commission Act, 2003' by the CVC.

10. Constitutional Status:

We are in agreement with the recommendations contained with the draft that a constitutional provision could be enacted by amendment providing for the institution of the Lokpal. However, the details of the Lokpal legislation should be provided for a separate law.

11. NGOs, private companies and media organizations:

We have gone through the draft, which has been prepared. The draft is confusing. We are of the opinion that the authority of the Lokpal should extend to investigating public servants/office bearers and organizations connected with the Government or funded by the Government. It is essential that the jurisdiction of the Lokpal should be extended to such organizations, which receives sizeable funding from government, and whose limit is a cap fixed by law i.e. Rs.10 lakhs per annum and are discharging functions of a public character. Any private organization, which does not receive any funding from the Government, cannot be included within the ambit of the Lokpal. For the functioning of the healthy democracy, we cannot afford to have intrusive institutions.

12. Whistle-blowers legislation:

We believe that the whistleblowers protection legislation should simultaneously be enacted as a part of the Lokpal legislation and the Lokpal should ensure the protection of the whistleblowers.

13. Phone tapping:

We are clearly of the opinion that the Standing Committee's recommendation with regard to the present status quo being maintained in the matter of tapping of telecommunications should be maintained.

14. Removal of Lokpal:

We are clearly of the opinion that the proposal that only the Government can move for the removal of Lokpal for his conduct is not appropriate. If a member of the Lokpal is biased in favour of the Government, obviously the Government will not seek his removal. Any 'person aggrieved' should be entitled to move the Supreme Court for removal of the Lokpal. The Supreme Court should have a two-phased procedure. A frivolous complaint against the Lokpal should be dismissed at the initial stage itself. Heavy penalties can also be imposed, if frivolous petitions are filed. If the Supreme Court decides to hear the complaint against a member of the Lokpal, then the detailed procedure of enquiry should be specified in the proposed bill. The power to recommend suspension of a member of the Lokpal pending enquiry should be with the Supreme Court who will forward the same to the Hon'ble President.

15. Budget of Lokpal:

A separate budget head in the Union Budget should be authorized and approved by the Parliament to clear the budget of the Lokpal as an institution. Rules can be framed, laying down detailed guidelines as to the manner in which the members of the Lokpal are entitled to spend the budget.

16. Article 311 to be followed:

Once the Lokpal holds a public servant guilty and liable for disciplinary action, the requirements of Article 311 of the Constitution will have to be complied with. The provisions of Article 311 require that it is only the appointing authority, which can remove a public servant. Needless to say that the appointing authority should give 'due regard' to the recommendations of the Lokpal. In case, it chooses to disagree with the recommendations, it will have to give reasons in writing.

17. Complaints against the Lokpal Staff:

A statutory Tribunal should be created by the Bill, which should hear the complaints against the members of the administrative staffs of the Lokpal. Since, the senior members can delegate the functions, which may be prescribed by rules, it is important that this complaint redressal mechanism should be completely independent and autonomous.

18. Quantum of Punishment:

The cancer of corruption has spread very deeply and it has entered into the vitals of the system. Therefore, the quantum of punishment prescribed for the guilty should be such that, it acts as a deterrent. There should be time limit prescribed for the Lokpal, i.e. six months after initiating an enquiry against the delinquent public servant. Similarly, the Act must provide for creation of special benches of High Court, which shall in time-bound manner endeavor to dispose off the appeals against the Lokpal.

Thanking you.

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|---------------------------------------------------------------------|-------------------------------------------------------|
| 1. Sd-
(KIRTI AZAD)
Member, Lok Sabha. | 2. Sd/-
(HARIN PATHAK)
Member, Lok Sabha. |
| 3. Sd/-
(BALAVANT <i>alias</i> BAL APTE)
Member, Rajya Sabha. | 4. Sd/-
(ARJUN RAM MEGHWAL)
Member, Lok Sabha. |
| 5. Sd/-
(MADHUSUDAN YADAV)
Member, Lok Sabha. | 6. Sd/-
(D.B. CHANDRE GOWDA)
Member, Lok Sabha. |

(ii) MINUTES OF DISSENT SUBMITTED BY SHRI RAM JETHMALANI

I have gone through the draft report on the Lokpal Bill, hereafter called the Report. I however find that I am unable to agree with some recommendations made in the report. I, therefore, submit the following note of dissent.

BRINGING THE CBI UNDER THE LOKPAL

This is my major point of concern and dissent. One has only to recall the glorious history of the CBI and its present state of degradation. It owes its horizon to corruption offences committed during the Second World War. It was intended to bring the offenders to book. For quite sometime its record was excellent. It enjoyed the confidence of the Courts as well as the people. It is a great misfortune for the country that today it is no better if not worse than any other police organisation or investigating agency.

I must start with what a three Judge Bench of the Supreme Court of India had to say in a judgment Centre for Public Interest Litigation & Anr. Vs. Union of India and others Paragraph 28. It is reproduced here under in full:-

“28. While CBI had to explain this averment made in para 18 of the writ petition, if really it wanted to convey to the Court as to the non-availability of Part II file to comment on the above allegation, one would have expected CBI to come forward with a simple explanation that it is unable to respond to the above allegation in view of the fact that the said file was not traceable instead of averring in the affidavit that no such file is in existence. The use of the words “no such file” clearly indicates that what CBI intended to convey to the Court in the first affidavit was to tell the Court that such file never existed and it is only when the reply to the said affidavit was filed by the writ petitioners with a view to get over the earlier statement, the second affidavit was filed by Mr. Raghuvanshi interpreting the word “existence” to mean “not traceable”. In the circumstances mentioned hereinabove, we are unable to accept this explanation of CBI and are constrained to observe that the statement made in the first affidavit as to the existence of Part II file can aptly be described as suggestio falsi and suppressio veri. That apart, the explanation given in the second affidavit of CBI also discloses a sad state of affairs prevailing in the organization. In that affidavit, CBI has stated before the Court that Part II file with which the Court was concerned, was destroyed unauthorisedly with an ulterior motive by none other than an official of CBI in collusion with a senior officer of the same organisation which fact, if true, reflects very poorly on the integrity of CBI. We note herein with concern that courts including this Court have very often relied on this organization for assistance by conducting special investigations. This reliance of the courts on CBI is based on the confidence that the courts have reposed in it and the instances like the one with which we are now confronted, are likely to shake our confidence in this organisation. Therefore, we feel it is high time that this organisation puts it house in order before it is too late”

The Supreme Court had to say this even though four years earlier in another case Costao Fernandez vs. State at the Instance of S.S.P. CBI Bombay in (1996) 7 SCC 516 paragraph 7 and 8 held-

“7. The CBI says the injuries were self-inflicted. The CBI has taken this stand because, according to it, the appellant had an ulterior motive in killing the deceased, which was to share reward relating to recovery of smuggled gold worth Rs. 28 lakhs. The reward had, however, become due in 1984 and the present occurrence had taken place on 16-05-1991. How far-fetched is the imputed motive? The High Court itself has disbelieved this and has really criticized the CBI for suggesting the same. This is, however not all. As the further case of the CBI is that no records were placed before it to show that the appellant had prior information of smuggling, following which the smuggler was chased. Another material used against the appellant is his so-called abscondence.

8. None of the aforesaid has legs to stand, as would appear from what is being stated later. A biased investigation of the type at hand from the CBI has indeed pained us, because people of this country have still high hopes from it, which would get dashed if bias creeps in its investigation. But, then the deceased was no ordinary mortal, as he was a brother of the one time Chief Minister of Goa; and the occurrence had taken place in Goa.”

These two paragraphs show how it is instrument of serious miscarriage of Justice.

I am not exaggerating but I believe that I have tremendous experience of the criminal side of our justice system and the way CBI has become a shameless instrument of the evil political design of the ruling government. My experience convinces me that the CBI has got to be rescued from this infamy and the nation saved from the grave consequences of its misdeeds. The present system of supervision has become hopelessly inadequate and much more effective one has to be imposed upon it.

