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Statutory and Non-statutory Public Undertakings

The growth of public undertakings, statutory or non-statutory, is a by-product of an intensive form of government. In order to undertake and fulfil multifarious welfare and service commitments, the government may choose from amongst the various forms of organisation. The government may undertake to accomplish its objectives either through its own department, or through an autonomous statutory corporation or through a government company registered under the Companies Act. The choice between the various available alternatives would depend on the policy, purpose and the nature of activity.

Before independence, because of the limited ambit of governmental activity the growth of public undertakings was negligible. But immediately after independence, a phenomenal burgeoning of public undertakings became evident as a result of the socialistic, welfare and service policies of the government. The Directive Principles of State Policy contained in Article 39(*b*) and (*c*) enjoined the State to direct its policy towards securing (1) that the ownership and control of material resources of the community are so distributed as best to subserve the common good; and (2) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. This led to the growth of public undertakings as an instrument for the economic structurisation of the country because in a public body accountability, freedom of action, public purpose and conscience corporate spirit and concern for the consumer could be legitimately expected. Furthermore, these public bodies could also generate resources much needed for the development of the country. In the beginning the organisational choice for undertaking any activity was in favour of statutory corporations. The industrial policy statement of 1948 clearly indicated that the management of State enterprises will as a rule be through the medium of public corporations. But thereafter, a conspicuous shift favouring governmental companies as the organisational model for State enterprises was in evidence. However, a trend favouring statutory corporations is again visible. The Administrative Reforms Commission in 1967 recommended statutory corporations as a mode for organising governmental commercial activities. It is also in conformity with the provisions of the Constitution because Article 19(6) provides for "the carrying on by the State or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise". How-

ever, with the new policy of 'free market economy' the role of the government in economic field through public corporation is bound to diminish.

Relative merits and demerits of various organisational forms of public enterprises

Statutory public corporations and government companies are preferred to departmental organisations because they obviate the increase in government departments and the proliferation of civil servants. Organisational autonomy of public corporations and governmental companies results in a decline of political interference, delay and red-tapism which may be rampant in bureaucratic departmental organisations. Government departments also lack initiative and push which is necessary for the success of any commercial activity. Financial autonomy, flexibility and commercial accountability are also not within the easy reach of a departmental organisation.

In some situations government companies as a mode of organisation of an activity is preferred to statutory corporations for companies obviate the necessity of rushing in a legislative measure every time a corporation is to be established. In case of companies, a greater amount of flexibility in action is possible as the articles of association of the company can be easily amended. Companies also make collaboration and capital participation more easy.

Statutory corporations have definite advantages over other forms of organisations due to their autonomy, financial and managerial, freedom of action and commercial accountability.

However, no consistent pattern is visible in the choice of the government from these three forms of organisations. The Railways and Posts and Telegraphs systems are run through departmental organisation, airways are managed through a statutory corporation and State trading is organised through a government company.

Out of these three forms of organisations through which governmental functions are exercised, departmental organisation does not present much legal difficulty as regards status of the organisation, rights of the employees and liabilities of the government because the employees of such an organisation are government servants and the State is liable for contracts and torts to the extent laid down under Articles 299 and 300 of the Constitution. This chapter, therefore, mainly deals with the other two forms of organisations:

1. Statutory Public Corporations.
2. Government Companies.

(A) STATUTORY PUBLIC CORPORATIONS

In the USA, it is an age of independent administrative agencies, regulatory or benefactory, but in India the growth is halting because the

government does not want to surrender any of its powers, especially regulatory, to any independent agency and lose the definite political advantage it possesses.

Independent statutory agencies discharging governmental functions pose a constitutional problem also. In India, one of the bases of the Constitution is ministerial responsibility to Parliament which in its turn is responsible to the people. The independent agencies discharging governmental functions may appear to run counter to this basic norm of a democratic Constitution. But the control which Parliament exercises over such agencies in India makes them responsible and responsive.

(1) Chief characteristics

A statutory public corporation may be defined as an agency created by an Act of legislature, operating a service on behalf of the government, but as an independent legal entity with funds of its own and largely autonomous in management.

Because a public corporation is a hybrid organisation combining features of a government department and a business company, it is difficult to lay down its basic characteristics with exactitude. However, the following points may be noted:

1. Statutory corporation is a creature of a statute which lays down its rights, duties and obligations. Therefore, a corporation can have those rights and exercise those functions only which are authorised by the statute either expressly or by necessary implication, provided it is not expressly prohibited. Actions of a corporation outside the authorised area of operation are ultra vires and cannot bind the corporation. Such ultra vires acts cannot be ratified and the doctrines of estoppel or acquiescence do not apply in such cases.

2. It has a separate legal entity and, therefore, can sue or be sued in its corporate name. It can hold and dispose of property by such name.

3. Depending on the provisions of the statute of its creation a corporation is largely autonomous in finance and management. It has funds of its own.

4. It operates an activity on behalf of the government which may be regulatory, benefactory, commercial or developmental.

5. The statute may delegate rule-making power to a corporation; such rules and regulations are binding if they are within the authority, made in the manner laid down by the statute and do not violate any provision of the Constitution.

6. A statutory corporation is a 'State' within the definition of the term in Article 12 of the Constitution, and therefore, is subject to the writ jurisdiction of the Supreme Court and High Courts under Articles 32 and 226 of the Constitution.

The logical deduction from this, therefore, is that fundamental rights can be claimed against a corporation.[1] Mandamus would also lie against the corporation to enforce a statutory or public duty.

Whether other public undertakings such as government companies and registered bodies are 'State' or not within the meaning of Article 12 would depend on the question whether they are 'agency or instrumentality' of the State. If a public undertaking is an agency or instrumentality of the State then it will be a 'State' under Article 12 and hence writ jurisdiction of the court shall be extended to it. Private corporations are not 'State' within the scope of Article 12, hence are not within the gravitational orbit of the writ jurisdiction of the courts. There seems to be no reason for such an exemption especially when it is a question of the enforcement of fundamental rights.

7. However, a corporation is not a citizen within the meaning of Part II of the Constitution, and therefore, is outside the purview of the Citizenship Act, 1955 which lays down in Section 2 that the word 'person' shall not include any company, association or body of persons whether incorporated or not. On this basis, whether a statutory corporation can claim fundamental rights given in Article 19 which are available only to a citizen is a curious question. The law in this behalf is in a nebulous state. In *State Trading Corporation of India Ltd.* v. *CTO*[2] and *Tata Engineering and Locomotive Co. Ltd.* v. *State of Bihar*[3], the Supreme Court held that a corporation was not a citizen within the comprehension of Article 19 and, therefore, could not complain of denial of fundamental freedoms guaranteed by Article 19 to a citizen. However, a different note was struck in *R.C. Cooper* v. *Union of India*[4], when the Supreme Court held that jurisdiction of the court cannot be denied when by the State action the right of the individual shareholder is impaired, if that action impairs the right of the company as well. In this case, the Court entertained the petition under Article 32 of the Constitution at the instance of a director and shareholder of a company and granted relief. These two conflicting trends were noticed by the Court in *Bennett Coleman and Co.* v. *Union of India*[5]. Keeping these divergent trends in view the Highest Bench in *Delhi Cloth and General Mills Co. Ltd.* v. *Union of India*[6], favoured the trend in the direction of holding that in the matter of fundamental freedom guaranteed by Article 19, the company can maintain a petition for the reason that the rights of a shareholder and the company which the

1. *Rajasthan State Electricity Board* v. *Mohan Lal*, AIR 1967 SC 1857; *R.D. Shetty* v. *International Airports Authority*, (1979) 3 SCC 489: AIR 1979 SC 1628.
2. AIR 1963 SC 1811.
3. AIR 1965 SC 40.
4. (1970) 1 SCC 248: AIR 1970 SC 564.
5. (1972) 2 SCC 788: AIR 1973 SC 106.
6. (1983) 4 SCC 166: AIR 1983 SC 937.

shareholders have formed are rather coextensive and the denial to one of the fundamental freedoms would be denial to the other. This case arose out of a group of writ petitions under Article 32 and appeals by special leave challenging the constitutional validity of Rule 3-A of the Companies (Acceptance of Deposits) Rules, 1975. Overruling the preliminary objection that the petitions are not maintainable because the incorporated company not being a citizen is not entitled to claim the fundamental right under Article 19(1)(*g*) the Highest Bench admitted the petitions. Beneath this controversy whether a company can claim the fundamental rights under Article 19 lies the unending battle between the forces of public control and the individual economic freedom and, therefore, the law must hold the balance even to protect the economic health of the society. There is no controversy that a statutory corporation can claim the benefit of Articles 14 and 16 of the Constitution. It is significant to note that the Law Commission of India in its 101st Report has recommended an amendment to the Constitution for making fundamental rights under Article 19(1)(*a*) available to those corporations and other entities which are not regarded as natural persons provided they are engaged in communication business.

8. A public undertaking is subject to Article 14 of the Constitution and thus not entitled to deny to any person equality by its treatment. Quashing the differential revised tariff rate laid down by the Orissa State Electricity Board in *Kartik Enterprise* v. *OSEB*[7], the court ruled that the Board is to so adjust its treatment that ultimately no inequality resulted.

9. Without the statutory immunity, the activities of a corporation are liable to tax. It is considered an 'assessee' under the Income Tax Act and a 'dealer' under the Sales Tax Act.

10. Statutory corporations cannot enjoy the privilege of the government to withhold documents. Though there is no decision of the court on this point, yet there seems to be no rationale in extending the privilege of the government to a corporation which by and large undertakes regulatory or benefactory or commercial functions.

11. Public enterprises are owned by the people and the persons who manage them are accountable to the people. In order to enforce this principle of accountability, the Supreme Court has broadened the doctrine of locus standi. Therefore, if the sale of the property of any public corporation is 'unjust, unfair and mala fide' the workers shall have right to challenge it under Article 32 or 226 of the Constitution.[8] In *Fertilizer Corporation Kamgar Union* v. *Union of India*[9], the Highest Bench was faced with the question

7. AIR 1980 Ori 3.

8. M.P. Jain: CHANGING FACE OF ADMINISTRATIVE LAW IN INDIA AND ABROAD, (1982), pp. 37, 38.

9. (1981) 1 SCC 568: AIR 1981 SC 344.

whether the labour union of the Fertilizer Corporation had locus standi to challenge the sale of old plants by the corporation. Though the Supreme Court dismissed the petition because it found nothing wrong with the sale of old machinery yet broadening the doctrine of locus standi, the Chief Justice observed: "But, in an appropriate case, it may become necessary in the changing awareness of legal rights and social obligations to take a broader view of the question of locus standi to initiate a proceeding, be it under Article 226 or under Article 32 of the Constitution. If public property is dissipated, it would require a strong argument to convince the court that representative segments of the public or at least a section of the public which is directly interested and affected would have no right to complain of the infraction of public duties and obligations."[10]

12. Continuing their efforts of broadening the horizons of socialism in India, the Supreme Court showed great sensitivity to the rights of the workers in *National Textile Workers' Union* v. *P.R. Ramakrishnan*[11]. In this case the question before the Court was whether the workers of a company have a right to participate in the winding-up proceedings before a court of law? Curiously enough, the Indian Companies Act, 1956 though it provides that a winding-up order shall be deemed to be a notice of discharge to the employees of the company yet it does not give workers a right to participate in the winding-up proceedings unless they fall within the categories of creditors or contributories. The decision of the Highest Bench in this area of high socio-economic visibility granted workers the right to appear not only at the hearing of the winding-up proceedings but also to appear and be heard both before the winding-up petition is admitted and an order for advertisement is made. The workers were further allowed entitlement to prefer an appeal and contend that no winding-up order should have been made by the Company Judge, including the right to be heard in the matter of the appointment of a provisional liquidator.[12] The majority decision is based on the ground that the company does not belong to the proprietors alone, it equally belongs to the workers who contribute their labour to it, hence they are equal partners. The Court further reasoned that no valid winding-up proceeding can take place unless the workers are given an opportunity to be heard because it is going to cost workers their very means of livelihood.[13] However, Venkataramiah, J. in his dissenting opinion asserted that the workers have no hand

10. *Fertilizer Corporation Kamgar Union* v. *Union of India*, (1981) 1 SCC 568: AIR 1981 SC 344, p.350.

11. (1983) 1 SCC 228: AIR 1983 SC 75.

12. *See* U. Baxi: *Pre-Marxist Socialism and the Supreme Court*, (1983) 4 SCC (J) 3.

13. *Per* Bhagwati, J. see *National Textile Workers' Union* v. *P.R. Ramakrishnan*, (1983) 1 SCC 228, 244-49: AIR 1983 SC 75. As an astute legal craftperson he reaches the decision through constitutional mandate in Article 43-A added by the Forty-second Amendment, 1976.

at all in any economic enterprise.[14] Commenting on this *causa celebre*, Professor Upendra Baxi thought-provokingly writes that "the minority view ignores Marx and the majority view distorts it. Perhaps some day even our Justices would learn that even what they call capital is nothing but accumulated, frozen and congealed labour".[15]

In another pace-setting decision the Supreme Court held that the wages of workers have first priority and must be paid before the company paid its other liabilities. Thus, the Court directed Rohtas Industries to sell its stocks and pay wages to the workers. Categorically rejecting the argument of the financial institutions that as the stocks are pledged with them, so they have priority over it, the Court held that no matter banks in law have priority yet it could not be disputed that these stocks were the products of the hard work of the labour without which no stock could have been produced hence it is they who must have priority.[16]

(2) Classification of Statutory Public Corporations

No conventional pattern has been followed in the establishment of statutory corporations. They have grown like mushrooms in the rainy season. However, they may be classified as follows:

1. *Commercial and Financial*: Corporations which carry on a business or discharge public service on commercial lines. In this category one may include the Air India Corporation, Indian Airlines Corporation, Industrial Finance Corporation, Road Transport Corporations, Life Insurance Corporation, Reserve Bank of India, etc.

2. *Social*: This classification includes those corporations which undertake welfare activities of the State, e.g., the Employees' State Insurance Corporation.

3. *Commodity*: Under this classification one may include those corporations which besides regulation, primarily undertake the function of development of a commodity, such as the Oil and Natural Gas Commission, Tea, Coffee and Silk Boards.

4. *Developmental*: Developmental corporations are those which undertake the developmental work in the country. The Damodar Valley Corporation may be cited as an illustration. This corporation was established under the Damodar Valley Corporation Act, 1948 to control floods and utilize water for irrigation, power, etc.

14. See *National Textile Workers' Union* v. *P.R. Ramakrishnan*, (1983) 1 SCC 228, 280: AIR 1983 SC 75.

15. *See* U. Baxi. *op. cit.*, pp. 12, 13.

16. *Rohtas Industries* v. *Workmen*, (1987) 1 SCC 210.

This classification is not watertight and at various points it may overlap. For example, Tea and Coffee Boards may be classified as commodity, commercial and developmental.

(3) Liability in Tort and Contracts

Statutory corporations can be sued for the torts committed by its servants provided the act is within the powers and the purpose of the corporation and is such that it would be actionable if committed by a private individual. Therefore, the corporation would not be liable if the act of the servant is ultra vires the powers of the corporation or is such that it could under no circumstances have authorised its servants to commit it. However, the servant would be personally liable for such ultra vires acts. The authority emanating from the corporation cannot be implied if the act is outside the authority of the corporation. The extent of liability of the corporation for the torts committed by its servants will be the same as that of a private person unless circumscribed by the statute. The statute may exclude liability for acts done by its servants in good faith under the Act or it may limit the liability to pay compensation from the corporate fund for the torts committed by its servants.

In a unique exercise of substantive judicial activism the Supreme Court in *M.C. Mehta* v. *Union of India*[17], held that the exceptions to the rule of strict liability as laid down in *Rylands* v. *Fletcher*[18] do not apply to Indian situations and hence the liabilities of industries engaged in hazardous or dangerous activities is absolute even when the injury occurs on account of an accident in such activities. The rule of *Rylands* v. *Fletcher*[19] laid down a principle of liability that if a person who brings on to his land and collects and keeps anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. However, this rule does not apply to things which escape either due to an act of God (accident) or an act of a stranger (sabotage). The Supreme Court emphasised that this exception has no application in a present-day highly-industrialised society and in consistence with the constitutional norms in India. Thus making the rule of strict liability absolutely strict the court observed that an enterprise which is engaged in hazardous or inherently dangerous industry owes an absolute liability to the community to conduct its affairs with the highest standards of safety and to compensate if harm is caused to anyone due to an accident.

In such cases of compensation, it is very natural for the industry to plead financial incapacity to pay compensations. Commenting on this attitude

17. (1987) 1 SCC 395.
18. (1868) LR 3 HL 330
19. *Ibid*

the court held that if the enterprise is permitted to carry on hazardous or inherently dangerous activity for profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident as an appropriate item of overheads. However, balancing private and public rights in such cases, the court observed that the measure of compensation must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. It may be recalled that in this case oleum gas had escaped from Shriram Chemical and Fertilizer Company, Delhi causing injury to people.

Yet in another pace-setting judgment, the Supreme Court ordered the prosecution of the Chairman and eight directors of the Modi Industries for discharging highly noxious and polluted trade affluents from Modi Distillery into the Kali river and thus set an important precedent on the question of liability of industry for pollution. In this case U.P. Pollution Board had sought to prosecute Modi Industries. Though the lower court had granted prosecutions yet the Allahabad High Court reversed the decision on the technical ground that only the Distillery Unit is to be prosecuted and not the industrial group. Reversing the decision, the Supreme Court stated that every person who at the time of the commission of the offence was in charge of and responsible to the company for the conduct of the business of the company as well as company itself shall be deemed to be guilty of the offence and shall be liable to be prosecuted. The import of the judgment is that the directors and also the parent company in such instances cannot escape liability for the actions of its subsidiaries.[20]

A corporation can sue for the torts committed by any person against it. It can maintain an action for libel or slander if it adversely affects its business.[21] However, it cannot sue for torts which are personal in nature, like assault or personal defamation.

Statutory corporations can also incur criminal liability. Corporations have been held to be liable for offences committed by its servants who are the organs of the corporation.[22] The liability even extends to offences involving mens rea, such as libel[23], fraud[24] and public nuisance[25]. However, since it possesses only a corporate identity it cannot be punished with death or imprisonment. It naturally follows that a corporation cannot be found guilty of an offence for which the prescribed punishment is death or im-

20. For full details see *Indian Express*, Chandigarh, August 10, 1987, p. 6.
21. *South Hetton Coal Co.* v. *North-Eastern News Assn. Ltd.*, (1891) 1 QB 133: (1891-94) All ER 548.
22. *R.* v. *ICR Haulage Ltd.*, (1944) 1 All ER 691.
23. *Triplex Safety Glass Co.* v. *Lancegaye Safety Glass Ltd.*, (1939) 2 All ER 613.
24. *South Hetton Coal Co.* v. *North-Eastern News Assn. Ltd.*, (1891) 1 QB 133: (1891-94) All ER 548.
25. *DPP* v. *Great North England Rly.*, 9 QB 315.

prisonment. A corporation can also not be found guilty of offences which can be committed by natural persons alone, e.g., bigamy.

A corporation can enter into a contract and can sue or be sued for the breach thereof. However, any contract made by it beyond its powers is void and the corporation incurs no liability. A corporation cannot divest itself of its statutory powers or fetter itself in the exercise of such power by entering into a contract. It cannot also fetter its free exercise of discretion by any contract.

The requirements of a valid government contract as laid down in Article 299 of the Constitution do not apply to corporation contracts. However, if any requirement for a valid contract has been laid down by the rules of the corporation or the statute, it must be complied with.

The requirement of two months' notice as laid down under Section 80 of the Civil Procedure Code before filing a suit against the government does not apply to statutory corporations.

(4) Status of the Employees

The employees of the corporation are appointed by the corporation. Their terms and conditions of service are regulated by the rules and regulations framed by the corporation, though in some cases a corporation may adopt the rules which govern the service of government servants. Therefore, employees of the corporation are not government servants and consequently not entitled to the protection of Article 311 of the Constitution.[26] Nevertheless because the protection of Part III of the Constitution applies to such employees, therefore, the distinction sought to be drawn between the protection of Article 311 and Part III has no significance. The fact remains that the employment in public sector has grown to vast dimensions and employees of the public sector often discharge onerous duties as civil servants and participate in activities vital to a country's economy. It is, therefore, right that the integrity and independence of those employed in the public sector be secured as much as the independence and integrity of civil servants.[27]

However, where the undertaking is not an independent statutory authority but merely a limb of the government, its employees would be government employees. Thus, in *Jaswant Singh* v. *Union of India*[28], the Supreme Court ruled that the persons employed by the Beas Construction Board are government servants entitled to the protection of Article 311.

If the employee of a corporation is subject to the control of the government by way of appointment and removal, he will be deemed to be holding an 'office of profit' under the government as to incur disability under

26. *S.L. Agarwal* v. *G.M., Hindustan Steel Ltd.*, (1970) 1 SCC 177: AIR 1970 SC 1150.
27. *A.L. Kalra* v. *Project and Equipment Corpn.*, (1984) 3 SCC 295: AIR 1984 SC 361.
28. (1979) 4 SCC 440: AIR 1980 SC 115.

Article 102 or 191 of the Constitution and cannot be a Member of Parliament or the legislature. But in other cases where the services are not so regulated, an employee of the corporation will not be deemed to be holding an 'office of profit'.[29]

Being subject to the provisions of the statute and the rules and regulations framed thereunder, an employee of a corporation does not enjoy a 'status'. His services are purely contractual. Therefore, if an employee of a corporation has been wrongfully dismissed, he cannot claim reinstatement but damages only.[30]

However, in *Sukhdev Singh* v. *Bhagatram*[31], the Supreme Court held that statutory regulations passed by statutory corporations give its employees a statutory status. An ordinary individual in a case of master and servant relationship enforces breach of contractual terms by damages because personal services are not capable of enforcement. In case of statutory bodies there is no personal element whatsoever because of the impersonal character of statutory bodies.

The employees of public corporations have also been allowed the benefit of industrial laws, especially in the case of wage fixation.[32]

Are the employees of a corporation 'public servants' within the meaning of Section 21 of the Indian Penal Code? The law is not clear on the point. However, the definition is wide enough to cover the employees of a statutory corporation. Sometimes the statute itself may confer the status of 'public servants' on its employees.[33] In a questionable ruling the Supreme Court held that a member of the Indian Administrative Service, whose services are placed at the disposal of the Super Bazaar, a cooperative store, is not a public servant within the meaning of Section 21(2), Indian Penal Code for the puposes of Section 197 of the Criminal Procedure Code. Accordingly, the store as well as the manager thereof can be prosecuted under the Prevention of Food Adulteration Act, 1954 without the sanction of the Central Government. The ruling becomes questionable because even in view of the fact that the government holds more than 97 per cent shares in the Super Bazaar and holds power to appoint and remove administrative staff, the court held that Super Bazaar is not the "instrumentality of the State".[34] Even if the statute creating public corporations confers on its employees the status

29. *Bibhuti Bhushan Ghosh* v. *Damodar Valley Corpn.*, AIR 1953 Cal 581.
30. *Indian Airlines Corpn.* v. *Sukhdeo Rai*, (1971) 2 SCC 192: AIR 1971 SC 1828.
31. (1975) 1 SCC 421: AIR 1975 SC 1331.
32. *Hindustan Antibiotics Ltd.* v. *Workmen*, AIR 1967 SC 948.
33. Section 56, Damodar Valley Corpn. Act, 1948.
34. *S.S. Dhanoa* v. *Municipal Cropn. of Delhi*, (1981) 3 SCC 431: AIR 1981 SC 1395. *See* also M.P. Jain: *Administrative Law*, XVII ASIL (1981) 528. This decision is not consistent with *Ajay Hasia* v. *Khalid Mujib*, (1981) 1 SCC 722: AIR 1981 SC 487.

of public servants they cannot acquire the status of civil servants. It also makes no difference if such corporations adopt the Fundamental Rules to govern the service conditions of its employees.

(5) Control of Statutory Corporations

Since statutory corporations discharge public functions and use public money as capital, the need for public control over the functioning of the corporations cannot be overemphasised. Such control may be exercised through Parliament, government and the court.

I. Parliamentary Control

Parliamentary control is implied in statutory corporations as they owe their origin and continued existence to a statute passed by Parliament. Therefore, initial control is exercised at the time when the Bill proposing the creation of a statutory corporation is introduced for discussion in the House. Members can discuss every organisational, financial and functional aspect of the corporation.

Members can discuss the functioning of corporations by asking questions, moving resolutions and motions in the House. In this manner, Parliament ensures public accountability of the corporations.

Parliamentary control may also be exercised through the technique of 'laying'. Sometimes, the statute creating a corporation may prescribe that the rules, regulations, financial statements and audit report be laid on the table of the House. This provides an opportunity for Parliament to scrutinize the functioning of a corporation. The laying of the rules and regulations may be subject to either affirmative or negative resolution. The Air Corporations Act provides that rules made by the Central Government shall be laid before both the Houses as soon as may be after they are made.

However, this general control over the functioning of statutory corporations exercised by Parliament is not very effective because either the members lack the technical skill needed to scrutinize the rules and regulations framed and financial and audit statements prepared or they are indifferent because of their preoccupation with 'politics' in the popular sense of the term.

The real and effective parliamentary control is exercised through Committees of Parliament. Before 1964, the Estimates Committee and the Public Accounts Committee were doing the work of scrutinising the functioning of corporations. But in 1964, on the recommendation of the Menon Committee, a separate committee known as the Committee on Public Undertakings was established for this purpose. It consists of 15 members, ten from the Lok Sabha and five from the Rajya Sabha. A Minister cannot be its member. It is appointed for a period of one year. Its functions include the examination of reports and accounts of the corporations and the report of the Comptroller

and Auditor-General on Public Undertakings. It also undertakes the examination of the entire working of the corporations to find out if the affairs of the corporations are being conducted in accordance with the policy of the government and the rules of commercial accountability. Though the functions of the committee are advisory, yet they go a long way in informing the mind of the members of Parliament and thus making parliamentary control effective.

II. Government Control

In order to ensure that the affairs of statutory corporations are conducted in the best interests of society, a general governmental control over the working of the corporations is highly desirable. However, general control does not mean governmental interference in the day-to-day working of the corporations, which is highly destructive of the idea of autonomy necessary for the success of any commercial or service undertaking. The governmental control is not uniform or in any set pattern over all statutory corporations. The nature and the extent of control depends on the provisions of the statute creating the corporations. However, the techniques of control may take any of the following shapes or a combination of these.

1. *Power of dissolution, removal and appointment*

The statute creating the corporation may provide for the appointment and removal by the government of the authority managing the affairs of the corporation. The Reserve Bank of India Act lays down that the Governor of the Bank shall be appointed by the government and may be removed by them.

Going a step further, the statute may also provide that the government shall have the power to dissolve the corporation. The Tea Board Act and Coffee Board Act contain such a provision. This gives ample power to the government to ensure that the corporation functions according to the policy of the government and in the best interests of the society.

2. *Power to issue directions*

The statute may provide that the government shall have the power to issue directions to the corporation. This is done to ensure that the affairs of the corporation are conducted in accordance with the policy pattern of the government. These directions may be specific or general, mandatory or directory, depending on the provisions in the statute. The Delhi Transport Undertaking Act empowers the government to issue specific directions on such matters as wages and terms and conditions of service of the employees. On the other hand, the Tea Board Act makes provisions for the issuance of general directions, but it is obligatory on the Board to follow them. In the same manner, Section 34 of the Air Corporations Act authorises the Central Government to give directions to either of the corporations relating to the

exercise of its functions and the corporations shall be bound to give effect to these directions.

The purpose of directions as a technique of governmental control can prove beneficial only if these directions do serve only as directions to the corporation. If the government, through directions, interferes with the day-to-day functioning of the corporation, it would be a self-defeating technique.

3. *Power to control finances*

Financial control provides teeth to the governmental control over the affairs of the corporation. Financial control may adorn various shapes depending on the terms of the statute.

Sometimes the whole capital of the corporation may be provided by the government. For example, the total capital of the Life Insurance Corporation is provided by the government. However, at times, the statute may invest the government with the power to control capital formation, borrowings and expenditure. The statute establishing Hindustan Steel Ltd. requires prior approval of the government in case of increase of capital, reduction of capital and consolidation or division of share capital. The Damodar Valley Corporation Act makes provision for the approval of the government in case of borrowings and capital investment. The Air Corporations Act provides for control of expenditure by the government. The Act provides for the prior approval of the government for incurring capital expenditure over Rs 15 lakhs, or for disposing of property, right or privilege exceeding Rs 10 lakhs. Section 36 of the same Act further requires the corporation to submit to the government a statement of their programmes of development and operation at least three months before the commencement of the financial year.

The statute may further provide for audit by the Auditor-General or by an auditor appointed by the government. The statute may also invest the government with the power to call for the budget, accounts and annual report of the corporation.

4. *Power to institute enquiries*

The statute may empower the government to institute enquiries into the working of the corporation under certain circumstances. This provides sufficient deterrent against any deviation from the norms of public functioning. The Delhi Transport Undertaking Act invests government with such powers.

III. Judicial Control

As discussed earlier, a statutory corporation is a 'State' within the meaning of Article 12 of the Constitution and is, therefore, subject to the writ jurisdiction of the Supreme Court and the High Courts.[35] A corporation

35. See *R.D. Shetty* v. *International Airports Authority*, (1979) 3 SCC 489: AIR 1979 SC 1628.

can sue and be sued like any ordinary person. It is liable for the torts committed by its servants and is also liable for damages in case of breach of contract. If a corporation is to discharge a public or statutory duty, mandamus would lie for the enforcement of such duty. In *Corporation of Nagpur* v. *Nagpur Electric, Light & Power Co.*[36], the writ of mandamus was issued against a public utility undertaking to compel it to supply electricity to the corporation. In matters of suit, the statutory corporation is not entitled to any of the privileges and immunities of the State. Fundamental rights can be claimed against a statutory corporation, therefore, in case of a breach of fundamental rights, the Supreme Court or a High Court can exercise its jurisdiction whenever necessary for the ends of law and justice. Courts can also control the actions of the corporation in cases of lack of jurisdiction, excess of jurisdiction and abuse of jurisdiction at the instance of any person who is adversely affected by such actions.

In *Kartik Enterprise* v. *OSEB*[37], the court made a significant observation which may herald a new era of judicial control of public undertakings. In this case, the Orissa State Electricity Board had increased electricity rates for various categories of consumers. While challenging the increased tariff, the petitioners made a unique contention. They argued that the statute casts an obligation on the Board to operate efficiently and economically, therefore, tariff cannot be enhanced unless the corresponding obligations are fulfilled. The court held that "without the corresponding obligation to act efficiently and economically, the Board is not intended to exercise the power to adjust its tariff. We cannot accept a situation where the State or any of its instrumentalities would have power without any correlative duty to exercise such powers.....". It was made amply clear that if other control mechanisms (legislative and executive) fail, the judicial control has to be operative. This bold judicial behaviour shall instil a sense of responsibility in public undertakings, many of which are not functioning efficiently and indulge in a lot of wastage.[38]

Courts have never hesitated in quashing the actions of corporations if found to be illegal, arbitrary, unreasonable or discriminatory. Even in the case of grant of largess, jobs, contracts and issuance of quota and licences courts have held that the corporations have to act in accordance with the provisions of law.[39] Apart from enforcing statutory regulations and granting relief in case of breach thereof by invoking the provisions of Articles 14 and 16, the courts have declared as unconstitutional the rules and regulations framed by the corporation if found to be illegal,

36. AIR 1958 Bom 498.
37. AIR 1980 Ori 3.
38. *Id.*, p. 9.
39. *R.D. Shetty* v. *International Airports Authority*, (1979) 3 SCC 489.

arbitrary and unreasonable.[40] No matter the court is not a competent authority to examine entrepreneurial activities but in exercise of their constitutional obligation the courts have never hesitated to interfere if there is a breach of the broad parameters of fairness in the administration, bona fides in action, and the fundamental rules of reasonable management of public business.[41]

IV. Public Control

Civil servants, corporations and companies are instrumentalities of the State to undertake various programmes for the benefit of the people. Therefore, it is highly desirable that these instrumentalities must respond to the need and the opinion of the people. It is no denying the fact that the indirect responsibility of these agencies to the public through their elective representatives is marginal and superficial, and the direct responsibility is non-existent because public opinion is uninformed and unorganised. However, effective public control over these agencies may be exercised through the following channels.

1. *Mass media*

Mass media in any free society not only reflects public opinion but also creates public opinion by informative and investigative journalism. Therefore, by exposing political interference, bureaucratic red-tapism, corruption and inefficiency, mass media can go a long way in making these agencies respond to the need of public interest. Sometimes a single newspaper can influence public bodies' policies and actions by discovering and publishing facts which embarrass or discredit the government and its agencies. In India this control mechanism is highly weak and sterile because television and radio are government departments and the press is largely dependent on the government for financial assistance (in the form of advertisements) and newsprint and other assistance. The approach of the Indian Press is highly simplistic and the era of investigative journalism is yet to begin. Instances of use of informal means to influence the press through quiet phone calls and unofficial approach are also not wanting, leaving aside the cases of open show of threats. Under these and various other constraint parameters, the mass media in India has not been able to establish its role of exercising control over the affairs of public bodies in the public interest.

2. *Consumer organisations and councils*

These organisations may either be established under a statute or be organised on voluntary basis in the form of unions. In western countries consumers are well-informed and organised, therefore their organisations provide an effective check on the planning, policies and actions of public

40. *Central Inland Water Transport Corpn.* v. *Brojo Nath Ganguly*, (1986) 3 SCC 156.
41. *Fertilizer Corpn. Kamgar Union* v. *Union of India*, (1981) 1 SCC 568.

bodies. In USA, on various occasions the corporations had to bring down the prices of their commodities because consumer organisations decided not to purchase their products. Through such organisations, consumers also ventilate their grievances and make their views known to the corporations. In England consumer councils have been established in the electricity, gas and coal industries under a statute.[42] In India this control is most feeble, partly because the consumer is unorganised and partly because we have still to learn to work in groups. It is desirable that some pattern of consumer consultative machinery must be evolved for every public undertaking.

It is heartening to note that the first panel discussion on distributive trade held under the auspices of the Federation of Indian Chambers of Commerce and Industry, recommended the setting up of an autonomous organisation, comprising representatives of trade, industry and consumers with close association of technologists, scientists and media-men to look after the consumers in the country. The consensus was that India needed a strong and broad-based consumer protection movement not only to effectively combat various malpractices indulged in by anti-social elements in trade and industry, but also to affirmatively protect consumers, the kingpin of the distribution system, who are the worst victims at the hands of a small but unscrupulous section of the community. It is a harsh reality that the consumer in India is either taken for granted or is taken for a ride which has made him a real stoic who generally tends to take things philosophically without raising a protest. One of the reasons for this state of affairs seems to be that the consumer movement in India has so far been a private affair and the government machinery was by and large indifferent and callous. However, with the announcement by the Central Government on August 25, 1983 for the setting up of a 28-member Consumer Protection Council with the avowed aim of helping the consumer movement in India, a new era in consumer movement is in the offing. The council is expected to review trade practices and suggest measures to curb the growth of corrupt practices such as adulteration, short weighment, blackmarketing and deceptive and misleading advertisements. The actual role perception and performance by this official body in an area of high socio-economic visibility is still to be watched but since the government has not involved private organisations who have already contributed to the growth of the consumer movement in India, it may dampen the vigour of the movement.[43] For the present administrative agencies established under the Consumer Protection Act, 1986 and the Monopolies and Restrictive Trade Practices Act are the only official

42. *See* Garner: ADMINISTRATIVE LAW, (1963), pp. 266-69. Such bodies have also been established under Transport Act, 1962 and Civil Aviation (Licensing) Act, 1960.

43. *Indian Express*, Chandigarh Edn., August 29, 1983. Prof. Manubhai Shah's Consumer Education and Research Centre has done excellent work in this area.

agencies providing control over public bodies in the interest of the consumers in India.

3. *Interest representation*

In order to make public bodies directly responsive to the consumers, it is desirable that real consumers of services and products of these bodies must have some say in the policy planning and actions of such bodies. Therefore, in Britain, Parliament by law requires that members of certain public corporations are to be nominated by local bodies or other bodies interested in the working of a particular corporation.[44] In India, the place of 'interest representation' as a strategy to control public corporations is yet to be fully appreciated and recognised.

4. *Consumer Grievance Redressal Forums*

The Consumer Protection Act passed by Parliament in 1986 and amended in 1993 provides for the establishment of Consumer Protection Councils at the Centre and State levels in order to protect the rights of the consumers.[45] The Act also set up a three-tier grievance redressal machinery at the Central, State and district levels. These forums now provide less expensive and quick justice to the consumers of goods and services. By the 1993 amendment these forums have been invested with the power to pass 'cease and desist' order and order 'recall' of defective goods. It is too early to comment, but these forums may provide a very effective control over public corporations providing goods and services to the people.

On the basis of the above analysis, it will not be incorrect to say that the public control of statutory and non-statutory undertakings is feeble and its bite is imperceptible.

(B) GOVERNMENT COMPANIES

Besides statutory corporations, the government carries on its commercial and service functions through non-statutory companies registered under the Companies Act, 1956. These are limited liability companies where the government holds the majority share capital. They are formed either to start a new venture or to take over an existing business.

Section 617 of the Companies Act, 1956 defines a government company in the following terms:

> "For the purpose of this Act, 'Government Company' means any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government or by State Government or

44. Garner: ADMINISTRATIVE LAW, (1963), p. 267.

45. These rights include: (1) Protection against goods which are hazardous to life and property; (2) right to be informed about the quality, quantity, potency, purity and price of goods; (3) right to access to a variety of goods at competitive price; (4) right to be heard; (5) right to seek redressal of grievances; (6) right to consumer education.

Governments, or partly by the Central Government and partly by one or more State Governments and includes a company which is a subsidiary of a government company thus defined."

After registration a government company, like any other company, is considered a distinct legal person with perpetual succession and common seal. But a government company is different from other companies inasmuch as its capital is subscribed by the government and no other person can purchase its share except with the permission of the government. It is controlled by the government which can appoint and remove its directors.