I could quote instances a galore. The first instance that comes to my mind is Bofors investigation and the role of Ottavio Quattrocchi. When investigation outside India revealed that Mr. Quattrocchi had received a large amount of money in a foreign bank because he had assured the Swedish Company that the deal will go through by a designated date and it did. An Ex-Director of the CBI for whom I have great respect immediately informed the then director of the CBI that now that Quattrocchi's name has appeared and there is reason to believe that he is a conspirator, immediate steps should be taken to arrest him. This was not done. The written request and advice of the earlier CBI Director is on record and is available. Quattrocchi was not only able to fly out of the country but his wife, whom he left behind, sold out all the Indian assets of the family and without challenge or hindrance quietly walked out of the country. thereafter a pretence of effort to extradite him from abroad was enacted but without any genuine intension of securing his extradition.

Kindly enquire how the Malaysian Court refused the request for extradition because the CBI did not carry out the simple request of the Judge to supply him with a summary of implicating evidence against Quattrocchi. Arrogantly and almost in language which in India would be contempt they told the Judge that they have filed a large number of volumes of evidence and the Judge could find the evidence for himself clearly inviting a dismissal. Crores have been spent on this pretended performance first in Malaysia and then elsewhere.

As hereinafter explained the appointment of the Director and Officers of equivalent status should be totally immunized from government's interference or influence. In the following pages you will find other instances of this unpardonable misdemeanor.

The entire reason for the Lokpal is to have an institution independent of the government for investigating corruption involving the government so as to avoid the conflicts of interest involved in a government controlled agency investigating corruption in the government. The Report proposes that the CBI be the main anti corruption agency and that it be left in the administrative control of the government, with only some vague and weak supervisory jurisdiction of the Lokpal in the same manner in which the CVC currently has that supervisory jurisdiction. This would be totally unsatisfactory and would leave the CBI under the control of the government through its power of postings, transfers, promotions and disciplinary control. Using these powers the governments of the day have been misusing the CBI for their own political purposes despite the supervisory jurisdiction of the CVC.

I have equally strong views on including the Citizens Charter And Public Grievance Redressal mechanism in the text of the Bill. Similarly the dissent of some Members of Parliament on Vote, Speech and Conduct within House has my approve. I believe that some members have put in their dissent and I endorse it.

I do wish to recall my great appreciation of the work that you have accomplished as a Chairman of this Committee. I believe the Committee has unanimously recorded their admiration.

My comments on the CBI do not retract from the presence in their force of some honest officers but they don't seem to prevail.

I hope this reaches you within time.

Sd/-
(SHRI RAM JETHMALANI)
Member, Rajya Sabha.

(iii) MINUTES OF DISSENT SUBMITTED BY SHRI RAM VILAS PASWAN:

(i) It may be recalled that the glass of juice that Anna Hazare drank to end his fast at the Ramlila maidan was offered by a little Dalit girl and a Muslim girl. This symbolic act was a clear acknowledgement that they presented groups that are among the foremost victims of a social order which is still far from equal. It is a stark reality that even 60 odd years after Independence, the SC & STs, women, minorities and OBCs continue to suffer from discrimination in almost every walk of life.

(ii) It may be recalled on several occasions the subject matter came up for discussion in the standing committee as also when Team Anna appeared before the committee. From the deliberations one got the general impression that reservation in Lokpal and search committee would be given for this groups. But in the last meeting position was change and therefore I gave my note dissent on the subject.

(iii) I strongly object to the ambivalent clause in the Report that insinuates that reservation of positions in the Lokpal and Search Committee will be optional and not mandatory. I wish to emphasise that the Search Committee and Lokpal must have reservation for SC/ST, OBCs, Minorities and Women to the extent of 50% of the total so that it represents and inclusive secular polity. Anything short of this basic requirement is unacceptable to me.

(iv) I have serious reservations regarding the recommendations of the Standing Committee on the Lokpal Bill.

(v) Most importantly, I strongly object to the ambivalent clause in the Report that insinuates that reservation of positions in the Lokpal is desirable but optional. I wish to emphasize that the Lokpal must necessarily have representation of women, SCs & STs, OBCs and minorities in the apex body to the extent of 50% of the total so that it represents our inclusive secular polity. Anything short of this basic requirement is unacceptable to me and my party.

(vi) I have grave reservations regarding the Committee's recommendation to include Group 'A' and 'B' officers (totaling about one million), corporates, private NGOs and media within the Lokpal ambit, as this mandate when combined with the inquiry, investigation and prosecution procedures spelt out in paras 49 to 81, will not only spawn a massive Lokpal bureaucracy that is another Frankenstein monster similar to that envisaged in the Jan Lokpal Bill but will destroy all existing institutions such as the CBI, the CVC, the internal vigilance apparatus in all govt. organizations, which have been painstakingly built up over the decades. Let me explain my reasons for this seemingly harsh judgement.

(vii) The Standing Committee has recommended that the preliminary enquiry will be done by the Lokpal for which it will have a "sufficiently large internal enquiry division" and it has also been mandated that no complaint except a trap case can be closed without inquiry. Is the Committee aware that the CVC which deals only with Group 'A' officers of Central Govt. and PSUs was required to give its advice on 5327 cases involving Group 'A' officers in 2010? By adding Group 'B', NGOs, media, corporates and politicians, the Lokpal will have to deal with 30,000 to 40,000 cases and possibly more, every year covering the length and breadth of the country. The mammoth task of conducting preliminary enquiries into all these cases would require thousands of enquiry officials and their paraphernalia in various parts of the country. Presently, the preliminary enquiry in most cases is done by the internal vigilance

of each organization. On top of this, the Committee also envisages a separate prosecution division under the Lokpal.

(viii) The Committee has recommended that in all cases, the investigation will be done by the CBI, which presently deals only with major cases of corruption. By entrusting all vigilance cases of Lokpal covered employees to the CBI for investigation, we are ensuring that the CBI is unable to handle even a small fraction of the workload with the existing strength. The CBI will certainly insist on a massive increase in its manpower, while at the same time, it will be frittering away much of its energies on relatively petty cases.

(ix) The Committee has proposed that after the investigation is conducted by the CBI, the case will be referred back to the Lokpal which will then give the public servant an opportunity to be heard. What this entails is that every charged employee from any part of the country will have to appear before the Lokpal Board before the chargesheet is issued. This is a patently absurd and unworkable suggestion.

(x) My greatest worry is the adverse impact that an overarching Lokpal will have on all govt. institutions. With disciplinary powers largely in the hands of the Lokpal, thereby emasculating the management of the different offices, there is bound to be organizational atrophy and paralysis.

(xi) I have highlighted the main issues on which I differ with the Committee's recommendations. May I also point out that my self and the Secretary General of my Party have sent four letters to the Committee highlighting my party's views on the Jan Lokpal Bill, the Government draft and what my party envisages should be the structure and powers of the Lokpal. For some reasons, the content of the letters have not been mentioned in the Report. For ready reference, I am enclosing another copy.

Sd/.

(RAM VILAS PASWAN)

(iv) **MINUTES OF DISSENT SUBMITTED BY SHRI SHAILENDRA KUMAR:**

Note of Dissent by Shri Shailendra Kumar

I have following dissensions over the recommendations of Lokpal Committee. These should also be included in the recommendations and report.

Citizens Charter and Public Grievance Redressal Mechanism

According to the para 1.8 of the draft report of the standing committee, at the end of the discussions held on 27th August, 2011 over the issue of Lokpal, the Minister of Finance Shri Pranab Mukherjee had given the following statement in the House:

“This House agrees in principle on the Citizens Charter, Lower Bureaucracy to be brought under Lokpal through appropriate mechanism and Establishment of Lok Ayuktas in the States. I will request you to transmit the proceedings to the Department-related Standing Committee for its perusal while formulating its recommendations for a Lokpal Bill.”

From this it is clear that it was the desire of the House to bring the issue of Citizens Charter within the ambit of Lokpal. And if it is not done then it would appear that the Standing Committee is violating the proposal of the House. Hence, it is my suggestion that the issue of Citizens Charter should also be included in Lokpal Bill by adding another chapter to the Report. I am annexing a draft of this Chapter along with this note (Annexure- ‘A’)

The mechanism suggested in the Annexure would be completely decentralized in its nature and this would facilitate public in getting their grievances addressed at the block or district level itself. There will be no direct appeal to the members of the Lokpal in this mechanism. This mechanism would also negate the apprehension that Lokpal would be overburdened by the complaints and thus it would be rendered defunct.