A government company is not a 'State' within the meaning of Article 12 of the Constitution[46] and its employees are not government servants within the meaning of Article 311 of the Constitution.[47]

Since a government company is neither a creation of a statute or a department or an agent of the government, it is not subject to the writ jurisdiction of the High Court under Article 226 of the Constitution.[48] However, a writ of mandamus would lie against a government company to enforce a statutory or public duty required by the statute.[49] Therefore, the Kerala High Court issued a writ against a government company when it acted in violation of a statutory duty imposed upon it by the Import and Export Control Act, 1947 in matters of regulation of import and export in cashewnuts.[50] Some High Courts have also issued writs against government companies for violation of standing orders made under the Industrial Employment (Standing Orders) Act, 1946 on the ground that the standing orders thus made have the force of law.[51]

Though the government company is a distinct legal person separate from its members, yet, in order to mitigate hardship to its members or private individuals, courts may provide the remedy by 'lifting the corporate veil' so that the real nature of the company may be determined and the liability may be fixed. Therefore, courts may lift the corporate veil, if the number of the members falls below the statutory minimum or where there has been fraudulent trading or where the company is a mere 'sham' or where it is controlled by enemy aliens, or where it is desired to establish its tax residence. However, the courts in India are of the view that they are not entitled to lift the veil and that it can be done by legislation alone.[52]

46. Vide *Kartick Chandra Nandi* v. *W.B. Small Industries Corpn.*, AIR 1967 Cal 231.
47. *State of Assam* v. *Kanak Chandra Dutta*, AIR 1967 SC 884.
48. *R. Lakshmi* v. *Neyveli Lignite Corpn.*, AIR 1966 Mad 399.
49. *Praga Tools Corpn.* v. *C.A. Immanuel*, (1969) 1 SCC 585: AIR 1969 SC 1306.
50. *K.L. Mathew* v. *Union of India*, AIR 1974 Ker 4.
51. *Borhan Kumar* v. *Barauni Oil Refineries*, AIR 1971 Pat 174; *Abani Bhusan Biswas* v. *Hindustan Cables Ltd.*, AIR 1968 Cal 124.
52. *Sunil Kumar* v. *Mining and Allied Machinery Corpn. Ltd.*, AIR 1968 Cal 322.

A government company would be subject to all those limitations which are imposed by the Indian Companies Act, 1956.

The modern State acts through its own civil service as well as through the instrumentalities of corporations and companies. Such instrumentalities acting as an instrumentality or agency of the government act for the State, though in the eyes of the law they possess a distinct personality. Their actions are State actions and, like the State, they are bound to respect fundamental norms of public action. But governmental control will not be the only test to determine whether such instrumentalities are agents of the State. The court propounded several others besides large financial assistance by the State, monopoly status, the functions performed and the like. Specifically, if a department of the government is transferred to such instrumentality, it would be a strong factor supportive of this inference. The Prasar Bharti will, therefore, be bound to respect the fundamentals of public dealings. The tests are not exhaustive. It is the cumulative effect of various factors that determines the character of such instrumentalities. Therefore, these State agencies will be subject to the same constitutional or public law limitations as government. The rule inhibiting arbitrary action by government must equally apply to these instrumentalities in their dealings with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into a relationship with any person it likes at its sweet-will, but their actions must be in conformity with some principles which meet the test of reason and relevance. Therefore, setting aside legal technicalities and dogmas, the courts would do well to exercise effective judicial control over the actions of these instrumentalities.[53]

Of late, the public sector in India has been a subject of vehement controversy because of its inefficiency and consequential sickness. The expectation that the public sector would generate resources for the economic growth of the country has remained unfulfilled. The following statistics would show the real state of public sector undertakings in India:

1. Total investment in public sector in 1994—Rs 1,64,332 which is 15% of the GDP.
2. Return on this investment comes to about less than 2%
3. Total number of PSUs. 246
4. Total number of PSUs. in operation 220
5. Total number of PSUs. which made profit in 1993-94 120
6. Total number of PSUs. which made losses in 1993-94 117
7. Total number of PSUs. deemed sick 104

53. See *R.D. Shetty* v. *International Airports Authority*, (1979) 3 SCC 489: AIR 1979 SC 1628.

8. Total number of PSUs. chronically sick 56
9. Total number of PSUs. without chief executives 37

Reasons for this state of affairs are many but the main reason seems to be as someone from Japan remarked, "we run our government on business lines and you run your business on government lines". For various reasons public sector became more a blight than blessing. But, in fact, public sector did not fail us, we failed it. It consumes 20% of domestic credit but generates only less than 2% of the GDP. Some of the reasons for this state of affairs seem to be: (*i*) Lack of efficiency which may include poor returns, poor technology and marketing skills; (*ii*) protection from competition; (*iii*) political interference; (*iv*) artificially depressed prices to appease voters; (*v*) serious environmental consequences; (*vi*) lack of continuity and autonomy in the administration; (*vii*) lack of accountability; (*viii*) inward looking attitude; (*ix*) disregard of foreign capital; (*x*) pampered labour which did not talk of productivity. It is for these reasons that privatisation of public sector is taking place. Fact remains that government can bread bureaucrats and not enterpreneurs. The government following the policy of disinvestment in 1995 disinvested its share in PSUs. to the tune of Rs 9,743 crore as against the target of Rs 13,500 crore. Thus, the progress of disinvestment is also slow and tardy. Except for the 9 PSUs. (Navratan) the public sector undertakings give an image of shattered scaffolding of broken reed.

However, it is wrong to assume that privatisation is a panacea for all ills. It has its own problems which may include: (*i*) exploitation; (*ii*) consumerism; (*iii*) self-centredness; (*iv*) divorce from norms and ideals. These may lead to a 'joyless economy' and 'unsocial society' where the people are left with nothing except to go for shopping. Nevertheless with good governance, vigilant accountability and regulatory institutions with emphasis on social justice and social growth, it can be harnessed in the service of the people. It is possible that in the short run it may increase inequality, it may be harsh on workers and inefficient producers but in the long run it may be rewarding in terms of creating more jobs, increasing quality of goods and services and better quality of life. In short, it is as good and as bad as democracy itself. When democracies come in different shapes and sizes, imposing one single economic system on a pluralistic world deserves a serious thought.

The fact remains that in a developing country like India where the private sector is capital starved the public sectors undertakings will have to play a significant role in the core sector of the economy but this is not possible unless PSUs. are allowed to run on business lines. It is for this reason that now the government is following the policy of ACA (Authority-Continuity-Accountability) to revitalise this important sector of Indian

economy. Nevertheless 'Business' in the context of public sector undertakings should not mean mere 'profit earning'. It should function in a manner as to promote business potential of the country for the benefit of the people.[54]

PROPOSED AREAS OF DISCUSSION

1. In India the mushroom growth of statutory and non-statutory public enterprises defies orderly classification by reference to any meaningful criterion because they have been set up by government and Parliament ad hoc to discharge a variety of tasks. Discussion on the topic may aim at evolving a meaningful criteria of classification and a consistent pattern of establishment.
2. According to one thesis the creative genious of the bourgeoisie invented corporate device and hence the controversy whether public corporations come within the definition of term 'State' is essentially a part of relentless class struggle. Against this backdrop the desirability or otherwise of treating public corporations as 'State' under Article 12 may be discussed.
3. The legal power vested in the corporations are extensive, and although a person having a sufficient legal interest can impugn the validity of their acts and decisions, successful challenges will be rare, firstly because of the breadth of their powers and secondly, because of the disinclination of courts to afford locus standi to members of the general public. In the backdrop of this observation, the problems of locus standi necessary to challenge the actions and policies of public undertakings and the difficulties in obtaining mandamus for enforcing legal duties of corporations may be discussed.
4. The main reason for preferring independent public undertakings to undertake various governmental functions over government departments was that civil servants would always be looking over their shoulders, apprehensive of the parliamentary inquisitor. Hence for a better performance of these undertakings, it is desirable that they must be insulated from the rigours of question time in Parliament. Against this background the desirability, mode and effectiveness of parliamentary control of public undertakings may be discussed.
5. The main reason which has turned many public undertakings into uneconomic pits is political interference. Against this background various problems of public undertakings adversely affecting their role performance with special reference to political interference may be discussed.
6. Public undertaking in general and those undertakings any public service in particular, have not been able to come to the people's expectations. One of the reasons for this seems to be that the public control exercised through mass media and consumers' representation and participation is very feeble. Discussion on this topic may aim at evolving norms and patterns of public control in the Indian situation.
7. Main constitutional problems relate to the legal status of public corporations, especially their liability in tort and contract. The problems of the liability of public corporations may be discussed with a view to reconciling the claims of individual justice and social defence.

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12

The Citizen and Administrative Faults

Any progressive system of administration presupposes the existence of a mechanism for handling grievances against administrative faults, and the recognition of a right of every member of the public to know what passes in government files. Therefore, the treatment of this subject involves the study of the following four topics:

(A) Ombudsman.

(B) Right to know.

(C) Discretion to disobey.

(D) Central Vigilance Commission.

(A) OMBUDSMAN

Any good system of administration, in the ultimate analysis, has to be responsible and responsive to the people. But history bears witness to the fact that more often, the impersonal bureaucratic system advertently or inadvertently tries to overwhelm the 'little man'. With the proliferation of administrative agencies affecting the life of a citizen in every conceivable aspect, the chances of administrative faults touching the rights of a person, personal or property, have tremendously increased. This has led to the never-ending search for an efficacious mechanism that can protect a person from administrative faults. The search has produced the idea of 'Ombudsman' which in terms of utility means a 'watchdog of the administration' or 'the protector of the little man'. This institution was first developed in Sweden in 1809 and soon became a cherished importable commodity the world over. It is a unique institution which leads to an 'open government' by providing a democratic control mechanism over the powers of the State. Its main catch is its apparent effectiveness despite minimal coercive capabilities. It has its own role to play by bringing 'renaissance' and 'humanism' in the working of modern governments which have tended to develop an attitude to look to the paper rather than the person behind it.

An Ombudsman, or his equivalent, has become a standard part of the machinery of any modern government. In the twentieth century, almost all countries have witnessed a change from laissez-faire to regulation, from individualism to collectivism, from a State with limited powers to a welfare and service State. Therefore the chances of friction between a government official and a private citizen have multiplied manifold. In these circumstances, in the name of progress and development, individual justice against

administrative faults may slip into the low visibility zone. Therefore the importance of an institution like Ombudsman to protect the 'little man' against administrative faults by keeping the administration on rails cannot be overemphasised.

(1) Development in England

Like any other country with an extensive form of government, in England also, the grip of Parliament and the courts over the ever-widening fronts of the administration started showing signs of weakness. The resultant discontentment due to administrative faults also started mounting, and ultimately erupted in the Crichel Down episode in 1954. This case, though it had little legal content, focused attention on the maladministration of the government in dealing with a citizen's grievance. In this case, the government had acquired a piece of land for use as a bombing range during the war. After the war was over, the owner desired to repurchase it. The claim of the owner was considered by various officials with the usual impersonal attitude and callous indifference. Ultimately, the land was given to the Agriculture Ministry to be used as a model farm. The public criticism and heat which this episode generated led to the appointment of the Franks Committee and on its recommendations the Tribunals and Inquiries Act, 1958 was passed. But the problem of administrative faults was solved only in 1967 when the Parliament Commissioner Act was passed.

The Parliamentary Commissioner envisaged under the Act is a permanent appointee with the security of service of a High Court Judge. He is appointed by the Crown on the advice of the Prime Minister. His salary is charged on the Consolidated Fund and he holds office during good behaviour, subject to the retiring age of sixty-five. He can only be removed on addresses from both Houses of Parliament. He has power to appoint his own staff subject to the Treasury's approval. Astonishingly, there is no professional lawyer on his staff. He does not receive complaints directly from the citizens but through the members of Parliament. This is done to reconcile the notion of ministerial responsibility with the concept of this institution. He has no other power except to investigate and report. The report is made to the Select Committee of the House of Commons which examines it and proposes action. Ministers are not outside the purview of this jurisdiction. One of the characteristic features of this institution is its non-lawyer character and, therefore, proceeds with the work in an informal manner without obsession with legal technicalities. However, for legal advice it can always use the office of the Treasury Solicitor. There is no set prescribed procedure of inquiry, but the Commissioner has adequate powers to investigate a complaint thoroughly. The investigations are conducted in private and the officials implicated are given reasonable opportunity to defend themselves. He can administer oath and compel the attendance of witnesses and the

production of documents. Contempt of his authority is punishable. His reports on investigations, and communications with Members of Parliament on the subject-matter of complaint, are protected by absolute privilege in the law of defamation.[1] Irrespective of the Official Secrets Act and the law relating to Crown privilege, he is entitled access to any relevant document except the one relating to the proceedings of the Cabinet and its committees.[2] However, 'Crown privilege' may be asserted to prevent the Commissioner or any member of his staff from disclosing the informations obtained during his investigation.[3] The Official Secrets Act may also be used to prevent disclosures for purposes other than investigation and report.[4] The Commissioner is prohibited from investigating an action in respect of which the person has a remedy in a court or tribunal by way of appeal, reference or review, unless he is of the opinion that such remedy would not be adequate. The jurisdiction of the Commissioner extends to the departments given in the Second Schedule of the Act. The Third Schedule lays down the departments which are excluded from his jurisdiction. Prominently external relations, crime investigation, judicial proceedings, prerogative of mercy, governmental, contractual and commercial transactions, award of honours, granting of royal charters, national health service, local government, police and personnel matters in armed forces and the civil services are excluded from this jurisdiction. This exclusion is the subject of much criticism in England. The jurisdiction of investigation extends to the cases of "injustice in consequence of maladministration".[5] However, the terms 'injustice' and 'maladministration' have been deliberately left undefined to make the boundaries of jurisdiction flexible. Nevertheless, 'injustice' includes cases of hardship and a sense of grievance, besides legally redressible damage. Maladministration covers a multitude of administrative faults of commission and omission, corruption, bias, unfair discrimination, harshness, misleading a member of the public as to his rights, failing to notify him properly of his rights or to explain the reasons for a decision, general highhandedness, using power for a wrong purpose, failing to consider relevant material, taking irrelevant material into account, losing or failing to reply to correspondence, delaying unreasonably before making a tax refund or presenting a tax demand or dealing with an application for a grant or licence and so on.[6]

1. Section 10(5) of the Parliamentary Commissioner Act, 1967.
2. Section 8.
3. Section 11(3).
4. Section 11(1) and (2).
5. Sections 4, 5(*i*) and Schedule II of the Parliamentary Commissioner Act, 1967.
6. S.A. de Smith: CONSTITUTIONAL AND ADMINISTRATIVE LAW, (3rd Edn.), p. 618.

Judged by international standards, the Parliamentary Commissioner has done commendable work and the ratio of his successes is consistently on the increase.[7]

Because of various jurisdictional and operational factors, difficult to quantify, the Ombudsman has been nicknamed by sceptics as an 'Ombudsmouse' especially after his special report on Sachsenhausen episode in 1967, when the Foreign Office officials had been guilty of procedural maladministration in dealing with an application by ex-prisoners-of-war for discretionary compensation for the sufferings caused by incarceration in a Nazi concentration camp. The reason for disillusionment is that a finding of maladministration does not necessarily lead to anything more than an expression of official regret or an undertaking that the department will suitably modify its procedures.[8]

Since 1994 Ombudsman has entertained responsibility for enforcing the open government code of practice on access to government information. He now investigates complaints forwarded to him by members of parliament against government departments and other bodies subject to his jurisdiction which fail to comply with the provisions of the Code.

In the absence of enforcement provisions, the select committee of the members of parliament plays an important role in bringing pressure on the departments to accept Ombudsman's report. The existence of select committee has strengthened this institution in the sense that there have been a few occasions when the recommendations of the Ombudsman have not been accepted.[9]

(2) Developments in USA

Though there is a lot of 'Ombudsmania' in USA no 'Ombudsman' has infiltrated the administration except in the three States of Hawaii, Nebraska and Oregon for local government agencies. Since 1963, in every session of the Congress a Bill has been introduced to establish an institution akin to Ombudsman, but it never did become an Act. The predominant reason seems to be that in USA the institution of Ombudsman is considered by the members of the Congress as a drag on their status and power for they consider it their sole prerogative to represent their constituencies and to handle the grievances of the people. However, the Congressional investigations and grievance cells established in various departments, like the police review Boards, discharge the work of Ombudsmen.[10]

7. *See* Schwartz and Wade: LEGAL CONTROL OF GOVERNMENT, (1972).
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10. Gellhorn: WHEN AMERICANS COMPLAIN, (1966).

(3) Developments in India

M.C. Setalvad, in his speech at the All India Lawyers' Conference held in 1962, suggested the idea of establishing an institution similar to that of an 'Ombudsman'. The idea was extensively investigated by the Administrative Reforms Commission and a definite suggestion was placed before the government in its Interim Report, dated October 14, 1966. On the basis of the recommendations, the government prepared the Lokpal and Lokayuktas Bill, 1968 and introduced it in Parliament but eventually it was allowed to lapse. In 1971 the Bill was again introduced but was soon lost in oblivion. In 1977 again an attempt was made and the Bill as emerged from the Joint Select Committee of Parliament, was to come for the consideration of the House in the 1979 monsoon session, but because of the resignation of Prime Minister Desai, the session was adjourned sine die. In 1985 another Lokpal Bill was introduced in Parliament which was restricted to offences punishable under the Indian Penal Code. This Bill drew violent protests from the Opposition and hence it was withdrawn by the government on the ground that its jurisdictional reach is highly limited. In 1989 another Lokpal Bill was introduced in Parliament but this Bill also could not see the light of day. Once again in the monsoon session of Parliament (1993) the government made a promise to appoint a Lokpal to look into the charges of corruption against the government but it could not be passed. By introducing the Lokpal Bill, 1997 in the Budget Session of the Parliament, the United Front Government can be said to have kept the promise it had made about cleansing public life and injecting an element of accountability at the highest level. However, because of the fall of the government, the Bill could not, once again, see the light of day.

Last attempt for the establishment of Lokpal at the center was made on August 3, 1998 when a fresh Lokpal Bill was introduced in the Parliament. This Bill also could not see the light of the day because of controversy regarding the inclusion of Prime Minister within the jurisdiction of Lokpal. Now in 2003 Lokpal Bill has once again been introduced in the Parliament. This Bill proposes to include Prime Minister also within the orbit of the Bill. The Bill provides that the institution of Lokpal shall consist of a Chairperson who is or has been a Chief Justice or a Judge of the Supreme Court and other two members who are or have been the Judges of the Supreme Court or the Chief Justices of the High Courts.[11] They shall be appointed by the President of India after obtaining the recommendations of a committee consisting of (*a*) Vice-President of India, (*b*) Prime Minister, (*c*) Speaker of the Lok Sabha, (*d*) Home Minister, (*e*) Leader of Opposition in Lok Sabha and Rajya Sabha. However, no sitting Judge of the Supreme Court or sitting

11. The Lokpal Bill, 1998, Section 3.

Chief Justice of a High Court shall be appointed except after consultation with the Chief Justice of India.[12] Section 5 provides that the Chairman and Member shall not be member of Parliament or State or Union Territory Legislature. They shall also not hold any office of profit or be connected with any political party or carry on any business, profession or business. The Chairman and Members shall hold office for a term of three years or until the age of seventy years, whichever is earlier. On ceasing to be the Chairperson and Member he shall be ineligible for reappointment as the Lokpal and further office of profit under the Government of India or the State Government.[13] Their salaries and other conditions of service shall not be varied to their disadvantage after their appointment.[14] The Chairperson and Member shall not be removed from his office except by an order of the President made on the ground of proved misbehaviour or incapacity after an inquiry made by a committee consisting of the Chief Justice of India and two other judges of the Supreme Court next to Chief Justice in seniority.[15] Lokpal shall appoint a Secretary and other staff necessary for the discharge of its functions as the President may determine in consultation with the Lokpal.[16] Lokpal shall have jurisdiction to enquire into any allegation made in the complaint. Limitation for filing a complaint shall be ten years from the date alleged offence is committed. However, if bias is alleged against Chairman or any Members the President, on application, shall obtain the opinion of the Chief Justice of India and shall decide accordingly.[17] Any person other than a public servant can make a direct complaint to the Lokpal. The complaint shall be made in the prescribed manner and shall be accompanied by prescribed fee and affidavit except in case of a complaint from a person in jail or other place of custody.[18] Every inquiry shall be conducted by the Chairman and the Members sitting jointly. The inquiry shall be open to which public may have access except in exceptional circumstances and for reasons to be recorded in writing such enquiry may be conducted in camera.

The Lokpal shall complete enquiry within a period of six months but where it is not possible it shall record reasons in writing.[19] For the purpose of conducting enquiry, Lokpal shall have the powers of a civil court and proceedings before Lokpal shall be deemed to be judicial proceedings within the meaning of Section 193 of the Indian Penal Code. The Government or any public servant shall not be entitled to any privilege relating to the pro-

12. Section 4.
13. Section 6.
14. Section 6(3).
15. Section 7.
16. Section 9.
17. Sections 10, 11, 13.
18. Section 12.
19. Section 14.

duction of any document or oral evidence. For the proper conduct of enquiry, Lokpal shall have power, to summon and enforce attendance of any person and to examine him on oath, to enforce discovery and production of any document, to requisition any public record, to issue commissions for examination of witnesses and documents and to search and seize any document.[20] After enquiry, if offence is proved, the Lokpal shall communicate its report and findings to the competent authority. Such competent authority shall be the Speaker in case of Prime Minister and Speaker in the case of member of Lok Sabha and Chairman of the Rajya Sabha in case of a member of Rajya Sabha. Competent authority shall place the report on the table of Lok Sabha or the Rajya Sabha, as the case may be, if House is in session and in case not in session, within a period of one week from the reassembly of the House. The competent authority shall communicate to the Lokpal, within a period of ninety days from the date of receipt of the report, the action taken or proposed to be taken on the basis of the report. Lokpal shall present annually to the President of India a consolidated report who shall cause the same to be placed before each House of Parliament as soon as possible but not later than ninety days from the date of receipt of the report. In computing the period of ninety days any period during which Parliament is not in session shall be excluded.[21] Whoever intentionally offers any insult or causes any interruption to any proceedings before the Lokpal shall be punished with an imprisonment for a term which may extend to six months, or with fine, or with both. Lokpal shall have power to try such offence and any person convicted shall have right to appeal to the Supreme Court against such conviction.[22] Every person who makes a complaint which is found by the Lokpal to be false shall be punished by it, after summary trial, with imprisonment which shall not be less than one year but which may extend to three years and also a fine which may extend to fifty thousand rupees.[23] Out of this fine Lokpal may award compensation to the public functionary against whom false report was filed.[24] President of India may also confer additional functions on Lokpal and may require it to enquire into any allegations against any public functionary.[25] If the complaint is wholly or partially substantiated the Lokpal may make necessary orders to compensate the complainant having regard to the expenses incurred by complainant in respect of such complaint.[26] Lokpal and its officers shall be immune from prosecution or other legal proceedings in respect of any thing done in good faith and its proceed-

20. Sections 15, 16.
21. Section 17.
22. Section 21.
23. Section 22.
24. Section 23.
25. Section 24.
26. Section 25.

ings or decisions shall not be called in question in any court of law.[27] It may be mentioned that this provision shall not oust the jurisdiction of the High Courts and the Supreme Court. Lokpal shall have power to make rules for the purpose of carrying out its functions.[28] Administrative expenses of the Lokpal institution shall be charged on the Consolidated Fund of India.

The creation of the office of the Lokpal is basically a western concept. When Sweden took the initiative to create the institution of the Ombudsman in the sixties it was seen as a device for controlling the bureaucracy. Over the years even the political executive was also placed under its jurisdiction. However, the proposed Lokpal Bill suffers from a major deficiency. The Lokpal Bill (1998) seeks to place unreasonable restrictions on those who may have genuine complaints but do not have the necessary proof to substantiate the charges. The complainant must be absolutely sure of the facts and must have proof to substantiate the complaint. It is like asking the complainant to investigate the case, collect evidence and prepare a foolproof charge sheet. If the complaint made in good faith is not proved, the complainant may be required to pay a fine up to Rs 50,000 and face a jail term up to three years. This provision would certainly deter even a genuine complainant.

Furthermore, there is no specific provision that Lokpal should specify the action to be taken against the public functionary in case charges were substantiated. Placing of the report before the Parliament for action would mean that the action would be lost in party politics. If the purpose of this institution is to check corruption in high places then it is equally necessary that there should be a binding provision for making obligatory for all public functionaries to file their property returns before the Lokpal soon after becoming a member of Lok Sabha or Rajya Sabha. They should also submit a copy of their annual income tax returns to the Lokpal. In other respects present Lokpal Bill, 1998 is certainly an improvement on the 1997 Bill.

It is too early to comment on the working of this institution because it is still in the take-off stage. However, its desirability has been fully realised. In India, the existing machinery for the correction of administrative faults is highly inadequate. The public law review system of administrative action through writs and orders under Articles 32, 226, 136 and 227 is not only technical and expensive, but also involves delay because of congestion in courts which has reached staggering proportions. Private law review by injunction, declaration and suit for damages is also not an adequate remedy due to similar reasons. The vigilance exercised by government vigilance and anti-corruption cells is far from satisfactory because of red-tapism and pol-

27. Section 26.
28. Section 29.

itical overtones by which the big fish always escape the net. The help of MLAs and MPs is not evenly available to every person because they are partisan politicians. Therefore, the institution of the Ombudsman seems to be the only hope for a quick remedy for administrative inertia, corruption and indifference.

The apprehension that the Ombudsman will impair ministerial responsibility has lost its substance. If a minister can be made responsible to courts there should not be any unconstitutionality if he is made accountable to the Ombudsman who is a creature of Parliament itself. For policy and efficiency of their departments ministers are responsible to Parliament but for administrative lawlessness they may be made accountable to the Ombudsman. Far from weakening ministerial responsibility, the Ombudsman will help that principle work better. On the basis of investigation, Parliament can reach the bottom of the problem and can hold a minister responsible and accountable for it. Even in England it is being increasingly felt that direct complaints (now they are routed through a Member of Parliament) to the Parliamentary Commissioner would fit in the constitutional structurisation because the Commissioner is necessarily an arm of Parliament.

Ministers in any self-governing country like India belong to a majority party and so long as the popular vote prevails, a party in majority today may become the minority tomorrow. Hence Ministers who shape the policies of the government should be aware that official inequities if tolerated today may tomorrow oppress yesterday's rulers. Hence "everyone, whether or not in momentary ascendancy, shares a long-range interest in nurturing even-handed, effective and honest law administration; the rulers and the ruled alike benefit from devices that correct governmental mistakes and help prevent their occurring again".[29] The existence of the Ombudsman will induce ministers to a greater degree of accountability and responsibility.

The functioning of the proposed institution of Lokpal may be greatly improved by securing for him a constitutional position like the Election Commission under Article 324. In the absence of this position, his powers may conflict with those of the High Courts under Article 226. Though the jurisdiction of the High Courts has been restricted to jurisdictional defects only, the proceedings before the Lokpal may be hampered by invoking the jurisdiction of the High Court. Keeping in view the status of the Lokpal as envisaged in the Bill, he must be insulated from interference by courts.

It must be noted that though the Ombudsman may take pressure off the courts and prevent legal principles being strained, yet he is not a panacea for all the evils of bureaucracy. His function is to tidy up and improve the

29. Prof. Gellhorn quoted by R.L. Narasimhan in *The Indian Ombudsman Proposal: A Critique*, Law and the Commonwealth, p. 27.

administration. His success depends on the existence of a reasonably well-administered State. He cannot cope with the situation where the administration is riddled with patronage and corruption.[30] There is also growing pessimism that in developing countries, where public opinion is unorganised, the executive is strong and the civil service is prone to abuse of power, the institution of Ombudsman may not give forth the desired results. Another source of uncertainty in India is that a single Ombudsman institution may not operate efficiently in so large a country because complaints may be too large for a single institution of three persons to dispose of. According to Mukherjea, J., this institution which is 'accusatorial and inquisitorial' in nature shall not be suitable in India because such an institution would be unprecedented in a democracy with traditions of independent judiciary. So he concludes that it is an 'impracticable and disastrous experiment' which will not fit into the Indian Constitution.[31]

It is also being argued that it is a clever move to remove public corruption cases in high places from the jurisdiction of the High Courts and the Supreme Court which can give binding and enforceable decisions. If the working of this institution in states is any indiction then it is highly improbable that Lokpal shall succeed in its laudable mission of removing corruption from public life. Alternative seems to be creation of special benches in the High Courts and the Supreme Court to try cases of corruption of public functionaries.

(4) The Institution of Ombudsman in the States

Though the birth of an Ombudsman in the Centre is still doubtful, but for the States it has become a cherished institution.

The institution of Lokayukta is functioning in 13 States. These States are: Andhra Pradesh, Assam, Bihar, Gujarat, Himachal Pradesh, Karnataka, Madhya Pradesh, Maharashtra, Rajasthan, Uttar Pradesh, Orissa, Punjab and Haryana.

In Tamil Nadu and Jammu & Kashmir different investigating agencies are functioning [*see* the Tamil Nadu Public Men (Criminal Misconduct) Act, 1973 and the Jammu & Kashmir Government Servants (Prevention of Corruption) Act, 1975]. A similar proposal is pending in the State of Kerala [*see* Public Men (Investigation About Misconduct) Bill, 1977]. Delhi has also established the institution of Ombudsman.

30. Prof. Gellhorn quoted by R.L. Narasimhan in *The Indian Ombudsman Proposal: A Critique*, Law and the Commonwealth, p. 35. For an exhaustive analysis *see* M.P. Jain: LOKPAL: OMBUDSMAN IN INDIA, (1970); P.K. Tripathi: *Lokpal: The Proposed Indian Ombudsman*, 9 JILI 135 (1967); Rajeev Dhawan: *Engrafting Ombudsman Idea on a Parliamentary Democracy—A Comment on Lokpal Bill, 1977*, 19 JILI 257 (1977).

31. Quoted by Thakker, C.K.: ADMINISTRATIVE LAW (1992), EBC, p. 474.

(5) Working of Lokayuktas in the States

The fact of the establishment of the institution of Ombudsman in States proves beyond doubt that the assumption of accepting the "system of responsible government" and the consequential "ministerial responsibility" as a means of providing continuous oversight over the administration is not wholly correct. A Lokayukta can be much more effective than a member of Parliament or State Legislature because of his freedom from political affiliation and because of access to departmental documents. The following tables would show the working of the Lokayuktas in various States.

Year	Complaints B.F.	Complaints received	Total	Complaints disposed of	Balance
		State of Assam			
1990	6	42	48	11	37
1991	37	147	184	34	150
1992	150	240	390	115	275
1993	275	188	463	105	358
1994	356	65	421	256	165
		State of Andhra Pradesh			
Nov. 15, 1993-Dec. 1994	—	33,339	33,339	32,921	418
1-1-1995-14-2-1995	418	214	632	—	632
		State of Bihar			
1991	—	1943	1943	1204	739
1992	739	2926	3665	1721	2944
1993	2944	3156	6100	2278	3822
1994	3822	3760	7582	2653	4929
		State of Himachal Pradesh			
1991	38	25	63	31	32
1992	32	27	59	39	20
1993	20	28	48	28	20
1994	20	48	68	40	8
		State of Kerala			
1992	28	11	39	14	25
1993	25	12	37	9	28

Present Lokayukta three member Commission assumed charge on March 11, 1992. Four cases in 1992 and three cases in 1993 stayed by the High Court.

Year	Complaints B.F.	Complaints received	Total	Complaints disposed of	Balance
		State of Madhya Pradesh			
1991-92	2417	737	3154	817	2337
1992-93	2337	1045	4382	1269	2113
1993-94	2113	892	3005	786	2219
		State of Maharashtra			
1991	3255	8760	12,015	8436	3579
1992	3579	8709	12,288	8142	4146
1993	4146	9038	13,184	8942	4242
1994	4242	9613	13,855	9267	4588

Though the above statistics are old and incomplete as they do not give the necessary details about all the aspects of the working of the institution of Lokayukta in the States, yet a few generalisations may still be made. It is clear beyond doubt that the number of complaints received by the Lokayuktas is constantly increasing. But a large number of them are filed because of various reasons which may include lack of jurisdiction, triviality, baselessness, anonymity or pseudonymity, etc. This indicates that the people while filing complaints have not acted with restraint and responsibility. Another important reflection from the above tables is that the cases in which grievances were redressed is highly negligible. This establishes the practical ineffectiveness of this institution in the Indian situation where lack of administrative cooperation and the apathy of political highups is significantly marked. However, it has no reflection on the Lokayuktic therapy if properly administered.

Much information is not available about the types of complaints received by the Lokayuktas in various States but whatever information is available clearly indicates that the main areas of grievance include police action or inertia, prison torture, mala fide exercise of power and demand or acceptance of illegal gratification.

A survey of state enactments relating to Lokayukta indicates that there is no uniformity in the provisions of these enactments. In some states, grievances against administration are within the jurisdiction of Lokayukta, while in other states such grievances are kept out of its jurisdiction. In some enactments jurisdiction of Lokayukta extends to only a limited number of public functionaries while in others even Vice-Chancellors and Registrars of the Universities have been brought under its jurisdiction. In some states the Chief Minister has been brought within the purview of the Act, while in some cases he is not. Similar is the case with the members of the legislatures. There is no uniformity in the qualification, emoluments, allowances, status and powers of Lokayukta. Only in some enactments power of search and

seizure and power to take action suo motu have been given to Lokayukta. In some states budget of the Lokayukta office is charged on the consolidated fund of the state but in others it is not done. Power to punish for its contempt is conferred upon the institution of Lokayukta in some states only. In the same manner only a few states have put an independent investigative machinery at the disposal of Lokayukta. In some states Lokayukta has been given some other additional functions to perform also in order to make the institution cost-effective. Besides these, there are various other matters where there is no uniformity in state enactments.

Institution of Lokayukta has not been given any constitutional status, hence, its existence and survival completely depends at the sweet-will of the state governments. For political reasons State of Orissa issued an ordinance in 1992 for the abolition of Lokayukta institution. For the same reasons Haryana repealed Lokayukta Act in 1999.

It is tragic that in some states this institution was established not for prevention of corruption but for harassing and intimidating political opponents and for protecting the ruling elite. It is for this reason that the governments are keen that the Lokayukta should be their own nominee. Supreme Court had to quash the appointment of Lokayukta of Punjab, Justice H.S. Rai, because the Chief Justice of the High Court had not been consulted. In the same manner Justice Vasisth was removed from the office of Lokayukta of Haryana by repealing the Act because the Act had made removal of Lokayukta cumbersome by the outgoing government. This is a dangerous sign when a good institution is being allowed to be destroyed in party politics.

Whether the recommendations of the Lokayuta or Upa-Lokayukta are mere recommendations or have a binding effect, is a question which deserves serious consideration. The Apex Court in *Lokayukta/Upa-Lokayukta* v. *T.R.S. Reddy*[32] opined that since the Lokayuktas/Upa-Lokayuktas are high judicial dignitaries it would be obvious that they should be armed with appropriate powers and sanctions so that their opinions do not become mere paper directions. These authorities should not be reduced to mere paper tigers but must be armed with proper teeth and claws so that the efforts put in by them are not wasted and their reports are not shelved. For this the Court suggested an appropriate legislation in this behalf so that the confidence of the people in this institution is maintained. However, before more powers are given to the Lokayukta it is essential to ensure that political influence in the appointment of Lokayukta is eliminated. Fact remains that power is not a self validating value, important is the purpose for which it is exercised.

32. (1997) 9 SCC 42.

Another problem worth noticing is that whenever the Lokayukta recommends disciplinary action against a public servant even after complying with elaborate procedure it is only the beginning of the beginning inasmuch as the recommendations are no substitute for the report of the inquiry committee under the CCA Rules and the whole procedure must commence from the very beginning before the government. Even if it may be lawful for the government to take action on the recommendation without any further enquiry, the government may not be bound by the recommendation. In this situation also the Court recommended a proper legislation though any writ court can determine this question in a PIL.[33]

For the effectivity of the institution of Lokayukata it is further necessary that the Lokayukta must have the power to make its orders/directions to the government regarding investigation time-bound failing which the Lokayukta must have the power to punish the authority for contempt. Government apathy and indifference on this behalf makes this institution ineffective.

Foregoing analysis of the working of the institution of Lokayukta clearly shows that this institution has not been successful in curbing corruption in high places of administration and creating awareness among the general public about its functioning. However, while assessing the role performance of this institution one should take into consideration social, economic, political and cultural millieu in which Lokayukta has to function. Corruption has struck deep roots in the society, therefore, it is not easy for any single individual or institution to uproot it especially when there is a lack of political will.

Besides the traditional institution of the Ombudsman, in India, keeping in view the compulsions and constraints, other Ombudsmanic activities need encouragement so that justice may be given to the poor and the downtrodden in an inexpensive and expeditious manner. Failure on this front would spell dangerous consequences. Terrorists in Manipur and Arunachal Pradesh are reported to have started a drive against corruption and are on the rampage, killing known corrupt officials and politicians. It is against this backdrop that the Ombudsmanic role of the print and television mass media needs impetus. Efforts have already been made by the *Indian Express*, Chandigarh and *Femina*, a Times of India publication, in this behalf. The *Indian Express* and *The Tribune* published a regular 'Complaint Box' in which individual grievances of the persons against administrative faults are published. In many cases the individual gets immediate relief. The paper also publishes the administrative action or explanation or suggestion, if any, on the complaint. The same task is undertaken through the 'Consumer Action' page of the

33. *Ibid.* Section 12(3) of the Andhra Pradesh Lokayukta and Upa-Lokayukta Act, 1983 gives power to the government to take action on the recommendation of the Lokayukta but this power is not coupled with duty to take action without further enquiry.

Femina, a fortnightly magazine. Jalandhar Television also proposes to start such a programme where complaints of a general nature are proposed to be included. One can only hope that in due course of time, newspapers, radio and television media in India would effectively undertake this new role performance in this area of high social visibility. Private voluntary agencies may also play a vital role in this behalf. In Canada, there has been rapid growth of complaint columns in daily papers and of radio and television programmes to receive and investigate individual grievances.[34] The Delhi Development Authority has also developed a grievance procedure under which on notified fixed days and time hearing is held by various heads of departments on matters relating to their departments. All this makes administration public-oriented. Therefore, the need of having an Ombudsman in specialised fields cannot be overemphasised. Now there is a growing awareness of the utility of this institution amongst Banks and the office of the Ombudsman has come into existence.