On the contrary if a penalty is imposed on the head of a department, he would immediately ensure that the Citizens Charter is not violated and such grievances are redressed

immediately. After some time people would not be required to file a complaint and the number of complaints would instead start decreasing.

Group 'C' Employees

During a discussion in the House on 27th August, "The Sense of the House" included bring the corruption of lower level officials under the ambit of Lokpal. Whether this Committee is not once again violating the proposal of the House by deviating from this?

In most of the corruption cases officers and employees from top to bottom rung of the bureaucracy are involved. In such a situation, how can we claim to establish an effective mechanism against corruption by creating separate investigation agencies for higher and lower bureaucracy? What would be the effect and utility of Lokpal if, 95 per cent Government employees are not included within the ambit of this institution? General Public have to deal with these Government employees in their day to day life. Police Inspector, Ration Inspector, School Inspector, Sales Tax Inspector, Tehsildar, Patwari, corrupt Junior Engineer of NAREGA etc are the officers whose act of corruption victimises each and every citizen of the country. Allowing them to continue their corrupt practices or to handover them to any weak institution would prove to be fatal for anti-corruption mechanism. Therefore, I strongly demand to bring the group 'C' employees also under the ambit of Lokpal.

It is said that by bringing 60 lakh employees within the ambit of Lokpal the volume of work of this institution would increase to such an extent that the Lokpal would not be able to handle it. Hence a separate agency would be entrusted the corruption related issues of group 'C' and 'D' employees. I wonder that if a separate agency can handle 57 lakh employees, why not the Lokpal itself.

The Prime Minister and Lokpal

I agree with the point in view of the sensitivity of the office of the Prime Minister, he shall be kept out of the ambit of the Lokpal. However, except the issues related to the national security, nuclear, defence and foreign policy, the office of the Prime Minister may be brought within the ambit of the Lokpal.

Selection of Members of Lokpal

I do not agree with the suggestion made by the Standing Committee in respect of selection committee. This selection committee consists of 5 members. Out of these 5 members, Prime Minister and the Speaker, Lok Sabha are from the Ruling Party. In additions to this the Leader of the Opposition is also a member of the selection committee. In this perspective, a question arises that when accusations of corruption against these persons would come within the ambit of Lokpal, would they ever like to select a strong & effective Lokpal?

Another member in the selection committee, would be jointly suggested by the CVC, CAG and the Chairman, Union Public Service Commission (UPSC). In my opinion, these three persons could never reach a consensus on a common name. There is every possibility that some names would be suggested to them by the Government and they would reach a consensus on of the names. Therefore, it is my suggestion that selection committee should consist of the following members:-

1. The Prime Minister
2. The Leader of Opposition in the Lok Sabha
- 3&4. One Judge of the Supreme Court and one Chief Justice of one of the High Courts.
(Their names' selection would be done by a full bench of the Supreme Court).
5. Chief Vigilance Commissioner
6. Chief Election Commissioner
7. Comptroller and Auditor General of India

Search Committee

As all members of the selection committee would be very important persons and they would also be very busy. It is, therefore, necessary that a joint search committee should be formed by including some retired and distinguished citizens. The search committee should invite public to propose some of the names and then submit the names to selection committee after shortlisting for their consideration.

Search committee should consist of ten members out of these five members should have retired as Chief Justice, Chief Election Commissioner, Comptroller and Auditor General of India and Chief Vigilance Commissioner. (person included in the search committee should be unblemished, independent of any political outfit and should not be holding any public office

after retirement). While these five names of the members for search committee would be determined by the selection committee, these five members together would choose another five members from the civil society. The five members of civil society would be the distinguished persons from Scheduled Caste, Scheduled Tribes, Other Backward Castes, Minorities and women. Thus, selection committee would consist of ten members out of these 5 members would be retired persons and 5 from the civil society. It is essential that 50 per cent members from these must come from SC, ST, OBCs, Minorities and women.

Selection committee and the search committee would take note of that fact that while selecting the Lokpal, 50% of the members must have representation from all the sections of the society like SC, ST, OBCs, Minorities & women.

Process of shortlisting the names for search committee.

Draft Report of the Standing Committee is silent about the selection process. The selection process must be completed in transparent manner with public participation, and such process must be categorically mentioned in the Bill itself. Our experience tells us that due to non-availability of categorical selection process the Government of the day have been making arbitrary appointments as head of the institutions. In this process incompetent persons close to and faithful to some political families get appointed to such institutions and thus these institutions deviate from their objectives. It is, therefore, my suggestion that following selection process may be incorporated in the Statute:

1. The search committee shall invite suitable nomination for the office of Chairman and members of Lokpal from distinguished persons or groups of various sections.
2. Only persons with integrity and with vast experience (particularly against corruption) in public service could be nominated for the office of the Chairman and members of the Lokpal.
3. While recommending the nomination, it would be essential to provide the basis of eligibility of the candidate for that office, his contribution against corruption and details of any type of accusations labeled against him under any law as also any other details that search committee may prescribe.

4. The search committee would collect maximum details about the background of these candidates and their achievements through other mediums.
5. After receiving the details of nominated candidates, it would be put on website in order to invite reactions of the public regarding their eligibility and ineligibility.
6. Keeping in view above information, the search committee would prepare a unanimous list of shortlisted probable candidates for the office of the Chairman and member of Lokpal as far as possible. This list would contain thrice the names of the number of vacancies.
7. In case three or more members of the search committee express reservations about any of the candidates his name would not be included in the shortlist.
8. Before sending the list of shortlisted candidates to the selection committee, the details of such candidates would be put on the website and again the information from general public would be invited thereon.
9. Keeping in view all the informations, the selection committee would select the chairman and members of Lokpal from amongst the candidates included in the shortlist. This selection as far as possible would be unanimous. If three or more members of the selection committee express reservations on the name of the candidate, selection of such candidates would not be considered.
10. After selecting eligible candidate for the office of chairman or members of the Lokpal the Selection committee shall seek consent of selected candidates before forwarding it to the President for final approval.

Lokpal and Central Bureau of Investigation (CBI)

At present CBI is under the control of the Government and we all know how the Ruling Party in the Centre has been misusing the CBI for furthering their interest. Hence, there is an urgent need to bring the CBI out of the control of the Government.

Now the question arises that whether CBI should be made an autonomous body or be brought under the control of Lokpal. To make the CBI an autonomous body would mean to create an institution which will have all powers of the police but would not be accountable to anyone. Such an institution could become a threat to our democracy in future. Therefore, I am of the opinion that CBI may be brought under the control of Lokpal with following provisions:

- (a) Selection of Director, CBI should be made in the same manner as the members of Lokpal.
- (b) Director, CBI shall be under the Lokpal.
- (c) The Central Government would have no role to play or intervene in formulation of its policy or otherwise. All the work related to CBI shall be done by Lokpal.

Process for removal of Members of Lokpal

Who will be vested with the power of removal of Chairman or members of Lokpal in case they have been found involved in corruption? Government wants that this power should exclusively vest in it. I am of the view that this power should be given to the public. Any person could file a complaint against the Chairman or the members of Lokpal the Chairman or the members of Lokpal in the Supreme Court. After hearing the complaint the Supreme Court should decide whether there is prima facie case or not? If there is a case, the Supreme Court shall direct removal of chairman and member of the Lokpal after getting it investigated within three months.

In case of false and baseless complaints being made against the chairman or members of Lokpal. The Supreme Court should have power to impose heavy fine or imprisonment so as to deter public from unnecessary wasting the time of the Supreme Court. The power to suspend the Chairman or members of Lokpal against whom, the complaints are under consideration should be with the Supreme Court and not with the Government.

Autonomy and Independence of the Lokpal

It is very important that Lokpal should be completely free from Government's control. It has been observed in the past that when the Government is not comfortable with an institutions, it stops funding them adequately in order to cripple their functioning and render them

ineffective . Here Lokpal would go into the depth of highest level corruption, it is obvious that it could buy the wrath of those in the Government in some of the cases.