It may be noted that in 1983 the then Martial Law Administration in Pakistan has also imported the institution of Ombudsman. After months on the anvil an Ombudsman, to be called *Wafaqi Mohtasib*, has finally been appointed. Justice Sardar Mohammad Iqbal become the first Ombudsman of Pakistan. As he was being inundated with petitions even before he started operating, the government had to issue a press note advising people to wait till the *Mohtasib's* secretariat is established. This simply exposes the dire need for an effective grievance machinery in the face of growing governmental lawlessness everywhere.[35]

The First All-India Conference of Lokayuktas and Upa-Lokayuktas was held at Simla in May 1986. This conference after due deliberations passed the following resolutions in order to make the institution of the Lokayukta still more effective:

1. That the institution of the Lokayuktas and Upa-Lokayuktas be given a constitutional status.
2. That suitable amendments be made in the Representation of the People Act and other similar Central and State enactments so as to enable the authorities concerned to take into consideration the findings/recommendations of the Lokayuktas and Upa-Lokayuktas in respect of persons holding elective offices.
3. That since the jurisdiction of the Lokayuktas/Upa-Lokayuktas in some enactments is restricted to Ministers and public servants in office, it is advisable that ex-Ministers and ex-public servants con-

34. *See* Balram Gupta: *Ombudsmanic Role of the Newspapers*, (1982) 3 SCC (J) 34, 37. "Some of them even use the word 'ombudsman' in their titles and have employed large staff to monitor hundreds of letters and thousands of phone calls."

35. *Hindustan Times*, February 11, 1983.

cerned in regard to the action complained against be also expressly brought within their purview.

4. That the jurisdiction of Lokayuktas and Upa-Lokayuktas should cover not only allegations/corrupt practices, but also grievances/maladministration as defined in the Central Lokpal and Lokayukta Bill of 1968.
5. That a time-limit be prescribed for placing the Special and Annual Reports by the Governor before the Houses of Legislature. Such time-limit should not, under any circumstances, exceed four months from the date of the receipt of the Report by the Governor or till the Legislatures meet next, whichever is earlier.
6. That the nomenclature of the institution should be 'Lokayukta' in every State.
7. That there should be uniformity throughout India in regard to the service conditions of the Lokayuktas and the Upa-Lokayuktas.
8. That there should be no security deposit for making a complaint before the Lokayuktas/Upa-Lokayuktas.
9. That the Lokayuktas and Upa-Lokayuktas should have discretion to dispense with the requirement of filing an affidavit with the complaint.
10. That there be a separate independent investigating agency under the direct control of the Lokayuktas/Upa-Lokayuktas.
11. That the provision relating to "Removal of Doubts" in the Lokayukta Acts, the expressions "Court" and "Judge" should mean only "High Court", "Civil and Criminal Courts" and their Presiding Officers, as the case may be.
12. That the Lokayukta/Upa-Lokayuktá be given the power to sanction search and seizure within the meaning of the Code of Criminal Procedure.
13. That suo motu power of investigation be conferred on the Lokayuktas/Upa-Lokayuktas.
14. That the Lokayukta and Upá-Lokayukta be deemed to be a High Court within the meaning of the Contempt of Courts Act.

This resolution was again adopted unanimously in the second conference held at Nagpur in 1989 and reiterated in the third conference held at Hyderabad in 1991. Implementation Committee appointed at the conference drafted a Model Lokayukta Bill and placed it before the fourth conference held at New Delhi in 1994. The Bill not only aims at uniformity but also provides for comprehensiveness in various provisions. The scope of the definition of terms like allegation, mal-administration has been widened to

include more matters for investigation. The definition of the term 'public functionary' has also been widened to include Chief Minister, Ministers, Members of State Legislature and Vice-Chancellors, etc.

In the matters of appointment of Lokayukta consultation with the Chief Justice of the High Court and the Leader of the opposition in the Legislative Assembly has been made mandatory and the criteria of merit, eminence and suitability of the person to be appointed is assured.

The conditions of service, salary, allowance, etc. of the Lokayukta have been clearly spelled out equating his status with that of the Chief Justice of the High Court. A time-limit has also been prescribed for filling up the vacancy. It is also provided that the administrative expenses of the institution to be charged on the consolidated fund of the State.

While providing for comprehensive powers of the Lokayukta to facilitate investigations, whether on a complaint or suo motu, into allegations of corruption or grievance of mal-administration against public functionaries, the proposed Model Bill provides for:

(*i*) empowering Lokayukta to recommend to the competent authority 'stay' or 'implementation' of the order or action complained against and to take such mandatory or preventive action as may be specified;

(*ii*) taking such action as is necessary including suspension of the public functionary complained against; and

(*iii*) granting interim relief to the complainant.

It has been further provided that if the action of the public functionary has resulted in any injustice or hardship to the complainant, the Lokayukta may recommend remedial action within a prescribed time frame. It is also provided that he can award compensation for loss or injury due to arbitrary action of the public functionary. A time-limit is provided for laying the annual reports with an explanatory memorandum before each House of State Legislature.

A provision is also made, for initiation of prosecution of public functionary, if Lokayukta is satisfied that the public functionary has committed an offence. Provision is also made for providing an independent investigative agency to function under the exclusive control and direction of Lokayukta. An important provision relates to submission of property statements of certain public functionaries to the Lokayukta.

The proceedings before Lokayukta are categorised as judicial proceedings with power to punish for its contempt.

Model Bill also provides for vesting of discretion in the Lokayukta to publish reports in public interest relating to exercise and performance of his functions and duties or any particulars of a case investigated by him.

The committee emphasised the need to give the institution of Lokayukta a constitutional status so that it could discharge its functions effectively and independently.

(B) RIGHT TO KNOW

Government openness is a sure technique to minimise administrative faults. As light is a guarantee against theft, so governmental openness is a guarantee against administrative misconduct. Justice Krishna Iyer rightly said: "A government which revels in secrecy... not only acts against democratic decency but busies itself with its own burial."[36] The right to know the truth is paramount and it must outweigh the right to property and other personal rights.

American Constitution, the oldest written Constitution of the World, does not contain specific right to information. However, the US Supreme Court has read this right into the First Amendment of the Constitution and granted access to information where there is a tradition of openness to information in question and where access contributes to the functioning of the particular process involved.[37] Administrative Procedure Act, 1946 (APA) was the first enactment which provided a limited access to executive information. The Act was vague in language and provided many escape clauses: (1) Every person had no right to information and only persons properly and directly connected could have access; (2) Agencies were permitted to withhold information without justification; (3) There was no provision for judicial review.

Taking these deficiencies into consideration the Congress in 1966 passed Freedom of Information Act, 1966, which gives every citizen a legally enforceable right of access to government files and documents which the administrators may be tempted to keep confidential. If any person is denied this right, he can seek injunctive relief from the court.[38]

However, this right recognises nine well-defined exceptions:

1. Information specifically required by executive order to be kept secret in the interests of national defence or foreign policy.
2. Information related solely to internal personal use of the agency.
3. Information specifically exempted from disclosure by statute.
4. Information relating to trade, commercial or financial secrets.
5. Information relating to inter-agency on intra-agency memorandums or letters.

36. *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248: AIR 1978 SC 597.
37. Hayes, M.J.: *Whatever Happened to the Right to Know? Access to Government Controlled Information since Richmond Newspapers*, 73, VAL Rev IV (1987).
38. *National Labour Relations Board* v. *Robbins Tyre and Rubber Co.*, 437 US 251 (1977).

6. Information relating to personal medical files.
7. Information compiled for law enforcement agencies except to the extent available by law to a party other than the agency.
8. Information relating to agency regulation or supervision.
9. Information relating to geological and geophysical maps.

After investigating the operation of this Act, Congress in 1974 amended it. Amendments provided: (*i*) for disclosure of "any reasonably segregable portion" of otherwise exempted records; (*ii*) for mandatory time-limit of 10 to 30 days for responding to information requests; (*iii*) for rationalised procedure for obtaining information, appeal and cost. Statistics show that maximum (80%) use of this Act is being made by business executives and their lawyers and editors, authors, reporters and broadcasters whose job is to inform the people have made very little use of this Act.

The judiciary in USA shares the same concern of the Congress which is reflected in the Freedom of Information Act, 1966. In *New York Times* v. *U.S.*[39], Justice Douglas observed: "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open discussion based on full information and debate on public issues are vital to our national health."

In order to provide access to Federal Government meetings, the Congress passed Sunshine Act, 1977 which mandates open meetings for regular session of federal agencies. However, closed door meetings are allowed in cases: (*i*) national defence and foreign policy; (*ii*) confidential commercial, financial information; (*iii*) invasion of privacy; (*iv*) law enforcement and criminal investigatory records; (*v*) pre-decisional discussions of general policy; (*vi*) bank examiners' record; and (*vii*) information which may lead to financial speculation. The Act provides that injunctive relief may be obtained to force a pending meeting to be open and to force closing of a meeting held in violation of law. After the enforcement of the Act, all meetings of federal agencies are to be open with at least one week's public notice unless prescribed exceptions are attracted. In the same manner The Federal Advisory Committee Act contains similar provisions regarding the meetings of outside groups advising federal agencies.

In England the thrust of the legislation is not on 'information' but 'secrecy'. The present law is contained in the Official Secrets Acts, 1911, 1920 and 1939. Under Section 2 of the Act of 1911 it is an offence punishable with up to two years' imprisonment to retain without permission, or failure to take reasonable care of information obtained as a result of one's present or future employment; or to *communicate* information so obtained, or entrusted to one in confidence by a person holding office under Her Majesty

39. 48 US 403.

or obtained in contravention of the Act, to anybody other than a person to whom one is authorised to convey it or to whom it is one's duty to impart it in the interests of State; or to receive such information, knowing or having reasonable cause to believe that it has been given in contravention of the Act. Under these wide-ranging prohibitions it may be an offence for a civil servant to pass on, or for a research worker to acquire from him, information even if such information has no bearing on security or is not classified as confidential.[40]

Keeping in view the desirability of 'openness' of governmental affairs in a democratic society, the Franks Committee recommended a repeal of Section 2 of the 1911 Act and its replacement by the Official Information Act. The proposals restricted criminal sanctions to defined areas of major importance: wrongful disclosures of (*i*) information of major national importance in the fields of defence, security, foreign relations, currency and reserves, (*ii*) cabinet documents, and (*iii*) information facilitating criminal activity or violating the confidentiality of information supplied to the government by or about individuals, and the use of information for private gains. Mere receipt of protected information would not be an offence under the Act, but communication to journalists and others would still be an offence if the author or speaker had reasonable grounds for believing that it had been conveyed to him in breach of the Act. Only material classified as 'Top Secret' or 'Secret' or 'Defence Confidential' would be protected.

Though this whole recommendation has not been implemented, yet in 1989 another Official Secrets Act was passed which repealed Section 2 of the 1911 Act and decriminalised much that was previously criminal. However, in other matters it is still very restrictive.

In 1993, the government in England published a white paper on 'open government' and proposed a voluntary code of practice of providing information. This code is voluntary and thus cannot be equated to a statutory law on access to information. It provides policies and principles relating to disclosure of government information. The sanction behind code is moral and not legal. If a request for information has been refused then only a complaint can be made to the parliamentary Ombudsman through a Member of Parliament.

The local government (Access to Information) Act, 1985 is the only statutory law providing a legal right to information against local governments. The Act provides for greater public access to meetings and documents of the major local councils. However, this Act leaves much to the discretion of the councils and mentions at least fifteen categories of exempted information. Individual seeking information has no adequate legal redress. It is

40. *See* S.A. de Smith: CONSTITUTIONAL AND ADMINISTRATIVE LAW, (3rd Edn.), p. 472.

certainly strange that a democratic country should be so secretive. It appears that this situation cannot last long because of mounting popular pressure and citizen's charter.

Referring to the right to obtain information and to publish it in USA and England, Howard Simpson, Managing Editor of the *Washington Post*, observed: "In USA the publishers have a right to print anything. If you get hold of a State secret, it is the editor who has the determining authority whether to hold it or print it. The government has the right to keep secrets, but if we come by it, nobody can stop us. Whereas in Britain, the press believes in national security, which means they can be told to hold a story back, they have Official Secrets Acts, etc."[41]

The Official Secrets Act, 1923 in India makes all disclosures and use of official information a criminal offence unless expressly authorised. The harshness of this law is mitigated to a limited extent by courts. Courts in India and England have rejected the concept of conclusive right of the government to withhold a document. But still there is too much secrecy which is the main cause of administrative faults.

Indian Constitution does not specifically provide for the right to information as a fundamental right though the constitutional philosophy amply supports it. Preamble of the Constitution constitutes India into a democracy and secures for its people, justice—social, economic and political, liberty of thought, expression and belief. This justifies the conclusion that the Indian Constitution is drawn upon the idea of open government. In the same manner Arts. 19(*a*), freedom of thought and expression and 21, right to life and personal liberty would become redundant if information is not freely available. Articles 39(*a*), (*b*), (*c*) of the Constitution make provision for adequate means of livelihood, equitable distribution of material resources of the community to check concentration of wealth and means of production. As today, information is wealth, hence, need for its equal distribution cannot be over emphasised. Taking a cue from this Constitutional philosophy, the Supreme Court of India found a habitat for freedom of information in Arts. 19(*a*) and 21 of the Constitution.

It is heartening to note that the highest Bench in India while recognising the efficacy of the 'right to know' which is a sine qua non of a really effective participatory democracy raised the simple 'right to know' to the status of a fundamental right. In *S.P. Gupta* v. *Union of India*[42], the court held that the 'right to know' is implicit in the right of free speech and expression guaranteed under the Constitution in Article 19(1)(*a*). The right

41. *Indian Express*, February 22, 1980.

42. 1981 Supp SCC 87: AIR 1982 SC 149. *See* also *Dinesh Trivedi* v. *Union of India*, (1997) 4 SCC 306.

to know is also implicit in Article 19(1)(*a*) as a corollary to a free press which is included in free speech and expression as a fundamental right. The Court decided that the right to free speech and expression includes: (*i*) right to propagate one's views, ideas and their circulation;[43] (*ii*) right to seek, receive and impart information and ideas;[44] (*iii*) right to inform and be informed;[45] (*iv*) right to know;[46] (*v*) right to reply;[47] and (*vi*) right to commercial speech and commercial information.[48] Furthermore, by narrowly interpreting the privilege of the government to withhold documents under Section 123 of the Evidence Act, the Court has widened the scope of getting information from government files. In the same manner by narrowly interpreting the exclusionary rule of Art. 72(2) of the Constitution, the Court ruled that the material on which cabinet advice to the President is based can be examined by the Court.[49] However, this judicial creativity is no substitute for a constitutional or a statutory right to information. Against this backdrop the provisions of the Official Secrets Act, 1923 suffer from the stigma of unconstitutionality. Strange as it might seem, the 1981 study of the Indian Law Institute, New Delhi on the Official Secrets Act is the only competent review of the Act ever undertaken in this country.[50] The Act, broadly speaking, falls into two parts. One concerns espionage and the other which affects the press, deals with unauthorised disclosure of official information. Section 5 of the Act lays down that if any person having in his possession any document or information which has been entrusted to him in confidence by any government official, or which he has obtained as an official, communicates it to any person other than a person to whom he is authorised to communicate it, he shall be guilty of an offence. So also a person who receives such document or information 'knowing or having reasonable ground to believe' that it is being communicated in breach of the Act. Later, the Act was amended to penalise disclosure of documents or even information which is "likely to affect friendly relations with foreign States". Considering the gross arbitrary abuse to which this vaguely and widely-worded expression may be subjected, the Act may be regarded as violating the provisions of Article 19(1)(*a*) of the Constitution and hence unconstitutional.

Section 5 is the virtual reproduction of Section 2 of the British Official Secrets Act, 1911 which is now recognised as wholly inappropriate in the

43. *Express Newspapers* v. *Union of India*, AIR 1958 SC 578.
44. *R.P. Ltd.* v. *Proprietors, Indian Express Newspapers*, AIR 1989 SC 190.
45. *Hamdard Dawakhana* v. *Union of India*, AIR 1960 SC 554.
46. *Indian Express* v. *UOI*, (1985) 1 SCC 641.
47. *LIC* v. *Manubhai Shah*, (1992) 3 SCC 171.
48. *Tata Press* v. *Mahanagar Telephone Nigam*, (1995) 5 SCC 139.
49. *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87.
50. *See* A.G. Noorani: *Secrets Act: An Anachronism*, Indian Express, July 31, 1981.

context of any modern democracy. While acquitting the editor of the Sunday Telegraph from the charge under the Official Secrets Act, 1911 for publishing a confidential assessment of the situation in Nigeria, written by the Defence Advisor at the British High Commission in Lagos, Justice Caulfield remarked that Section 2 should be "pensioned off".[51] Soon there was a demand for repeal which led to the appointment of the Franks Committee. The Committee condemned Section 2 and observed: "The main offence which Section 2 creates is the unauthorised communication of official information (including documents) by a Crown servant. The leading characteristic of this offence is its catch-all quality. It catches all official documents and information. It makes no distinctions of kind, and no distinctions of degree. All information which a Crown servant learns in the course of his official duty is 'official' for the purpose of Section 2, whatever its nature, whatever its importance, and whatever its original source. A blanket is thrown over everything; nothing escapes. The section catches all Crown servants as well as all official information. Consequently anyone, whether newsman or lay person, who receives such information is liable to punishment. Both the giver and the receiver of information are liable to imprisonment for a term which may extend to three years."

However the uniqueness of the Act is that ministers are, in effect, self-authorising. They decide for themselves what to reveal. Senior civil servants exercise a considerable degree of personal judgment in deciding what disclosures of official information they may properly make, and to whom. Such communication is regarded as 'authorised'. The result is that official leaks, a fertile source of disinformation, are protected but their exposure by unravelling the whole truth is forbidden.[52] Lord Delvin's remark is very apt: "It (Section 2) instals as the judges of what ought to be revealed men whose interest it is to conceal."

It may be pointed out that Section 2 was drafted in haste in times of crisis. The Bill was put forward by the government as a measure against spying and was essential on grounds of national security, therefore, passed without debate.[53] Consequently its repeal due to its unsuitability to the recent times was recommended by the Franks Committee. The Committee also recommended the replacement of 'likelihood of harm' test by the 'strict proof' test while determining injury to the public interest. Section 2 of the Official Secrets Act, 1911 has now been repealed by the British Official Secrets Act, 1989.

All these criticisms apply with added force to Section 5 of the Indian Official Secrets Act, 1923. The Indian Law Institute's study further points

51. *See* A.G. Noorani: *Secrets Act: An Anachronism*, Indian Express, July 31, 1981.
52. *Ibid.*
53. *Ibid.*

out a glaring difference between English and Indian practices. In England, the Attorney-General alone decides whether to prosecute or not. As Lord Shaweross pointed out in a letter to *The Times* (November 19, 1970): "Although the Attorney-General is a political appointee, his actions as Attorney-General and the way he exercises his discretion are entirely non-political. I know of no instance (since the *Campbell case*) in which the Cabinet has been called upon to decide whether or not a prosecution should take place, still less in which it has taken any such decision on political grounds." In India the executive controls the launching and as recent experience shows, even the withdrawal of prosecutions.