Therefore, following provisions are necessary to make the Lokpal autonomous and independent:-

1. In order to make Lokpal financially independent a certain percentage of Government of India's expenditure may be fixed for Lokpal which could be as little as 0.1% of the total expenditure of the Government. Lokpal could ask for budget for spending on any item within the limit of the said allocation which could be placed for approval of Parliament. Lokpal, instead of forwarding its budget to any Ministry, would place it directly before the Parliament. The Parliament shall directly approve its budget.

In order to prevent misuse of funds for personal benefits or private amenities, a provision could be made that the pay scales of members of Lokpal and employees would be at par with the pay scales of similarly placed officials in the Government of India. Lokpal would seek the approval from Parliament for any modifications therein.

2. Lokpal shall be completely independent of the Government for its administrative, economic and functional activities.
3. Lokpal would not be required to get any of its expenditure approved from any Ministry.
4. The appointment of the officers of Lokpal shall be made according to the rules made by the Board of Lokpal (consisting of the Chairman, all members of the Lokpal).
5. Lokpal shall appoint a Secretary whose hierarchy would be at par with the Secretary to the Government of India.
6. Lokpal shall be free to make appointments of judicial officer, advocates, senior advocates etc. for their various functions.

7. In the official Bill the power to formulate rules regarding working of Lokpal has been retained with the Government in respect of many issues. As a consequence the Government is getting overwhelming powers to interfere in the working of the Lokpal. Misusing these powers, the Governments could pose unwarranted hindrance in the working of Lokpal. The Power to formulate rules in respect of working of Lokpal should vest exclusively with the Lokpal. The Government should have no power to formulate any rule regarding Lokpal without its concurrence.

Removal of Government Employees from Service:

After the completion of an inquiry the case would be referred to the trial court. In addition to this the officer shall be liable for departmental penalty. In the official Bill there is a provision for imposition of departmental penalty by the Minister of the concerned Department on the employees working under him. It is not possible to abide by the same owing to the close relation between the minister and the employees working under him since they work in close coordination. There is every possibility of their being hands in gloves.

Therefore it is my suggestion that the Lokpal Bench should offer the accused an opportunity to be heard in public and reach the decision for imposition of the departmental penalty. Lokpal would suggest the penalty to be imposed by the Appointing Authority of the accused officer. The Appointing Authority within a month of receipt of the report of the Lokpal shall take a decision on the action to be taken according to report within one month of the Report. In case the Appointing Authority prefers to disagree with the suggestions of the Lokpal, same would be intimated to the Lokpal after recording the reasons therefor. In case the Lokpal feels necessary he would move the Court against this.

A bench comprising of the Members of the Lokpal shall deal with the matters related to senior officers. But in order to deal with matters concerning Junior officers a bench comprising of appointed judicial officers may be constituted.

Complaints against Employees of Lokpal:

According to the provisions of the draft of the official Lokpal Bill, the Lokpal itself would conduct inquiry into the complaints related to its own employees. This shall create a paradoxical situation.

I suggest that for this an independent complaint Authority may be constituted on the lines of suggestions given by the Hon'ble Supreme Court for police reforms. For this the following chapter would be required to be added to the official Lokpal Bill.

Independent Complaint Authority:

A complaint authority shall be constituted at the national level and one or more such authorities shall be constituted at State level to hear the complaints against the officers and employees of Lokpal.

2. The procedure for selection to such authorities shall be same as for the members for the Lokpal and it shall be done by the same Committee.

3. The Chairperson of the authority shall be a retired judge of the High Court. In addition to this it shall also have two retired government officers and two other distinguished citizens.

4. The complaint authority shall conduct open hearing of the complaints against the employees of the Lokpal and shall take a decision on every complaint within two months of

its receipt. The employee of the Lokpal shall be given every opportunity to defend himself. If the accused employee is found guilty of misconduct, or of unfair inquiry or corruption, then the Complaint Authority may order his removal, dismissal or reduction in rank.

5. The final order of the complaint authority shall be appealable to Supreme Court under Article 226 of the Constitution.

6. If the Authority feels it appropriate it can order suspension of the employee of the Lokpal.

7. The Lokpal shall also bear the expenses incurred on the business of the complaint Authority.

8. The business of the Authority shall be transacted in the benches as per rules made under this Act.

Punishment in cases of Corruption:

In case a company or its employees is punished under Prevention of Corruption Act such company and all other companies associated with the promoters of such a company shall be barred from transacting business with government in the future. If any employee is punished for corruption, he shall be removed from his office.

Procedure for Time Bound Appeal:

At present it takes many years for a decision by the High Courts in corruption case, therefore, a provision for constitution of special division benches of the High Court for exclusive hearing of cases under Anti-Corruption law shall be inserted in the law. The law should provide that hearing of such appeal shall be concluded within a period of not more than six months.

The Judges of special courts (at trial level) hearing cases under Prevention of Corruption Act and the judges of the Appellate Benches constituted in the High Courts for hearing these cases shall exclusively hear the cases of Prevention of Corruption Act.

Incentives to Whistleblowers:

Encouraging persons against corruption.

The Lokpal shall put in place the appropriate incentive schemes to encourage government employees and other citizens to raise their voice, against corruption, to provide information and encourage spirit of providing evidences about corruption and the amount of such incentive award shall not be more than 10% of the amount recovered either out of the loss suffered by the Government or expected loss to the Government.

Protection to Whistleblowers:

Persons raising voice against corruption either by using Right to Information or otherwise are being targetted across the nation. They are being victimized and are also subject to attacks. There is apprehension that no sooner than some person lodges a complaint with Lokpal he would be subjected to harassment. In such a situation only the Lokpal will be better placed to provide security to the complainant since it would be well conversant with the case. But to tackle this problem, the Government is bringing a separate bill where the authority to provide security to the person raising voice against corruption will vest with the Central Vigilance Commission instead of the Lokpal. In the year 2003, the Supreme Court in the matter of Satyendra Dubey's Murder had appointed Central Vigilance Commission (CVC) as the nodal agency to provide professional and physical security to the Whistleblowers. But during past 8 years despite receiving a huge number of applications the C.V.C. has failed to provide security even to a single person. It is because that the CVC

neither has the resources nor the authority to do so. During the last few years 13 Right to Information activist have been murdered and CVC has failed to provide security to any one of them. Even the Standing Committee of the Parliament stated in their point that the CVC is not the appropriate institution for this work. I therefore, strongly opine that the responsibility of providing security to the whistleblowers should vest with Lokpal.

Annexure 'A'

Definition: 'Grievance' means a claim made by any person who did not get a satisfactory solution as provided in Citizen's Charter even after contacting the Head of a department.

Chapter:

1. After the enforcement of this law every public authority shall in a reasonable time, but within maximum of one year, formulate a citizen's charter.
2. Every Citizens' Charter shall clearly mention the committed time frame and business being transacted by the officers responsible for completion of the work within given time frame.
3. If any public authority fails to formulate a citizens' charter within an year of the enforcement of this law. The Lokpal after the deliberation with that public authority shall itself formulate the Citizens' Charter and it would be binding upon the Public Authority.
4. Every public authority shall assess the necessary resources required to implement its Citizens' Charter and the government shall provide the said resources.
5. Every public authority, in its office where it may be, shall nominate one employee as the public grievance officer. In the event of violation of the Citizens' Charter a citizen will be able to complain to such Public Grievance Officer.
6. The senior most officer in every office shall be nominated as the public grievance officer.
7. It will be the duty of the public grievance officer to receive complaints regarding violation of Citizens' Charter and to address them within not more than 30 days time.
8. In the event of a complaint, not being addressed within the stipulated time frame of 30 days by the public grievance officer, a complaint can be lodged with the Head of the Department.
9. If the head of the department also fails to address the problem within 30 days, a complaint can be made to the Judicial officer of the Lokpal.
10. Lokpal shall appoint at least one judicial officer in every district. This number may be more, depending upon the quantum of work in every district. Lokpal shall appoint Judicial officers from amongst retired judges, retired government officers or such kind of ordinary citizens.
11. If in the opinion of the judicial officer, the complaint has not been addressed in an appropriate matter, he shall penalize the responsible officer for the non redressal of the grievance after giving the related parties an opportunity for hearing. The penalty for delay in grievance redressal shall not be more than Rs.500 per day and Rs.50,000 per officer. This amount shall be deducted from the salary of the accused officer for responsible. In such cases, if aggrieved person is socially or economically backward, the amount of penalty to be recovered from the responsible officer will be double.
12. In such cases the Judicial officer of the Lokpal shall also order the concerned officer to address the complaint of the complainant in a given time frame.