With the judicial support, the right to information has now become a cause of public action and there is a strong demand for a formal law on freedom of information. States of Goa, Tamil Nadu and Rajasthan have, since 1997, enacted laws ensuring public access to information, although with various restraints and exemptions. There is a pressure on the Central Governments also to enact law granting right to information. Various drafts were submitted for consideration by empowered bodies like the Press Council of India and by independent citizens' groups. Ultimately, Freedom of Information Act, 2002 was passed which was assented to by the President on January 6, 2003. The preambular declaration is fairly ambitious in setting the objectives for the Act: "To provide for freedom to every citizen to secure access to information under the control of public authorities, consistent with public interest in order to promote openness, transparency and accountability in administration and in relation to matters connected therewith or incidental thereto." The Act provides that any person seeking information could approach the designated authority either in writing or through electronic media. Deficiency of the proposed law lies in the number of exemptions granted from public disclosures of information. The Press Council of India Bill, 1996 had provided three exemptions which included: (1) Information, disclosure of which will have prejudicial effect on sovereignty and integrity of India, security of State and friendly relations with foreign states, public order, investigation of an offence which leads to incitement to an offence; (*ii*) Information which has no relationship to any public activity and would constitute a clear and unwarranted invasion of personal privacy; (*iii*) Trade and commercial secrets protected by law. However, the information which cannot be denied to Parliament or State Legislature shall not be denied to any citizen. Present Freedom of Information Act, 2003 tightens all these exemptions while adding several more. One such exemption is in respect of cabinet papers, including records of deliberations of Council of Ministers, Secretaries and other officers. This would make the conduct of all officers of state immune from public scrutiny. Another exemption relates to the "legal advice, opinion or recommendations made by an officer of a public authority during

the decision-making process prior to the executive decision or policy formulation.'' This confers too far reaching an immunity on officials. However, in one respect the Act marks a definitive advance over the initial draft in doing away with the exemption on information connected to ''the management of personnel of public authorities''. This makes information available relating to recruitment process of public agencies which is often riddled with corruption and nepotism. The Act is highly inadequate in respect of credible process of appeal and penalties for denial of information. The jurisdiction of the courts has been ruled out since the Act makes provision for an administrative appeal only. The officers who would deal with the requests for information are totally unencumbered by the prospects of any penalty for wilful denial of any access. Nevertheless, in spite of these limitations, this Act is a right step in the right direction.

The 'right to know' has a definite implication for courts also.[54] People have a right to access to courtrooms and court judgments irrespective of the fact whether it affects them individually or generally as a member/members of the community. People in an open society do not demand infallibility from judicial institutions but it is difficult for them to accept a situation when they are prohibited from observing or reading. Bentham has put it thus: ''Where there is no publicity there is no justice.'' Besides the well-recognised exceptions, in no other situation the public may be excluded from the courtrooms no matter the parties may have agreed to such a course or the judge may have thought it expedient and desirable. It is gratifying to note that this aspect of the right to know has been fully recognised in India. The Supreme Court in *S.P. Gupta* v. *Union of India*[55] rejected the government's claim for privilege and ordered disclosure of correspondence and documents pertaining to non-confirmation of Justice Kumar. Thus the seed of freedoms of information has been planted but it requires careful nurturing by Parliament and the executive. In a society like ours where freedom suffers from atrophy and activism, it is essential for participative democracy that the narrow pedantry which now surrounds the privilege of the government to withhold information must be replaced by the 'right to know' mobilisation.

Right to know also has another dimension. The Bhopal gas tragedy and its disaster syndrome could have been avoided had the people known about the medical repercussions and environmental hazards of the deadly gas leaked from the Union Carbide chemical plant at Bhopal. Therefore, the government has a duty to provide people baseline health data around existing hazardous plants. Failure to undertake such studies and to provide information to people must render government liable.

54. *See* Soli Sorabjee: *The Right to Know*, Indian Express, March 16, 1982.
55. 1981 Supp SCC 87: AIR 1982 SC 149.

In India bureaucrats place serious difficulties in the way of the public's legitimate access to information. The reason for this can be found in colonial heritage. Even after independence, a government official feels that he is acting on behalf of the President or the Governor and not on behalf of the public. Hence he had to remain anonymous and his actions secret, for the convenience of the government in power. A democratic government, to use the words of Woodrow Wilson, "ought to be all outside and not inside". There is a strong public feeling against secrecy of any kind in the administration of government. The secrecy system has become much less a means by which government protects national security than a means by which the government safeguards its reputation, dissembles its purpose, buries its mistakes, manipulates its citizens and maximises its power and corrupts itself.[56]

Today in India secrecy prevails not only in every segment of governmental administration but also in public bodies, statutory or non-statutory. There is a feeling everywhere that it pays to play safe. Even routine reports on social issues continue to be treated as confidential long after they are submitted. What is given out is dependent on the whims of a minister or a bureaucrat. The result is that there is no debate on important matters and no feedback to the government on the reaction of the people. The stronger the efforts at secrecy, the greater the chance of abuse of authority by functionaries.

There is need for administrative secrecy in certain cases. No one wants classified documents concerning national defence and foreign policy to be made public till after the usual period of 35 years is over. Secrecy may also be claimed for other matters enumerated in the Freedom of Information Act, 1966. But the claims of secrecy, generally by the government and public bodies, may play havoc with the survival of democracy in India. Because of the constraints of the Official Secrets Act, 1923, which was drafted to suit the needs of a foreign rule in India, the claims of informing the public are ignored. The government has unlimited powers to classify documents as confidential with impugnity.

The government has also in 1986 amended the Commissions of Enquiry Act, 1952 in such a way as to empower the government to suppress reports of any inquiry commission under the Act if it is satisfied that in the interest of sovereignty and integrity of India, security of State, friendly relations with foreign States or in the public interest, it is not expedient to lay the report before Parliament or the State Legislature, as the case may be. This was done in the wake of the Thakker Commission Report relating to the assassination of Mrs Indira Gandhi and also the Ranganathan Commission Report

56. Justice K.K. Mathew: *The Nature and Scope of the Right to Know in a Democratic Republic*, (1979) 3 SCC (Jour) 19, quoting President Polak.

relating to the riots following Mrs Gandhi's assassination. This may also seriously jeopardise the people's right to know if power of withholding information is not properly exercised. However, in 1990 this process was reversed by the National Front Government to redeem its pre-election pledge to end all laws blocking the conduct of an open government.

There is a burden on the government to justify secrecy. There is often a talk to make the government open but nothing has been done so far. Even the report of a working group appointed by the Janata Government in 1977 has recommended to keep the basic structure of the Official Secrets Act unchanged. It has only concentrated on how to make leakage of information to the enemy more stringent and has recommended the death penalty not only to the giver but also to his accomplices. But about the 'right to know' and 'classification of documents' nothing was said.[57]

At a seminar on "Press, Society and Government" organised by the Servants of the People Society at Chandigarh,[58] the "Right to Know" received mammoth support. B.C. Verghese, Editor-in-Chief, *Indian Express* said that information cannot be doled out like ration and the "executive privilege" was an invasion against democracy which was sustained by the people. Sahay expressed the need for a 'pressure group' to take up the cause of 'open government' in India. Open government is a part of the Constitutions of Denmark and Finland and USA, Austria and France have laws on the subject. In a democracy the citizen's right to know is assumed rather than guaranteed. In fact the right is derived from the government's accountability and answerability to the people. Therefore, no government should think that people must be told only that much which it thinks to be good for the people and safe for itself.

Dealing directly with 'Right to Know' the Apex Court has held on various occasions that it is a fundamental right of the people covered under Articles 19(*a*), 14 and 21 of the Constitution. Moving forward in the same direction the Court in *Union of India* v. *Association for Democratic Reforms*[59] held that voter's right to know antecedents including criminal past of a candidate to membership of Parliament or Legislative Assembly is also a fundamental right. Court observed that voter's speach and expression in case of election would include casting of vote, that is to say, that voter speaks out or expresses by casting of vote and for this purpose information about candidate to be selected is a must. In this case the Supreme Court had further directed the Election Commission to acquire information about crime and property and education status of the candidates as a part of nomination paper. Subsequently Parliament amended the Representation of People (Third

57. *See* write-up by Kuldip Nayar: *Secrecy of Government*, Indian Express, March 19, 1980.
58. *Indian Express*, Chandigarh, December 12, 1982.
59. (2002) 5 SCC 249.

Amendment) Act, 2002 by which a candidate was required to supply information about his conviction in a criminal case, however, he was not required to give information about his assets and education. Declaring the amendment as illegal, null and void as violative of voter's fundamental right to know under Article 19(1)(*a*), the Court in *People's Union of Civil Liberties* v. *Union of India*[60] held that the information allowed by the Amendment Act, 2002 is deficient in ensuring free and fair elections which is the basic structure of the Constitution. Similarly, Court held that people have a right to know the circumstances under which their representatives got allotment of petroleum retail outlets.[61]

Some legislation, therefore, is necessary which recognises the right to know, makes rules for the proper 'classification of information' and makes the government responsible to 'justify secrecy'. This will not only strengthen the concept of open government, but also introduce accountability in the system of government. Outside the government, there is no justification for secrecy in public undertakings except within a very limited area of 'economic espionage'.

Sometimes there appears to be a conflict between the right to know and the right to privacy of public figures through whom the machinery of government moves. Our experience in India suggests that a public figure should not be allowed protection against exposure of his private life which has some relevance to his public duties on the plea that he has a right to privacy. Right to privacy should not be allowed as a pretext to suppress information.[62]

(C) DISCRETION TO DISOBEY

St. Thomas Aquinas wrote: "Laws may be unjust though being opposed to the divine good; such laws are the laws of tyrants...laws of this kind must no wise be observed." About laws which are ultra vires the authority granted to the lawmaker, St. Thomas says that those are acts of violence rather than laws, and such laws do not bind the conscience. St. Augustine also expressed the view that a law which is not just is no law at all.[63] However, today any talk about discretion to disobey may sound seditious at least to those whose minds are trained in the common law system. In a country like India where people have no right to know, the judicial process grinds slow and the other grievance procedures are feeble and inefficient, perhaps the discretion to

60. (2003) 4 SCC 399.

61. *Onkar Lal Bajaj* v. *UOI*, (2003) 2 SCC 673.

62. This was also the consensus at a seminar on *Right to Know and Right to Privacy* organised by the Haryana Union of Journalists on August 20, 1983. *Indian Express*, Chandigarh, August 23, 1983.

63. See *Summa Theologia*, 96, 4 and *De Libero Arbitrio*, 1, 5 quoted in review of this book by Dr Joseph Minattur in Journal of the Bar Council of India, Vol. 9(3), 1982, pp. 637-641, p. 640.

disobey may provide an effective check on the operation of the governmental machinery in a reckless manner. It is gratifying to note that at a time when we are not only governed but administered, the Supreme Court has rightly taken the right foot forward in allowing discretion to disobey void orders. The decision of the Supreme Court in *Nawabkhan Abbaskhan* v. *State of Gujarat*[64] allows every person the discretion to make his own decision and disobey an order of the government, if in his opinion it is void. If he turns out to be wrong in his decision, of course, he is answerable, but if he is right he is not answerable in any way. In this case, the petitioner was prosecuted under Section 142 of the Bombay Police Act, 1951 because he had violated the externment order passed by the Police Commissioner. The accused was acquitted by the trial court but on appeal by the State, the High Court reversed the order of the lower court. The important fact in this whole process was that the accused had challenged the validity of the externment order before the High Court under Article 226 during the pendency of his criminal trial and the High Court quashed the order on July 16, 1968. The accused took the defence in criminal appeal proceedings before the High Court that since the order becomes void ab initio and there being no externment order in the eye of the law there is no offence when he re-entered the forbidden area on September 17, 1967. The question whether a person can disobey the order with impunity if subsequently that order is quashed was answered by the High Court in the negative. The High Court held:

> "There is no principle in upholding the respondent's claim that he has a right to violate an order passed by an authority having jurisdiction to pass it, if subsequently he can persuade the court that there was an inbuilt lacuna or latent defect in the said order. In other words he claims to have the right to judge for himself whether it is legal or illegal and in anticipation of the court upholding his contention, the right to violate it with impunity."[65]

On appeal the Supreme Court reversed the decision of the High Court and held that the externment order is of no effect and its violation is no offence. The individual decision-making by private persons of public actions may be considered as a very radical approach but the alternative is a travesty of constitutional guarantees. Grave consequences involved in allowing discretion to disobey, someone may argue, may first lead to anarchy and then to tyranny. But what is the remedy available to a person who has been subjected to an illegal order? Our legal system does not recognise the right to compensation for damage suffered by a person in obeying an invalid order. However, the distinction between a 'void' and 'voidable' order brought in by the Supreme Court obstructed the real thrust of the decisions.

64. (1974) 2 SCC 121: AIR 1974 SC 1471.
65. *Ibid.*

This brings us to another problem which is a necessary corollary to the proposition of 'discretion to disobey'. The problem is, to what extent a person can resort to 'self-help' against a public servant who seeks to enforce an invalid law or order against him. The problem came before the Supreme Court in a slightly different complexion in *Kesho Ram* v. *Delhi Administration*[66]. In this case the appellant struck a Section Inspector of the Delhi Municipal Corporation on the nose which bled and also got fractured. The Inspector had gone to the appellant to seize his buffalo in discharge of his duties to realise the arrears of milk tax from him. The main contention of the appellant was that the attempt to realise the arrears of milk tax by duress was illegal because no demand notice under Section 154 of the Delhi Municipal Corporation Act, 1957 was ever given, so he had a right of self-defence against illegal action. The Supreme Court negatived the contention because in its opinion the Inspector was acting in good faith and had simply erred in the exercise of his powers. However, the Supreme Court reduced the sentence of the appellant from three years to imprisonment already undergone on the ground that the Inspector acted in an improper manner under a misconception about the mode of exercise of his powers. Though the decision is a pointer in the right direction yet the course of law in this area is still to be watched carefully. It is strange that the case of *Stroud* v. *Bradbury*[67] a leading English case on the point was not brought to the notice of the Court. In this case a Sanitary Inspector had entered the house of the appellant under the provisions of the Public Health Act, 1936 without giving prior notice which was the requirement of the law. The appellant obstructed the entry of the Inspector. The court held that the appellant had the right to obstruct entry of the Inspector which was not warranted by law.

When the Government of India seriously addresses itself to administrative law reforms, it is necessary that the forms of redress against official conduct must receive priority. There seems to be a strong resistance to any significant change, as we saw in the Law Commission's and Administrative Reform Commission's attempts to instigate widespread reform which was resisted by the government. The canvas of grievance redress strategies must be spread wide to include 'right to know' and 'discretion to disobey' besides other judicial and administrative techniques if the rampant corruption and the abuse of power is to be checked effectively before the people lose complete faith in democracy in India.

66. (1974) 4 SCC 500: AIR 1974 SC 1158.
67. (1952) 2 All ER 76.

(D) CENTRAL VIGILANCE COMMISSION (CVC)

In any system of government, improvements in the grievance redressal machinery have always engaged the attention of the people. Even in parliamentary forms of governments where the rulers rule with the consent of the people the need for a viable grievance redressal machinery cannot be overemphasised. Actualities of our times have proved false the assumption that the system of responsible government provides for a built-in continuous review of the activities of the administration. The growth of party discipline and the prominence of partisan attitudes in asserting grievances and in defending the performance of the governments by Ministers tend to create an unfavourable atmosphere for the proper consideration of individual complaints against the administration. This system no matter, howsoever, ineffective completely fails when inertia and corruption filter from the top. It was against this backdrop that the establishment of the Central Vigilance Commission (CVC) was recommended by the Committee on Prevention of Corruption, the Santhanam Committee. The committee known after the name of its Chairman was appointed in 1962. It recommended the establishment of a Central Vigilance Commission as the highest authority at the head of the existing anti-corruption organisation consisting of the Directorate of General Complaints and Redress, the Directorate of Vigilance and the Central Police Organisation.[68] The recommendations of the Santhanam Committee were accepted by the government and thus the Central Vigilance Commission was established on a non-statutory basis under a Resolution No. 24/7/64 dated February 11, 1964. The CVC was attached to the Ministry of Home Affairs of the Government of India. Nevertheless it is independent in its functioning in the sense the Union Public Service Commission is and no order, direction or instruction can be issued by the ministry so as to interfere with its independent operation. The Central Vigilance Commissioner was appointed by the President for a term of six years or till he attains the age of 65 years whichever is earlier. Therefore the Central Vigilance Commissioner, like other civil servants, does not hold office at the pleasure of the President. He can be removed or suspended from the office by the President on the ground of misbehaviour but only after the Supreme Court has held an enquiry into his case and recommended action against him. His responsibilities include the operation of the vigilance machinery and coordination of the work of vigilance officers subordinate to him.

The powers and functions of the Commission were set out in the resolution under which it is established. It exercised general control and supervision over the vigilance and anti-corruption work carried on in various

68. Other existing grievance machineries included Special Police Establishment (1943), Vigilance Organisation (1955) and Central Bureau of Investigation (1963).

ministries, departments and public undertakings. It had been given jurisdiction and power to conduct an enquiry into transactions in which public servants are suspected of impropriety and corruption including misconduct, misdemeanour, lack of integrity and malpractices against civil servants. The Commission was assisted by the Central Bureau of Investigation (CBI) in its operations. The CVC has taken a serious note of the growing preoccupation of the CBI with work other than vigilance. Thus when the CBI is extensively used for non-corruption investigation work such as drug-trafficking, smuggling and murders it hampers the work of the CVC. The CVC also advises the Home Ministry on the necessity of departmental disciplinary action against public servants where prima facie charges of corruption and misconduct are established.

But how effective this institution has proved in uprooting corruption depends on various factors, the most important being the earnestness on the part of the government, citizens and institutions to clean public life. Over the years independence of CVC has also been seriously compromised. Originally the CVC had been equated with UPSC and its Chairman had a six years' term. However, later on it was reduced to five years which was further reduced to three years in 1977 with a provision for two years' extension at the pleasure of the government. U.C. Agarwal who demitted office on July 7, 1987 after a period of three years was not only refused extension of two years but the office remained vacant for about one year when C.G. Somiah, former Home Secretary was appointed in 1988. It is discouraging to note that the CVC has mentioned in its 1982 annual report 41 cases where the government did not accept its advice of imposing major penalty on erring officials in various units in the central sector.[69] The Commission has suggested premature retirement as the legitimate handle to be used for weeding out the corrupt among the public servants in higher positions. The Commission in its 1982 report also suggested that in cases where prosecution cannot be launched due to lack of evidence and other reasons, corrective and deterrent action should be taken at the stage of confirmation or the crossing of efficiency bar.[70] In its 1986 report the Commission has reacted sharply to the government decision to limit its role over public sector undertakings where the problem of corruption is by no means negligible.

In its efforts to check corruption in public life and to provide good governance the Apex Court recommended measures of far-reaching consequences while disposing a public interest litigation petition on the *Jain Hawala case*.[71] Three-Judge Bench separated four major investigating agencies from the control of the executive. These agencies are: Central Bureau

69. *Indian Express*, Chandigarh, August 29, 1983, p. 5.
70. *Indian Express*, Chandigarh, September 4, 1983.
71. *The Tribune*, Dec. 19, 1997.

of Investigation, Enforcement Directorate, Revenue Intelligence Department and the Central Vigilance Commission. The Court has shifted the CBI under the administrative control of the CVC. The Central Vigilance Commission, until now, was under the Home Ministry entrusted with the task of bringing to book cases of corruption and sundry wrong-doings and suggesting departmental action. Now the CVC is to be the umbrella agency and would coordinate the work of three other investigating arms. The Court further directed that the CVC should be made a statutory body and its head is to be selected by a three-man high-powered panel consisting of the Prime Minister, the Home Minister and the Leader of the Oppositions.

In order to give effect to the views of the Supreme Court, the government issued an ordinance on August 25, 1998. However, this measure had diluted the views of the Supreme Court by pitting one view against the other. Therefore, what ought to have been visualised as a reformative step had begun to be seen as a cleaver bureaucratic legalese. Main objections against the Ordinance related to: (*i*) restricting the membership of the CVC to bureaucrats; (*ii*) making prior permission of the competent authority mandatory before starting investigation against government officers above the rank of Joint Secretary and high ranking officers of nationalised banks and public sector undertakings; (*iii*) making Secretary Personnel ex officio member. Objections were also raised against Art. 21 of the Ordinance which had authorised commission to make rules but in consultation with the government.

It was when the Supreme Court expressed concern over these aspects of the Ordinance in the hearing relating to its validity that the government decided to amend the Ordinance and thus, on October 27, 1998 Central Vigilance Commission (Amendment) Ordinance was issued. The Commission was made a four-member body and its membership was opened to 'others' besides bureaucrats. In the same manner the single directive of prior permission was deleted and the membership of Secretary Personnel, Government of India was deleted. Nagarajan Vittal, a retired senior bureaucrat, was appointed the first Chief Vigilance Commissioner after the Commission was given a statutory status. It is too early to comment on the functioning of the reconstituted statutory Central Vigilance Commission but one thing is certain that no commission can root out corruption which has sunk so deep in the body politic. It can only act as a facilitator and propellant in the absence of a strong political will.

To ensure probity in public life and incorruptibility in public officials, government at last brought before Parliament Central Vigilance Commission Bill, 2003 which was passed amidst doubts expressed by many members that the law is unlikely to be an effective instrument against corruption in the administration due to many anomalies apparent in the Bill.

An obnoxious feature of the Bill is much-derided Single Directive provisions contained in Section 6-A which protects officials of the rank of Joint Secretary and above from investigation and prosecution without the permission of the government. This has managed to circumvent even a Supreme Court directive to do away with this provision terming it "arbitrary, unreasonable and overprotective" in the *Hawala case*. The Law Commission of India, to which the matter was referred, also concurred with the Apex Court's view. In simple terms this provision would make it impossible for the police to investigate corruption cases against senior bureaucrats because necessary permission, which will come from upper reaches of bureaucracy itself, may come too late or not at all. Chapter III of the Bill relating to the powers and functions of the CVC restricts it from giving any directive to the CBI or to the vigilance departments of various corporations and government departments inconsistent with the instructions of the government. Furthermore, as presently worded, it is possible for the government to ignore the views of the Leader of Opposition while making appointments to the Commission because there is no requirement of a consensus between the Prime Minister, Home Minister and the Leader of Opposition in matter of such appointments. This may make CVC a nominee of the government. All this may rob the CVC of an effective role in ensuring probity in public life.

PROPOSED AREAS OF DISCUSSION

1. After the birth of the institution of Ombudsman in Sweden in 1809, it soon became a most cherished importable commodity the world over. Efforts made in India so far to establish this institution may be discussed with special reference to its desirability and effectiveness in a vast country like India ridden by unprincipled and competitive politics, corruption and inertia.
2. The Report of the Joint Select Committee on the Lokpal Bill, 1977 presented to Parliament on July 20, 1979 recommended to include Members of Parliament within the scope of the Bill. There is a sharp cleavage of opinion on this aspect of the bill. The points for and against this extension of the bill may be discussed with reference to the concept of ministerial responsibility.
3. The purpose of the Lokpal is not to adjudicate but to provide a regular machinery for investigating grievances against the administration in a discreet and informal way. Under these circumstances will it not be a futile institution unless the attitude of the party in power and bureaucrats in position defending the performance of the government is most strong?
4. Generally vague terms like 'misconduct', 'allegation', 'maladministration', 'injustice' and 'grievance' define the jurisdiction of the Ombudsman. The scope and ambit of these expressions may be discussed to fix the boundaries of jurisdiction in Indian situations.
5. The Lokpal Bill, 1977 did not contemplate any constitutional status for the Lokpal. It is generally feared that this may bring the Lokpal within the scope of judicial review, and thus dilute his authority and effectiveness. Will it be desirable to give the Lokpal a constitutional status and insulate him from the jurisdiction of courts? Discussion may cover growing disenchantment with judicial and parliamentary methods of redress.

6. After reading the Lokpal Bill, 1977, sceptics may refer to the 'Ombudsman' as 'ombudsmouse' because he has not been given teeth and his jurisdiction remains advisory which may have very little or no meaning in partisan politics. A complainant on the other hand may get nothing except an official regret. Against this backdrop, evaluation may be made of jurisdictional limitations of the proposed Lokpal in India.
7. Information is the bloodstream of democracy. Without the 'right to know' the freedom of speech and expression which includes freedom of press guaranteed by Article 19 of the Constitution becomes meaningless. Against this background the constitutionality of the Official Secrets Act, 1923 may be discussed.
8. The American Congress passed the Freedom of Information Act, 1966 which replaced the principle of 'need to know' with a 'right to know'. This led to the development of investigative journalism and made possible the publication of the Pentagon Papers and the exposure of Watergate. The desirability of a similar type of legislation replacing the Official Secrets Act, 1923 may be discussed.
9. Even the most ardent advocates of the 'right to know' realise that a certain area of secrecy, no matter howsoever limited, must belong to the government. It is because of this reason that the American legislation provides nine well-defined escape clauses. These escape clauses are considered to be very wide. The discussion should aim at demarcating escape clauses in the Indian situation if the 'right to know' is given a statutory recognition.
10. 'Discretion to disobey' may sound seditious but in view of the growing disenchantment with the parliamentary, judicial and administrative redress processes, it may be the only alternative left to put the administration on the tap. Against this background, the whole concept of 'discretion to disobey' and 'self-help against government officials' may be discussed.
11. Central Vigilance Commission Bill, 2003 may be discussed with special reference to Section 6-A which contains Single Directive Provision and has a tendency of robbing the CVC of an effective role in ensuring probity in public life.

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13

Constitutional Protection to Civil Servants and the Administrative Service Tribunals

In India government is the biggest provider of jobs to the people. According to an estimate in 1947 the strength of civil servants was 10 lakhs which rose to 20 lakhs in 1978 and became 30 lakhs in 1993. However, this does not include the jobs in public sector undertakings. Maximum number of jobs provided by the government are in defence, railways and post offices.

This tremendous growth in civil services was mainly due to the fact that without a big army of civil servants it was not possible to realize the dream of a Welfare State which was the cornerstone of the Indian Constitution. After independence in order to achieve the goals of social welfare, economic and social justice government passed various socio-economic legislations and prepared various schemes and programmes to provide social and economic justice to the people especially the weaker sections of the society, which could not have been operationalised without an expansion of the civil services.

India is the only country where law relating to service matters of the civil servants is provided in the Constitution. The reason for this was that the members of Indian Civil Service, ICS, who were considered to be the steel-frame of the British Government of India wanted that their salaries and conditions of service be protected through the Constitution and that the civil services of independent India be also protected by the Constitution so that the services in India could remain immune from the political vagaries. Therefore Chapter XIV containing Articles from 308 to 323 providing protection to civil servants was included in the Constitution. However, Article 314 which provided protection to the members of Indian Civil Service was repealed by the Twenty-eighth Constitution Amendment Act, 1972 after the last member of the service retired.

India also tops the list of the countries where suits filed by its servants against their master-State are the maximum. Litigation increased so much that on the one hand it clogged the wheels of justice and on the other it made the government servants dissatisfied, inefficient and demoralized. Therefore, in 1985 by-pass surgery was done to clear the arteries of the administration by passing Administrative Service Tribunals Act, 1985 which aimed at establishing Service Tribunals at the Centre and the State levels to decide service disputes of the Central and State Government employees. But will this surgery restore the health of the administration to the normal po-

sition is still an open question. It is self-evident that the tribunals have not been able to perform to the expectation as substitutes to the High Court, therefore, these tribunals have been brought under the jurisdiction of the High Court to play only supplemental role in service matters.[1]

Civil services play a crucial role in the administration of a State in every country, but in a welfare state like India civil services play a still more important role because it is the duty of civil servants to execute policies and programmes of the government and also to provide necessary inputs for future policy planning. Therefore, it is expected that a civil servant would be imaginative, dynamic, effective, committed, objective, independent, fair, reasonable and non-political. However, unfortunately the popular image of a civil servant has gone down considerably. Today the general impression is that civil servants have become political, useable and pliable and that there is corruption, indifference and inertia in the services besides maladministration, non-administration and abuse of power. Therefore, civil servants cease to be a second line of defence in case political executive fails.

Civil services in India, modelled on British pattern, are based on 'tenure system' in contradistinction to American model which is based on 'spoil system'. Hence the nature of civil service in India is 'status' and not 'contract'. No matter the conditions of service of civil servants can be changed unilaterally by the government and a civil post can be created, abolished and filled at its discretion yet in case of illegal termination of service, a government servant can claim reinstatement.[2]

Provisions of Chapter XIV of the Constitution apply to established civil services of the Union and the States and to civil posts under the Union and the States. Article 308 of the Constitution provides that the expression 'State' in this Chapter does not include the State of Jammu and Kashmir.[3] The definition of the word 'State' as given under Article 12 of the Constitution is also not applicable to define the scope of the term 'State' in Chapter XIV because here the scope of the term 'State' is very much narrow. Thus in the context of Chapter XIV 'State' shall not include panchayats, local bodies, public corporations and government companies unless the law provides otherwise.[4] Therefore, the word 'State' in Chapter XIV means only a State as specified in Part A or Part B of the First Schedule of the Constitution.[5]

1. *L. Chandra Kumar* v. *UOI*, (1997) 3 SCC 261.
2. *Shankarayan* v. *State of Kerala*, (1971) 2 SCC 361.
3. Constitution (Seventh Amendment) Act, 1956.
4. In the State of Gujarat, Panchayats are 'State' within Art. 308.
5. Constitution (Seventh Amendment) Act, 1956.

(A) SERVICE RULES

Under the provisions of Article 309 appropriate Legislature has been empowered to frame service rules regarding recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State. Article 309 in Clause 2 further provides that until the Legislature has legislated on the subject, the executive may frame rules in this behalf. Rule-making powers of the Legislature and the executive is thus co-extensive.[6] Nevertheless the power of the government to make rules is subject to the legislative power of the Legislature.[7]

Opening words of Article 309 "Subject to the provisions of this Constitution" clearly indicate that the service rules whether legislated by the Legislature or framed by the government must conform to the mandatory provisions of Articles 310, 311 and 320 of the Constitution. Similarly the service rules should also not violate the provisions of Articles 14 and 16 of the Constitution. Thus in *Moti Ram* v. *North Eastern Frontier Railway*[8], the court held that the Rules 148(3) and 149(3) of the Railway Code which provided for termination of service of permanent employees by giving them notice for the period mentioned in the rules violate Article 311. In the same manner in *West Bengal State Electricity Board* v. *Desh Bandhu Ghosh*[9], the Supreme Court ruled that the service rule providing for termination of service on three months' notice on either side is arbitrary and hence violative of Article 14 of the Constitution.

Subject to the provisions of Article 20(1) rules under Article 309 can be made with retrospective operation,[10] however there must be a nexus between rules and retrospectivity.[11] Therefore, it is not enough that the statute should authorise retrospective operation of rules, the government must also show that there was sufficient reasonable and rational justification for applying the rules retrospectively. However the power under Article 309 to make laws with retrospective effect cannot be exercised to nullify a vested right.[12] Besides making rules, government in exercise of its administrative powers, can issue instructions also in order to fill a gap. Such instructions are binding provided these are not contrary to any existing law or rule.

Under Article 309 rules can be framed by the Legislature or the government relating to recruitment and conditions of service of the civil servants. No matter the words 'conditions of service' are comprehensive enough but

6. *Ram Autar Pandey* v. *State of U.P.*, AIR 1962 All 328 (FB).
7. *Katyani Dayal* v. *Union of India*, (1980) 3 SCC 245, 260-61.
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10. *B.S. Vadera* v. *Union of India*, AIR 1969 SC 118.
11. *B.S. Yadav* v. *State of Haryana*, 1980 Supp SCC 524: AIR 1981 SC 561.
12. *Union of India* v. *Tushar Ranjan Mohanty*, (1994) 5 SCC 450.

a rule validating a past illegal retirement was held to be beyond the authorisation of Article 309.[13] However, the rules dealing with compulsory retirement were held to be rules relating to conditions of service.[14]

It is surprising that though Article 309 had contemplated that the Legislature would make service rules yet it has not been done and the civil services continue to be governed by the rules made by the executive. The reason for this seems to be that it is comparatively easy to change service rules to suit the requirements of the government and the services. But this logic has made the service rules a plaything in the hands of the government,[15] and are frequently changed, sometimes, just to suit the convenience, sometimes to tide over a temporary crisis, sometimes to appease a class of officers who shout louder and sometimes to strike at an individual.[16]

(1) Tenure of office: Doctrine of Pleasure

Clause (1) of Article 310 lays down that every person who is a member of a defence service or a civil service of the Union or an All-India Service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President and in the same manner any person who is a member of a civil service of a State or holds any civil post under a State shall hold office during the pleasure of the Governor. Thus Article 310 makes the tenure of civil servants at the pleasure of the President or the Governor as the case may be.

This 'pleasure' doctrine has been imported from England. Common law doctrine of pleasure is based on the principle of public policy in order to make civil servants responsible to the government and responsive to the people. In common law this doctrine implies that the civil service is not a contract and hence service can be terminated at any time without assigning any reason and a civil servant cannot enforce any condition of his service in a court of law and cannot claim damages or arrears of salary against the government. In this common law doctrine Parliament has now made many inroads by legislation relating to employment, social security and labour relations.[17]

Doctrine of pleasure as developed in England has not been accepted in full in India. It is subject to the provisions of Article 311 which lays down procedural safeguards for civil servants. Thus Article 311 becomes a proviso to Article 310. Therefore, services of any civil servants cannot be terminated at pleasure unless the mandatory provisions of Article 311 have been ob-

13. *State of Mysore* v. *Padmanabhacharya*, AIR 1966 SC 602.
14. *Shyam Lal* v. *State of U.P.*, AIR 1954 SC 369.
15. *B.S. Yadav* v. *State of Haryana*, 1980 Supp SCC 524: AIR 1981 SC 561.
16. *Id.*, p. 569.
17. *Om Prakash* v. *State of U.P.*, AIR 1955 SC 600. Now Central Administrative Tribunal is the Forum for this purpose.

served. Doctrine of pleasure is further restricted by the general law of the land which empowers any civil servant to file suit in a court of law for enforcing any condition of his service and for claiming arrears of pay. Power to dismiss at pleasure any civil servant is not a personal right of the President or the Governor as the case may be. It is an executive power which is to be exercised at the advice of council of ministers.[18] Doctrine of pleasure as contained in Article 310, being a constitutional provision, cannot be abrogated by any legislative or executive law, therefore Article 309 is to be read subject to Article 310. This is not the case in England where Constitution is unwritten and hence the common law doctrine of pleasure can be whittled down by any act of Parliament.

Doctrine of pleasure only applies to civil services and posts held under the State. Therefore, this doctrine has no application to various constitutional posts of Judges of the Supreme Court and High Courts, Chairman and members of Public Service Commissions, Chief Election Commissioner and Comptroller and Auditor-General of India. These functionaries hold office for the term as laid down in the Constitution and can be removed only according to the procedure as also laid down in the Constitution.

Clause (2) of Article 310 especially empowers the government to enter into service contracts with persons having special qualifications. Doctrine of pleasure can be qualified or limited by such service agreements. Thus in order to secure the services of any person the government may include in the service agreement a provision for compensation in case of premature abolition of the post or retirement not due to misconduct.

(2) **Limitations on pleasure doctrine**

1. Articles 14, 15 and 16 place limitations on the free exercise of pleasure doctrine. Article 14 prohibits any discriminatory and arbitrary termination of service. Article 15 prohibits termination of service on grounds of religion, race, caste, sex or place of birth or any of them. Article 16(1) obligates equal treatment and bars arbitrary discrimination.
2. Article 320(3)(*c*) places another limitation on the pleasure doctrine by providing that in all disciplinary matters affecting civil servants, Union or State Public Service Commission, as the case may be, is to be consulted.
3. Article 311 places two more limitations on the free exercise of pleasure doctrine which will now be discussed in detail.

18. *Samsher Singh* v. *State of Punjab*, (1974) 2 SCC 831: 1974 SCC (L&S) 550.

(3) Constitutional safeguards to civil servants

Article 311 is a limitation on the doctrine of pleasure as laid down in Article 310 and thus places two limitations on the power of the government to dismiss a civil servant at pleasure. These limitations are:—

(*i*) that no civil servant can be dismissed or removed from service by an authority subordinate to that by which he was appointed;

(*ii*) that no civil servant can be dismissed or removed or reduced in rank except after an enquiry in which he has been given the charges against him and also given a reasonable opportunity to defend himself.

These two limitations lay down the constitutional code of procedural safeguards for civil servants in India. For the first time in India constitutional protection to government servants was provided by the Government of India Act, 1919 which was followed by the Government of India Act, 1935 and continued by the Constitution of India in Article 311.

(4) Constituency of Article 311

Two procedural safeguards provided in Article 311 apply only to persons who are members of a civil service of the Union or of an all-India service or of a civil service of a State or to persons who hold a civil post under a Union or a State. The expression 'civil post' means an appointment on the civil side of the administration as distinguished from the military side. Therefore, these safeguards are not available to the members of the defence forces or to any post connected with the defence who are governed by the Army Act.[19] Even a civilian holding a post in a department connected with defence, such as Military Engineering,[20] or Farm[21] service cannot claim the protection of Article 311. Furthermore, the term 'civil post' signifies that there must exist a master and servant relationship between the holder of the post and the State which may be indicated by the State's right to recruit, appoint, control and payment of wages. A relationship of master and servant can be indicated by all or some of these factors. Therefore, holding of a 'civil post' under the State is a question of fact.

The protection of Article 311 applies both to permanent and temporary civil servants because Article 311 does not make any distinction between permanent and temporary employees.[22]

Protection of Article 311, however, shall not be available in case of, compulsory retirement in public interest,[23] or termination of service during

19. *V.K. Nambudiri* v. *Union of India*, AIR 1961 Ker 155.

20. *Subodh Ranjan Ghosh* v. *NAO Callaghan (Maj.)*, AIR 1956 Cal 532.

21. *Union of India* v. *Dharam Pal Chopra*, 59 Punj LR 472. *See* also *Sher Singh* v. *State of M.P.*, AIR 1955 Nag 175.

22. *Parshotam Lall Dhingra* v. *Union of India*, AIR 1958 SC 36.

23. *State of U.P.* v. *Madan Mohan Nagar*, AIR 1967 SC 1260. *See* also *D. Ramaswami* v.

probation[24] or termination of service which was temporary and for a fixed period[25] or reversion from an officiating post[26] provided the termination of service is bona fide and simplicitor which does not attach any stigma to the employee.

However, when termination of service is, punitive or simplicitor or when it is a 'foundation' or a 'motive' of the action was explained by the Supreme Court in *Dipti Prakash Banerjee* v. *S.N. Bose National Center for Basic Sciences*[27]. The Court observed:

(1) If finding arrived at in an enquiry as to misconduct of the employee behind his back without any regular enquiry, the simple order of termination will be founded on allegation, hence bad in law.