13. Recurrence of similar nature of complaints received against an officer, it will be treated as corruption.
14. In the event of recurring complaints being received against an officer, the judicial officer shall recommend to the division bench of Lokpal for removal or reduction in the rank of the responsible officer for such complaints. The division bench after duly hearing the officer shall recommend such stringent action to the Government.
15. Every public authority shall review its Citizens' Charter once a year and shall bring appropriate changes. The review shall be done in the presence of the representative of the Lokpal and through public deliberations.
16. The Lokpal can order for incorporating changes in the Citizens' Charter of the public authority. But such changes have to be approved by the three member division bench of the Lokpal.
17. The concerned public authority shall implement the order of the Lokpal to make changes in the Citizens' Charter within one month of the receipt of such order.
18. The social audit of the work of every judicial officer shall be done once in every six months. In such social audit the judicial officer shall present himself before the public, and present all facts related to his work, shall answer all question asked by the public and shall incorporate the suggestions of the public in his procedure. Such public hearing shall be done in the presence of the senior officer of the Lokpal.
19. No case shall be closed until the complaint of the complainant is addressed or it is rejected by the judicial officer.

Sd/-
(SHRI SHAIENDRA KUMAR)
Member, Lok Sabha

(v) MINUTES OF DISSENT SUBMITTED BY SHRI PRASANTA KUMAR

MAJUMDAR:

As has been widely acknowledged by overwhelming sections of our society, unabated rise of corruption and incidents of scams are attributable to the policy of economic liberalization being mindlessly pursued by the successive governments since the early 1090's in the country without caring for the need of putting in place adequate regulatory measures and/or ensuring transparency.

Even the commitment for putting in place the mechanism of 'Ombudsman' (Lokpal) have witnessed wavering by Government of the day since 1967. The present Lokpal Bill, 2011, therefore, holds out yet again a substantial potential for the Parliament to make good for the lost opportunities by bringing in an effective Law; in the backdrop of the enormous dimension and magnitude of corruption witnessed by the society virtually since independence of our country, in its attempt to usher in a corruption-free system of governance. Since India is a country comprising vastly of poor population and knowing that corruption hurt them the hardest, by any attempt to combat the 'corruption' if made in a half-hearted manner we would not only be failing in our duty to protect the basic interest of the poor but would also be inviting the wrath of the affected citizens which would, in turn, weaken Indian democracy- the signs of which have off late started surfacing in various forms and substance.

Viewed in this perspective, the Draft of the 48th Report of the Standing Committee on the 'Lokpal Bill, 2011' has disappointed us as it has failed to hit at the root of corruption in our society in several critical areas where it has been seen to be prevailing mostly and, hence, I, on behalf of the Revolutionary Socialist Party, feel constrained to register dissent note on some of the Committee's recommendations as detailed hereunder:-

Chapter 4: Citizen's Charter and Grievances Redressal Mechanism:

While the recommendation in para 4.16 is appreciated, I would like to reiterate the suggestion made in my letter to the Chairman dated 4/11/2011 that the proposed mechanism on the Citizens' Charter and Grievances Redressal should be given a Constitutional Status in order to prevent its casual amendments/manipulation.

Chapter 5: Inclusion/Exclusion of Prime Minister:

While I take note that on the issue of inclusion or exclusion of the Prime Minister under the Lokpal Committee will be awaiting the outcome of its deliberations scheduled for Nov.30 & Dec. 01, 2011, I take this opportunity to reiterate our party stand that Prime Minister and PMO must be included within the ambit of the Lokpal because Prime Minister is not above the Law and nor is he immune to the Indian Penal Code or Cr. PC in the matter relating to the Prevention of Corruption Act, keeping him out of the Lokpal will not be justified. Notably, Prime Ministers in several other democracies of the world are included within the provision of Ombudsman.

Chapter 8: Inclusion of Lower Bureaucracy under the Lokpal:

The common man (aam admi) experiences 'corruption' at the lower level of bureaucracy who are entrusted with the responsibility of delivery of public services, like issuing of Ration Card, Birth Certificate, ST/SC/OBC certificates, Driving Licence,

Passports, Disbursement of Govt. subsidies and so on, on day to day basis. While the Lokpal Bill is restricted to the Group-A cadre of bureaucracy, it is recommended in the Draft Report (Para 8.18A) for inclusion of Group-B official within its ambit.

Since this will be a half-hearted attempt to combat corruption, we strongly demanded that Group-C employees of Govt/PSUs must be brought under the Lokpal in order to make the system corruption free.

Chapter 10: Corruption in Judiciary:

While we confer with the suggestion contained in para 10.21(ii) of the Draft Report that subjecting judiciary to the normal process of criminal prosecution or punishment through the normal courts of the land would not be conducive to the preservation of the judicial independence in the long run, we demand that a comprehensive provision for facilitating investigation/prosecution and punishment against corruption in the judiciary in a non-complicated manner by an appropriate provision in the proposed Judicial Commission. We demand that this requirement must be fulfilled by providing appropriate mechanism within the Judicial Standards and Accountability Bill, 2010.

We would demand that the above Chapter-wise suggestions may be incorporated in the final Report of the Standing Committee failing which this letter be treated as a Note of Dissent from my side and be annexed to the Final Report of the Committee.

Sd/-

(SHRI PRASANTA KUMAR MAJUMDAR)

Member, Lok Sabha

(vi) MINUTES OF DISSENT SUBMITTED BY SHRI PINAKI MISRA:

1. The Biju Janata Dal (BJD) is firmly of the opinion that the office of the Prime Minister must be included in the purview of the Lokpal Institution. The Constitution framers advisedly did not give the Prime Minister any immunity from prosecution, as they did to the office of the President of India. Similarly the Indian Parliament when enacting the Prevention of Corruption Act did not give the P.M. any immunity from prosecution. In fact this was again advisedly so since, unlike in the United States of America, in our system since independence the P.M. has very often held important economic portfolios such as defence, telecom etc., in which ministries there have been numerous scandals. Therefore there is no reason to grant the P.M. who in our Parliamentary System is "only first among equals", any immunity from the Lokpal's scrutiny, WHILE THE P.M. HOLDS OFFICE.

This can be subject to just exceptions of some sensitive subjects like Space, Atomic Energy, National Security etc. Also a further safeguard could be that the full strength of the Lokpal must decide on a investigation/prosecution of the P.M., with at least a 3/4th majority deciding in favour of such action.

2. The 'A' and 'B' category Govt. Servants in Central Services have already been included as per the Committee's decision. As far a category 'C' is concerned a provision should be incorporated in the Bill that in the event in future the Lokpal believes that there are any "significant decision making level staff" escaping the rigors of scrutiny, and which is significantly impacting the anti corruption drive, the said "C" category staff may also be included. That way the vast number of nearly 57 lakh "C" level employees such as peons, stenographers and typists etc., who really have no important decision making roles, will not burden the Lokpal Institution. The BJD believes the Lokpal at the Centre should be a body of prestigious and reputed persons, served by a honest and compact Secretariat and the discussion which was mooted in our Committee Meetings that a 35,000 strong Lokpal Secretariat could be created to monitor the approximately 60 lakh employees of "A" "B" & "C" category will be extremely impractical due to multifarious reasons.

Further the lower bureaucracy in category "C" in the States, who play an important role in the lives of the people on a daily basis such as SHOs' and sub inspectors of police, junior engineers of various departments such as PWD, irrigation and rural development, excise and civil supplies staff, revenue field staff etc. can all be included under the purview of the Lokayukts in the States, which would make the Institution have a wide base at the bottom, becoming learner and more tightly knitted as it goes up, to tackle the big ticket corruption at the Central level, rather than making it "TOO TOP HEAVY", which may result in collapse of the mechanism before it starts its important work.

3. The independence of the C.B.I. is of paramount importance. The Supreme Court's judgment in the Vineet Narain case envisaging the independence of the C.B.I. has been followed in the breach by all Government since 1998. This is because the C.B.I. has continued to be the favoured hatchet instrument of all ruling regimes, and therefore it has become ineffective in tackling corruption, and that has led to the present clamour for a popular anti corruption crusade leading up to the demand for a vigorous Lokpal by the public.

The decision of the Committee on 30th November to free the C.B.I. Director's appointment from the control of the ruling Government was a salutary step and the decision to reverse the same by majority vote at the meeting of 1st December is MOST REGRETTABLE and appears to have been motivated by vested interests at the Centre. The B.J.D. believes that

since the C.B.I is going to be the principal investigative arm of the Lokpal, it must be released from the tight control of the Central Government as at present.

The post of Director C.B.I. and all Special Directors must be selected by a Selection Committee comprising of the Prime Minister, Leader of the Opposition in the Lok Sabha and the Chairman, Lokpal. This would be an effective way to ensure that in future the ruling party at the Centre is not able to control the C.B.I. through handpicked officers and pick and choose the anti corruption drive to suit their political convenience as has happened repeatedly in the past, leading to severe erosion in the credibility of the C.B.I. and serious weakening of the entire anti corruption drive. Further it has been seen that the C.B.I. has become the exclusive turf of the Indian Police Service, which is not desirable. It should be ensured in future that the C.B.I is staffed with officers from diverse services in order to make it a more representative body. Similarly the post of CVC and the Director of the Directorate of Prosecution (recommended elsewhere by our Committee), should also be released from Governmental controls and be selected by this above suggested independent mechanism. This would truly add to the robustness of the anti corruption movement.

4. The decision of the Committee to recommend separate Constitutional provision for the creation of an independent Citizen's charter is a good step and the B.J.D. hopes that an effective Citizen's Charter and Public Grievance Redress mechanism will be put in place by the Government at the earliest. The B.J.D. believes that the mechanism provided by the Government in the draft Citizen's Right to Grievance Redress Bill which has been put up on the website is inadequate and must be comprehensively changed and redrafted to make it more efficacious. Further since giving effect to this would entail substantial additional expenditure for poorer states like Odisha, the BJD hopes that the Central Government will support the states entirely in terms of the necessary financial outlay in that regard.

5. The B.J.D. also believe that the present Whistleblower's Protection Bill that is pending in Parliament has serious lacunae and has given rise to acute misgivings amongst large sections of Civil society. This must be withdrawn by the Government and a more comprehensive and effective Whistleblower's Protection Bill should be introduced at the earliest.

Sd/-

(SHRI PINAKI MISRA)

Member, Lok Sabha

(vii) MINUTES OF DISSENT SUBMITTED BY ADV. A. SAMPATH:

The people of India are eagerly expecting Parliament to adopt a legislation that will constitute an effective Lokpal authority to curb corruption in high places and in the public sphere. With this in view, I am submitting this note of dissent as I strongly feel the incorporation of the steps mentioned below are essential for a strong and effective Lokpal body to be set up.

1. The Prime Minister should be brought under the purview of the Lokpal.
 2. The Members of Parliament should be brought under the purview of the Lokpal. For Members of Parliament, Article 105 of the Constitution provides protection with regard to freedom of speech and voting. The real issue is that, this freedom and protection does not extend to acts of corruption by Members of Parliament. This should be done through an amendment to Article 105 of the Constitution of India on the lines recommended by the National Commission to review the working of the Constitution.
 3. The powers of the Lokpal should be expanded to include not only Group A and Group B officers, but also officers belonging to Group C and Group D. The provisions for the State Lokayuktas should contain similar counterpart reference for purposes of coverage of all similar categories at the state level which are the same or equivalent to Group A, Group B, Group C and Group D for the Lokpal.
 4. The constitution of the Search Committee should be made mandatory to prepare the panel of names for the consideration of the Selection Committee for the appointment of chairperson and other members of the Lokpal.
 5. The Lokpal should be provided with its own investigative mechanism with exclusive jurisdiction for the Prevention of Corruption Act.
 6. The CBI Director should be selected by the Selection Committee constituted for selecting chairperson and other members of the Lokpal.
 7. The definition of “corruption” under the PCA 1988 is inadequate. Therefore the following needs to be added: “willfully giving any undue benefit to any person or obtaining any benefit from any public servant in violation of any laws or rules.”
7. Lokpal should be given powers to investigate cases which involve business entities and to recommend cancellation of licenses, contracts, lease or agreements if it was obtained by corrupt means. The Lokpal should also have the power to recommend blacklisting companies from getting government contracts and licenses. Similarly, if the beneficiary of an offense is a business entity, the Lokpal should have the power to recommend concrete steps to recover the loss caused to the public exchequer.

Sd/-
(ADV. A. SAMPATH)
Member, Lok Sabha

(viii) MINUTES OF DISSENT SUBMITTED BY SHRI S. SEMMALAI:

I strongly feel that the decision arrived at the Parliamentary Standing Committee on Personnel, Public Grievances, law & Justice relating to the formation of Lokayukta as necessary instrument to contain corruption through a single enactment of Lokpal Bill by the Centre is an infringement of the state's power and intrusion of state autonomy. It would strike at the roots of the federal concept enshrined in the Constitution of India.

Art. 246 of the Constitution empowers the states to make law with respect to any of the matters enumerated in list-III of the Seventh Schedule of the Indian Constitution. By exercising the powers provided under Art. 253 of the Constitution as indicated in the draft report, the Centre attempts to over-ride the independence of the State and relegate the States to a subordinate position. This is quite unacceptable. The concept of federalism, as mandated by the Constitution does not allow the Center to treat the States with over-riding powers and authority. Strong States are vital to a stable and strong Center. The Constitution does not make any difference between Centre and States and the concurrent list enjoyed by the Centre and the States should be to serve the interest of both the limbs.

Hence, I strongly advocate that the states should be given freedom to constitute Lokayukta and the State Legislature should be allowed to decide when and in what manner such a body (Lokayukta) has to be created. The Center's directions in this regard through a Lokpal Act as contemplated in the Committee's report is unwarranted and unjustifiable.

I place on record on behalf of my party AIADMK my dissenting view against the Committee's report in paragraph 16 of page No.143. I urge the Committee to reconsider its view taking into account the strong sentiments and views expressed by the Government of Tamil Nadu and other State Governments and withdraw the portion of the recommendation (Para 16 of Page No.143) contained in the Committee report.

Sd/-
(SHRI S. SEMMALAI)
Member, Lok Sabha

**(ix) MINUTES OF DISSENT BY KUMARI MEENAKSHI NATARAJAN, ADV. P.T.
THOMAS AND SMT. DEEPA DASMUNSHI**

We the undersigned member of the Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law & Justice propose that the 48th Report of the Committee on the Lokpal Bill, 2011 be amended as needed to reflect the following:-

1. The CVC should be placed under the Lok Pal and the state vigilance commissions should be under Lokayukta.
2. Investigations into corruption cases by the CBI shall be subject to the superintendence and control of the Lok Pal.
3. Group C officers shall be included in the jurisdiction of the Lok Pal in accordance with appropriate administrative arrangements.
4. The proposal that Article 311 of the Constitution of India be repealed or amended should be deleted from the Report.

-Sd-

(Meenakshi Natarajan)

-Sd-

(P.T. Thomas)

-Sd-

(Deepa Dasmunshi)

(x) MINUTES OF DISSENT SUBMITTED BY SHRI VIJAY BAHADUR SINGH:

The common man is being harassed and has to pay bribes at each steps whenever he contacts the Governments officials. The quantum of bribe increase with the status of officials. But the common man in majority is harassed by lower officials also and have to grease their palm at the entry level who are mostly lower officials.

Since, in Lokayukta at the state level employees of Class-I to IV have been covered there is no reason or logic of exempting similar Class-C employees in the Central Government from the jurisdiction of Lokpal.

Majority of the poor man are harassed on day to day basis by Class-C employees also in very large degrees. Therefore, it would fair, proper and also in public interest to cover Class-C employees also under jurisdiction of Lokpal.

-Sd-

(Vijay Bahadur Singh)

ANNEXURES

Annexure B

[vide para 2.2 of the Report]

Gist of debates held in Lok Sabha and Rajya Sabha on 27th August, 2011 on the statement made by the Finance Minister on the issues relating to setting up of a Lok Pal

The Minister of Finance made a Statement in both the Houses requesting Shri Anna Hazare to end his fast in view of the appeal made by the Prime Minister in his statement and the sentiments expressed by the Leader of the Opposition and the Hon'ble Speaker, Lok Sabha, on 25th August 2011. He then gave an update of the events covering the deliberations of the Joint Drafting Committee followed by enumeration of the issues on which there was disagreement in the Joint Drafting Committee. He stated that the Government had assured the representatives of Shri Anna Hazare that if a consensus in House emerges over these issues, the Standing Committee would be requested to take into account the same while recommending upon the Lokpal Bill, 2011. Accordingly, Shri Pranab Mukherjee, Honorable Finance Minister apprised Parliament of the negotiations held with Shri Anna Hazare and developments that occurred since the formation of the Joint Drafting Committee comprising of the representatives of the Government and Civil Society. Thereafter, discussions were raised in both Houses to elicit the opinion of the Members *vis-à-vis* issues arising out of the Lokpal Bill in general and over the following three points of discussion in particular. These three points were:-

- Whether the jurisdiction of the Lokpal should cover all employees of the Central Government?
- Whether it will be applicable through the institution of the Lokayukta in all States?

- Whether the Lokpal should have the power to punish all those who violate the 'grievance redressal mechanism' to be put in place?

4.2 Members, during discussions in Parliament, demonstrated serious commitment to evolve effective mechanisms to deal with the menace of the corruption. They were of the opinion that the supreme legislative body should convey a cogent message to the Government to ensure the constitution of a strong and effective institution of Lokpal to root out the widespread corruption. Members acknowledged that the three specific issues raised by Shri Anna Hazare were relevant and they deserved attention while examining the Lokpal Bill.

4.3 Majority of the Members expressed their unanimous and in-principle association with these three issues⁶. For instance, Smt. Sushma Swaraj, Leader of Opposition in Lok Sabha conveying a representative view of her party stated: *“I hereby register the consent of my party on all the three points raised by the hon. Leader of the House”*.

4.4 However, several ideas were floated by the Members about how to proceed while evolving the required legislative frameworks to address the demands of civil society *vis-à-vis* these three issues. The Members were of the opinion that the spirit of the Constitution should not be undermined while providing statutory shape to these three issues. Members, though lauded the need to include the three issues in appropriate legislations but, they cautioned that such legislative initiative must not be inconsistent with the principle enshrined in the Constitution.

⁶ However, most of the Members who participated in debates were not in agreement with many provisions of Jan Lokpal Bill like Prime Minister be brought within the ambit of Lokpal without safeguards and extension of the authority of Lokpal *vis a vis* the Members' conduct in relation to the matters of the House etc.

4.5 With regards to the issue of Public Grievance Redressal Mechanism and the Citizens Charter, Members unanimously acknowledged the necessity of establishment of such mechanisms in all Government of India's Departments/organizations if the objective of good governance was to be attained. However, instead of creating provision in the Lokpal Bill for the purpose, the Members favoured a separate law to deal with these issues. Some Members also drew the attention of the House towards the laws enacted by some State Governments in this regard and suggested that such laws may be considered while legislating upon a central legislation to deal with the issue. Shri V Narayanaswamy, Minister of State for Personal, Public Grievances and Pensions apprised the House that the Government is planning to unveil a separate Bill to provide for an effective public grievance redressal machinery along with making the Citizens Charter a statutory obligation for Government departments/ organizations.

4.6 On the establishment of the institutions of Lokayuktas in States through a single Act, Members did acknowledge the need for establishing effective institutions of Lokayuktas in all of the States. Notwithstanding so, Members were of the view that establishment of Lokayuktas in States should be in accordance with the spirit of our federal polity.

4.7 Apprising the House about the responses of State Governments over the said issue, Union Finance Minister, Shri Mukherjee shared the seriousness and concerns of the Government in this regard with the Members. Also, he candidly requested the Leader of Opposition in Rajya Sabha, Shri Arun Jaitley, who is also an eminent lawyer, to share his opinion over the issue of providing for Lokayuktas in the States in the Central Legislature. Shri Jaitley suggested two alternatives to overcome the federal dilemma over the issue. He put his views as:-

".....One possible option is that you can legislate on areas where the Central legislature has jurisdiction. Where you find that the Central Legislature has no jurisdiction, you have two options -either you leave that part to the States or under Article 252, with the consent of two States, the Central Legislature can bring an enabling law compatible with the Constitutional Scheme....."

4.8 Most of the Members were of the view that a model Bill should be framed in this regard and the States should be given the authority to constitute the Lokayuktas. Members were hopeful that this federal dimension would be earnestly examined by the Standing Committee in the light of relevant constitutional provisions.

4.9 Over the inclusion of lower bureaucracy within the ambit of the Lokpal, Members admitted the need to make all classes of bureaucracy more accountable to the people of this country. However, the question before the Parliament was what would be the appropriate legislative framework for the purpose. There were apprehensions that if all classes of the bureaucracy are brought under the Lokpal, the institution will become overburdened and it will not be able to discharge its responsibilities effectively. Likewise, the Members also pointed out that constitutional protections given to the bureaucrats under articles 311 and 320 should also be taken into account while making provisions in this regard in the Lokpal Bill.

4.10 Shri Sitaram Yechury, Member, Rajya Sabha suggested a very lucid solution in this regard. He put his point as:

".....For the lower bureaucracy, existing vigilance machinery, which is there to oversee them, can be brought under the supervision of the Lokpal. You already have existing vigilance machinery. That can be

brought under the supervision of Lokpal. If the existing machinery is not delivering then the Lokpal can be approached....."

4.11 He and other Members were of the view that while legislating upon the issue of inclusion of lower bureaucracy, the aspects of constitutionality and practical feasibility need to be considered in detail.

4.12 While giving the reply to the debate the Minister of Finance concluded that the House discussed various issues relating to setting up of a strong and effective Lokpal in these words:

"This House agrees in principle on the Citizens Charter, Lower Bureaucracy to be brought under Lokpal through appropriate mechanism and Establishment of Lokayuktas in the States. I will request you to transmit the proceedings to the Department-related Standing Committee for its perusal while formulating its recommendations for a Lokpal Bill."

ANNEXURE-D
[Vide Para 2.5 of the Report]

STATUS NOTE ON THE LOKPAL BILL, 2011

- 4th August, 2011 - Bill introduced in Lok Sabha.
- 8th August, 2011 - Referred to the Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice by Hon'ble Chairman, Rajya Sabha.
- 10th August, 2011 - I. Presentation by the Secretary, Department of Personnel and Training on the Bill.
II. Oral evidence of :-
(i) Anna Hazare;
(ii) Shanti Bhushan,
(iii) Prashant Bhushan;
(iv) Arvind Kejriwal; and
(v) Kiran Bedi..
- 23th September, 2011 - Oral evidence of :-
(i) Smt. Aruna Roy, National Campaign for People's Right to Information; and
(ii) Shri Jayaprakash Narayan, President, Lok Satta Party.
- 24th September, 2011 - Oral evidence of:-
(i) Shri Jayaprakash Narayan, President, Lok Satta Party;
(ii) Shri Ashok Kumar Parija, Chairman, Bar Council of India;
(iii) Shri Pratap Bhanu Mehta, President, Centre for Policy Research, New Delhi;
(iv) Shri Harish N. Salve, Senior Advocate, Supreme Court of India; and
(v) Dr. Udit Raj, President, Indian Justice Party.
- 1st October, 2011 - Oral evidence of:-
(i) Central Vigilance Commissioner; and
(ii) Director, CBI.
- 13th October, 2011 - Oral evidence of :-
(i) Justice M.N. Venkatachalaiah, Former Chief Justice of India; and

- 14th October, 2011
- (ii) Justice J.S. Verma, Former Chief Justice of India.
 - Oral evidence of:-
 - (i) Confederation of India Industry
 - (ii) FICCI
 - (iii) ASSOCHAM
- 21st October, 2011
- Oral evidence of:-
 - (i) National Commission for Scheduled Castes
 - (ii) Delhi Commission for Protection of Child Right's
 - (iii) Federation for Economic Freedom
 - (iv) United Nations Development Programme (UNDP)
 - (v) Transparency International India
 - (vi) PRS Legislative Research
 - (vii) Akhil Bhartiya Vidhyarthi Parishad (ABVP)
 - (viii) Shri P.S. Krishnan (IAS Retd.)
 - (ix) Indian Social Institute
 - (x) Gandhian Sewa and Satyagraha Brigade
 - (xi) Bharat Raksha Manch
 - (xii) All India Council of Human Rights, Liberties & Social Justice
 - (xiii) Consumer Online Foundation
 - (xiv) Public Interest Legal Support and Research Centre (PILSARC)
 - (xv) Shri J.B. Mohapatra, Former Joint Secretary, Judges Inquiry Committee
 - (xvi) Civil Society for Truth
 - (xvii) Confederation of All India Traders
 - (xviii) 1. Ms. Sandhya Jain, Journalist; and
2. Shri Rohit Srivastava, Journalist.
 - (xix) Shri Ranjit Singh
 - (xx) Akhil Bhartiya Sant Samiti
 - (xxi) Editors Guild of India
- 3rd November, 2011
- Oral evidence of:-
 - (i) Civil Society headed by Anna Hazare
 - (ii) NSUI
- 4th November, 2011
- Further interaction/ Question and Answer Session with Civil Society headed by Anna Hazare.
- 14th November, 2011
- In-house Discussion.
- 15th November, 2011
- In-house Discussion.
- 24th November, 2011
- In-house Discussion.

- 30th November, 2011 - In-house Discussion on Draft Report
- 1st December, 2011 - In-house Discussion on Draft Report
- 7th December, 2011 - Consideration and adoption of the Draft Report.

ANNEXURE-E
[Vide Para 13.12(b) of the Report]

OPINION OF JUSTICE J.S. VERMA

As desired on behalf of the Standing Committee of the Parliament, I reiterate my views expressed personally before it on 13 October 2011, and answer the specific Issues addressed to me for my response.

Preface

I am of the firm view that the unanimous demand of the people as well as the avowed commitment of all political parties for a strong Lokpal can be best met by conferring constitutional status to the proposed Lokpal for the Union and the Lokayuktas for the States, akin to the Election Commission and the Union Public Service Commission/State Public Service Commissions. To avoid any delay in making the needed constitutional amendment for the purpose, the Constitution Amendment Bill must eschew any contentious issue (all of which can be addressed in the consequent legislation with all details) containing only the bare minimum required for the purpose.

I have already circulated a rough draft of the suggested Constitution Amendment Bill for consideration of the Standing Committee before our above meeting, which does not contain any contentious issue while mandating the Union to constitute the Lokpal and the States to constitute the Lokayukta. It provides for all the details to be incorporated in the contemplated accompanying legislation to complete the task.

Such a constitutional amendment would not attract the Proviso to Sub-Article (2) of Article 368 of the Constitution, and, therefore, it would not require ratification by the States. For ease of reference, Article 368(2) is extracted below:

“An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be

presented to the President who shall give his assent to the Bill and thereupon] the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

(a) article 54, article 55, article 73, article 162 or article 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.”

As would be evident on a plain reading of Article 368(2), the only requirement is for it to be passed by the majority of total membership of each House and by a majority of not less than two-thirds of members present and voting.

With the unanimous demand in the people supported by unanimity of all political parties in the Parliament to constitute a strong Lokpal/Lokayuktas, there can be no doubt of unanimous support for a constitutional body, which would obviously be the strongest visualized in the constitutional scheme. Once the constitutional amendment is made, it would become a part of the indestructible ‘basic structure’, immune from any future attempt to erode its status. The exercise for the accompanying consequent legislation providing the details dealing with the contentious issues can continue simultaneously, since it must follow to complete the process.

There is no occasion to doubt the sincerity of the commitment and resolve of the people and the political will in this behalf. Therefore, there can be no risk of any delay in this method.

With the above preface, my answers to the specific Issues referred for my opinion are as under:

Issues

- (i) Whether the proposed Lokpal legislation to be enacted by Parliament can include in it the structure for and content of State Lokayuktas by invocation of Articles

253/254 and/or entries 1,2 and 11A of List III of the Constitution and/or any other legal or constitutional basis?;

- (ii) Would such a national legislation be constitutionally valid (with reasons there for) and, if not, the reasons thereof?;
- (iii) Would it be constitutionally and legally feasible to follow the model of the NHRC and/or the RTI Act, 2005 and/or the Consumer Protection Act, 1986 etc. and/or any other appropriate central legislation, to provide for Lokpal and Lokayuktas in one central enactment and the basis on which the validity and constitutionality of such a legislation can be sustained?

Answer

These three issues being connected are combined for their answer.

Consequent upon the aforesaid constitutional amendment the proposed Lokpal legislation to be enacted by the Parliament by invocation of Article 253 does not require any additional legislative support. For ease of reference, Article 253 is quoted below:

“Legislation for giving effect to international agreements. - Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.”

This confers the legislative competence needed to implement the UN Convention Against Corruption, which has been signed and ratified by India. It is relevant to highlight that Article 6 of the Convention enshrines a specific obligation for member-States to establish bodies that prevent corruption. Article 6 of the Convention is quoted in full below:

“Article 6. Preventive anti-corruption body or bodies

1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:

- (a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;
- (b) Increasing and disseminating knowledge about the prevention of corruption.

2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.

3. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.”

The directive principle of State policy in Article 51(c), as a principle fundamental in governance is available as an aid. (Article 51 states: “*The State shall endeavour to... (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another...*”.) There is, therefore, no need to look for any additional support for the legislative competence of the Parliament to legislate on the subject for the whole territory of India. In addition, it would not be out of place to mention that the failure to take effective steps with respect to the establishment of such institutions could lead to India being considered to be in breach of its obligations under international law, which must obviously be avoided at all costs.

The Protection of Human Rights Act, 1993 providing for the constitution of the NHRC and the SHRCs was enacted by the Union Parliament for the whole territory of India to implement the Paris Principles, 1991 for the ‘better protection of human rights’, in addition to the existing constitutional guarantees and statutory rights with the machinery to enforce them. This was done by invoking Article 253 for the whole territory of India. Similarly, for ‘combating corruption’ in a more effective manner a uniform legislation enacted by the Union Parliament by invoking Article 253 can provide for the Lokpal and the Lokayuktas.

The Parliamentary central enactment made by invoking Article 253 would be constitutionally valid, such legislative competence in the Union Parliament being expressly provided as a part of the constitutional scheme, consistent with the nature of federalism created by the Constitution.

Issue No. (iv):

If the answer to the aforesaid is in the affirmative, whether by virtue of Article 254 of the Constitution of India and/or any other available power, the aforesaid proposed Lokpal Act to be enacted by Parliament would also be entitled to repeal the existing State Lokayukta enactments?

Answer

Once the Union Parliament enacts the central legislation by invoking Article 253 for the whole territory of India, the existing State legislations relating to the Lokayuktas being repugnant to it shall be void, by virtue of Article 254(1), which states as under:

“If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.”

In the light of the above provision, it would be advisable, in order to avoid needless litigation, for the central law to indicate - with reference to the above Article – that the existing State laws shall be treated as void and inoperative. It may however be added that this question would become purely academic in the event that the route of a constitutional amendment (along the broad lines I have suggested) is adopted, since the proposed amendment envisages parallel laws being enacted by Parliament and by the State legislatures.

4th November 2011

[J.S. VERMA]