(2) If no enquiry was held, as employer was not inclined to hold one, order of termination will be simplicitor and it would be a case of 'motive' and not 'foundation', hence will not be bad in law.

(3) If employer does not want to enquire into allegations against the employee because of reason of delay in taking action or if he is doubtful if adequate evidence will be available, then allegations would only be motive for termination of service and hence termination would be simplicitor, not bad in law.

(4) Where there is a stigma on the employee arising out from any record or order or annexure which can be asked for by any future employer, the order of termination will be bad in law.

This distinction has been further explained by the Supreme Court in *Chandra Prakash Shahi* v. *State of U.P.*[28], as follows:

> "Important principles which are deducible on the concept of 'motive' and 'foundation', concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of probation on account of general unsuitability for the post in question. If for determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his services, the order will not be punitive in nature. But, if there are allegations of misconduct and an

State of T.N., (1982) 1 SCC 510: 1982 SCC (L&S) 115: AIR 1982 SC 793; *S.S. Saksena* v. *State of U.P.*, (1980) 1 SCC 12: (1980) 1 SCR 923.

24. *State of Maharashtra* v. *V.R. Saboji*, (1979) 4 SCC 466: 1980 SCC (L&S) 61: AIR 1980 SC 42; *Government Branch Press* v. *D.B. Belliappa*, (1979) 1 SCC 477: 1979 SCC (L&S) 39: AIR 1979 SC 429.
25. *ONGC* v. *Iskender Ali*, (1980) 3 SCC 428: AIR 1980 SC 1242.
26. *Hartwell Prescott Singh* v. *State of U.P.*, AIR 1957 SC 886.
27. (1999) 3 SCC 60.
28. (2000) 5 SCC 152.

inquiry is held to find out the truth of that misconduct and an order terminating the services is passed on the basis of that inquiry, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against him. In this situation, the order would be founded on misconduct and it will not be a mere matter of 'motive'.

'Motive' is the moving power which impels action for a definite result, or to put it differently, 'motive' is that which incites or stimulates a person to do an act. An order terminating services of an employee is an act done by the employer. What is that factor which impelled the employer to take this decision? If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary inquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary inquiry."

Applying the same principle the Apex Court in *Dhananjay* v. *Chief Executive Officer, Zilla Parishad, Jalna*[29], held that where the services of a temporary could be simply terminated under the Rules, without holding an enquiry, mere allegation or suspension order or contemplation of an enquiry culminating in termination order cannot be held to be punitive attaching stigma.

Government has power to compulsorily retire any government servant in public interest who has put in a specified number of years of service. This gives unfettered power to the government without any counter balancing protection of Article 311 being available to the employee. Therefore, in many a situations this power has been exercised in mala fide manner for punishing an employee. Therefore, the courts have started extending the protection of Article 311 in cases of compulsory retirement against executive arbitrariness. Hence, if it can be proved that power was exercised in mala fide manner and action carries any stigma to the employee, then the courts would not hesitate to quash the administrative actions.[30] In *Baldev Rai* v. *Union of India*[31], the Supreme Court quashed the order of compulsory retirement which had been passed after taking into account old adverse confidential reports and ignoring confidential reports of the last 5 years. In another case court quashed the order when the employee was allowed to cross the effi-

29. (2003) 2 SCC 386.
30. *Union of India* v. *M.E. Reddy*, (1980) 2 SCC 15.
31. (1980) 4 SCC 321: AIR 1981 SC 70.

ciency bar but was compulsorily retired soon thereafter, even though there was nothing against him subsequent to his crossing the efficiency bar.[32]

In case of compulsory retirement decision rests on subjective satisfaction, and it is not considered a punishment or any suggestion of misbeha-viour. The proceedings are also not quasi-judicial, therefore, principles of natural justice are not attracted. However, it can be challenged on the ground of mala fide, no evidence or arbitrariness.[33]

Hitherto the government has unfettered power to terminate the service of a probationer or a temporary civil servant without any protection of Article 311 being available to him. However, courts have also made some inroads into this area of administrative discretion. The Supreme Court in *State of Maharashtra* v. *V.R. Saboji*[34] observed that in case of termination of service of a probationer or a temporary staff the court may ask the government to produce its records if the government servant makes out a prima facie case that the order was by way of punishment. Thus where the termination of service of a temporary employee was preceded by a show-cause notice which was not pursued and his services were terminated on the ground that his services were purely temporary, the court quashed the termination order when it was proved that there was nothing on record against the employee except the show-cause notice.[35]

Courts have further held that the protection of Article 311 is available to a quasi-permanent employee also.[36] According to government rules a quasi-permanent employee is one who is appointed to a temporary post but continues in that capacity for more than three years and has been certified by the appointing authority as fit for employment in a quasi-permanent capacity.

Constitutional protection of Article 311(1) is available in case of 'dismissal' or 'removal' from service but the protection of Article 311(2) applies in case of 'reduction in rank' also besides removal and dismissal. Thus the scope of Article 311(2) is wider than clause (1). 'Dismissal' or 'removal' are basically the same concepts because in both the cases termination of service takes place. But the difference between the two expressions is that in case of 'dismissal' the employee is barred from future employment but not in case of 'removal'.[37] 'Reduction in rank' does not entail termination of service because it is only a change to lower grade or class. Therefore, if a person has been appointed on the lowest grade, this punishment cannot be

32. *S.S. Saksena* v. *State of U.P.*, (1980) 1 SCC 12: (1980) 1 SCR 923.
33. *Baikunth Das* v. *Chief District Medical Officer*, (1992) 2 SCC 299.
34. (1979) 4 SCC 466: 1980 SCC (L&S) 61: AIR 1980 SC 42.
35. (1979) 1 SCC 477: 1979 SCC (L&S) 39: AIR 1979 SC 429.
36. *Champaklal* v. *Union of India*, AIR 1964 SC 1854.
37. *Mohd. Abdul Salam Khan* v. *Sarfaraz*, (1975) 1 SCC 669: 1975 SCC (L&S) 179: AIR 1975 SC 1064.

awarded to him. If a person is appointed temporarily or to officiate on a higher post he gets no right to that higher post and hence if reverted to his substantive post Article 311 is not attracted. But if reversion is by way of punishment then protection of Article 311 shall be available to him.[38]

Suspension of a civil servant pending an inquiry is neither a dismissal nor removal from service so the protection of Article 311 is not available to a suspended employee. However, if the suspension is by way of punishment, or is based on extraneous or irrelevant considerations or there is a total non-application of mind then court may grant relief.[39]

In the same manner if the service of a civil servant is terminated as a result of abolition of his post, then also the protection of Article 311 shall not be available. Creation and abolition of a post is a matter of public interest which is in the sole discretion of the government. Nevertheless if the post has been abolished mala fide or as a cloak to punish the employee then court may grant relief.[40]

The Supreme Court has extended Court's jurisdiction by ruling that the availability of judicial review even in cases of departmental proceedings cannot be doubted. Principles of natural justice are integral part of administrative jurisprudence, therefore, in departmental proceedings, if it is found that the recorded findings are based on no evidence or the findings are totally perverse or legally untenable, the Court will exercise its power of judicial review.

(B) PROCEDURAL SAFEGUARDS

(1) No termination by subordinate authority

Article 311(1) provides the first safeguard to a civil servant in case of his dismissal or removal from service. Article 311(1) provides that no member of a civil service or holding a civil post can be dismissed or removed from service by any authority subordinate to the authority by which he was appointed. The reason behind this safeguard is that the dismissed employee may not have faith in the judgment of a subordinate officer. Therefore, where a member of the Calcutta police force who had been appointed by the Commissioner of Police was dismissed by the Deputy Commissioner of Police, it was held that the order is violative of Article 311(1).[41] In the same manner dismissal of a civil servant by the Deputy Secretary who had been appointed by the Secretary was held to be in violation of the provisions of Article

38. *R.S. Sial* v. *State of U.P.*, (1975) 3 SCC 111: 1974 SCC (L&S) 501: AIR 1974 SC 1317; *G.S. Gill* v. *State of Punjab*, (1975) 3 SCC 73: 1974 SCC (L&S) 451: AIR 1974 SC 1898.

39. *State of T.N.* v. *P.M. Belliappa*, AIR 1985 SC 429.

40. *K. Rajendran* v. *State of T.N.*, (1982) 2 SCC 273: 1982 SCC (L&S) 208: AIR 1982 SC 1107.

41. *Santosh Kumar Dutt* v. *Commr. of Police*, AIR 1955 Cal 81.

311(1).[42] However, it does not mean that appointing and dismissing authorities must be the same. It is enough if both the authorities are of the same rank and grade.[43] Whether an authority is of the same rank or not will be determined with reference to the date of appointment because it is from the date of appointment that the constitutional guarantee becomes available to him.[44] However, there is no bar for conducting an enquiry by a subordinate authority which may ultimately lead to a dismissal or removal of a civil servant.[45]

(2) Reasonable opportunity to defend

Another safeguard which Constitution gives to a civil servant is predecisional hearing. Article 311(2) provides that no civil servant shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity to defend himself against those charges. Before 1976 Article 311(2) had provided another safeguard of post-decisional hearing against the proposed punishment as a result of the enquiry but this safeguard was taken away by the Constitution Forty-second Amendment Act, 1976. This protection will be available only when dismissal or removal or reduction in rank is by way of punishment and not otherwise.[46] Therefore, if a person is dismissed as a consequence of the abolition of his post the protection of Article 311(1) will not be available.

Enquiry begins with the service of charge-sheet on the delinquent civil servant. The charges given in the charge-sheet must be clear, sufficient and not vague. The test of sufficiency of charge-sheet is that it must give the employee sufficient information to enable him to defend himself. Therefore, sufficiency of the charge-sheet is a question of fact and is also a justiciable issue.

The concept of 'reasonable opportunity to defend' is synonymous with natural justice. A full discussion on the principles of natural justice has been made in Chapter VI of this book, nevertheless a few salient principles may be discussed here.

The concept of 'reasonable opportunity' is also the same as that of 'Procedural Due Process' in the American Constitution, therefore, the final authority is vested with the courts to determine whether an 'opportunity' was 'reasonable' or not. The Legislature or the executive may by law lay

42. *Satish* v. *State of W.B.*, AIR 1960 Cal 278.
43. *MSRTC* v. *Mirza Khasim Ali Beg*, (1977) 2 SCC 457.
44. *Krishna Kumar* v. *Divl. Asstt. Electrical Engineer*, (1979) 4 SCC 289.
45. *Registrar Cooperative Society* v. *F. Franando*, (1994) 2 SCC 746.
46. *Sukhbans Singh* v. *State of Punjab*, AIR 1962 SC 1711.

down the elements of a 'reasonable opportunity' but the final authority to pronounce on the validity of the enquiry procedure rests with the court.

If the law under which enquiry is held lays down a procedure then it must be faithfully followed failing which the order of the administrative authority will be declared void.[47] If the law does not lay down any procedure for the enquiry then the enquiry must be conducted according to the principles of natural justice. Therefore, the Supreme Court in *State of Bombay* v. *Nurul Khan*[48] held that Rule 55 of the Civil Services (Classification, Control Appeal) Rules which made oral hearing mandatory if demanded by the civil servants is binding and must be strictly followed and the denial of it would make the final order of the authority void.

Enquiry must be specific and not general. Therefore, if a general statutory enquiry was held on the basis of which an action was taken against the Assistant Station-Master without serving him any show-cause notice court held the action of the authority as void.[49]

Delinquent employee has a right to know all the evidences against him. Government cannot rely on any evidence which has not been brought to the notice of the employee and he has not been given a reasonable opportunity to rebut those evidences. Delinquent employee has also right to bring all relevant evidence, oral or documentary, before the Enquiry Officer. Therefore, Enquiry Officer should provide opportunity for the production of documentary evidence and also attempt to secure the attendance of defence witnesses.[50]

Under Rule 15(5) of the Central Civil Services (Classification, Control and Appeal) Rules, 1967 a civil servant has a right to present his case before disciplinary authority through any government servant approved by the authority or through a lawyer with its permission. This rule is mandatory and any denial of it would vitiate the enquiry. The Supreme Court has further fortified this right by holding that the disciplinary authority must bring this right to the notice of the employee. Therefore, when the enquiry against a class IV employee preceded without any assistance though the government was assisted by a presenting officer the Supreme Court quashed the order of dismissal because the employee had not been informed of his right of representation through another government servant.[51]

47. *Ranendra Chandra* v. *UOI*, AIR 1963 SC 1552.
48. AIR 1966 SC 269.
49. *Amalendu* v. *Distt. Traffic Supdt.*, AIR 1960 SC 992.
50. *Hanif* v. *Supdt. of Police*, AIR 1957 All 634.
51. *A.L. Kalra* v. *P&E Corpn. of India*, (1984) 3 SCC 316: 1984 SCC (L&S) 497: AIR 1984 SC 1361. See *Harinarayan Srivastava* v. *United Commercial Bank*, (1997) 4 SCC 384.

No matter though the oral hearing is not a part of natural justice, yet if the delinquent employee insists on oral hearing he cannot be denied the right because the courts have held that personal hearing is a part of reasonable opportunity.[52]

In the same manner though the right of cross-examination is not a part of natural justice, but the Supreme Court has held that the delinquent employee must be given a chance to cross-examine the witnesses who have deposed against him.[53]

Departmental proceedings and the case in the law court can simultaneously proceed against the delinquent employee. He can be punished by the government if found guilty in departmental proceedings, no matter he may have been acquitted by the criminal court.[54] The reason for this is that the standard of burden of proof required by the criminal court is much higher than in the departmental enquiry.

Article 311(1) and (2) only provide for procedural safeguards to a civil servant therefore, courts only ensure that the enquiry is held according to the principles of natural justice. Courts generally do not interfere with the punishment awarded. Nevertheless courts have held that in cases, where penalty imposed is arbitrary, grossly excessive or out of proportion to the offence committed or not warranted by the facts and circumstances of the case, it will strike down the impugned order.[55] Court further held that in dealing with government servant State must also conform to the constitutional requirement of Articles 14 and 16 which guarantee just and fair treatment.[56]

Regarding disciplinary action against government an enigmatic problem worth noticing is that whenever Lokayukta/Lok Pal recommends disciplinary action against a public servant even after complying with elaborate procedure it is only the beginning of the beginning in as much as the recommendations are no substitute for the report of the enquiry under the CCA Rules and the whole procedure must commence afresh from the very beginning. Even if it may be lawful for the government to take action on the recommendation without any further enquiry, government may not be bound by the recommendation. The Apex Court did not give its opinion on this curious problem and recommended a proper legislation.[57] Same is the situation where a

52. *State of Punjab* v. *Karam Chand*, AIR 1959 Punj 402; *C.S. Sharma* v. *State of U.P.*, AIR 1961 All 45; *Nripendra* v. *State of W.B.*, AIR 1961 Cal 1.

53. *Bhagat Ram* v. *State of H.P.*, (1983) 2 SCC 442: 1983 SCC (L&S) 342: AIR 1983 SC 454.

54. *Corpn. of Nagpur* v. *Ramchandra Modak*, (1981) 2 SCC 714: 1981 SCC (L&S) 455: AIR 1984 SC 626; *Govind Dass* v. *State of Bihar*, (1997) 11 SCC 361.

55. *Union of India* v. *Tulsiram Patel*, (1985) 3 SCC 398: 1985 SCC (L&S) 672: AIR 1985 SC 1416.

56. *Nepal Singh* v. *State of U.P.*, (1985) 1 SCC 56: 1985 SCC (L&S) 1: AIR 1985 SC 84.

57. *Institution of A.P. Lokayukta/Upa-lokayukta* v. *T.S.R. Reddy*, (1997) 9 SCC 42.

Human Rights Commission recommends action against a public servant for the violation of human rights. A proposal for the amendment of Protection of Human Rights Act, 1993 is in the offing to make the recommendation of the commission binding on the government so that the duplication of enquiry is avoided and action is taken immediately.

(3) Whether the report of the enquiry be shown to the delinquent civil servant?

This topic has been exhaustively dealt within Chapter VI. Here it will suffice to point out that the conflicting law laid down by the Supreme Court in *Kailash Chander Asthana*[58] and *Ramzan Khan*[59] *cases* has now been finally settled by the Court in *Managing Director, Electronic Corpn. of India* v. *V.B. Karunakar*[60]. The Court finally ruled that a person has a right to the copy of the enquiry report before the authority takes decision on the question of his guilt. This rule will apply to all authorities whether public or private and the failure to ask for the report will not be considered as waiver. However, this law will have no retrospective operation[61] and a person cannot take the advantage of the law laid down in this case no matter the proceedings challenging the dismissal order are still continuing in a court of law.[62]

(4) Can disciplinary action be taken against an Enquiry Officer exercising quasi-judicial powers for misconduct?

An Enquiry Officer conducting an enquiry exercises quasi-judicial powers, therefore, as a general rule, he is not amenable to any disciplinary action for his actions as a judge. However, the Supreme Court in a recent case of *Union of India* v. *K.K. Dhawan*[63] held that where an officer in exercise of judicial or quasi-judicial powers acts negligently or recklessly or in order to confer undue favour on a person he is not acting as a judge and hence can be subjected to disciplinary action. Elaborating the point further the court observed that such action can be taken against the officer in the following cases:

1. Where the officer has acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty.
2. If there is a prima facie material to show recklessness or misconduct in the discharge of duties.

58. (1988) 3 SCC 600.
59. (1991) 1 SCC 588.
60. (1993) 4 SCC 727.
61. See *UOI* v. *Mohd. Ramzan Khan*, (1991) 1 SCC 588.
62. *MD, Food Corpn. of India* v. *Narendra Kumar Jain*, (1993) 2 SCC 400.
63. (1993) 2 SCC 56. In this case the court explained in *UOI* v. *Desai*, (1993) 2 SCC 49, holding that in this case Enquiry Officer had found nothing wrong against the officer exercising quasi-judicial powers.

3. If he has acted in a manner which is unbecoming of a government servant.
4. If he had acted negligently and omitted the prescribed conditions necessary for the exercise of the statutory powers.
5. If he has acted in a manner to unduly favour a party.
6. If he has been actuated by corrupt motives however, small the bribe may be.

(5) Consequential benefits on reinstatement

A government servant suspended on corruption charges is not entitled to consequential benefits as a matter of course even if he is acquitted and reinstated in job. Apex Court held, that the purpose of prosecution of a public servant is to maintain discipline in service, integrity, honesty and truthful conduct in the performance of public duty. His conduct must be an open book. Though legal evidence may be insufficient to bring home the guilt beyond all reasonable doubt, reinstatement would send ripples among the people in office and locality and would give wrong signals. This is the valiant effort of the judiciary to bring back the lost discipline in the service.[64]

Furthermore, the government may decide as a part of executive policy the date from which arrears would be granted to its employees. The matter being an executive policy in character, cannot be considered as arbitrary violating Article 14 of the Constitution. Therefore, where the High Court had allowed selection grade with consequential benefit, the Apex Court held that the government can fix a date from which consequential benefits would be available.[65]

(6) Suspended Employee must follow service rules

Upholding the dismissal of a Punjab police officer for abstaining from duty while under suspension, the Supreme Court, rejecting the argument that an employee under suspension need not apply for leave, held that the employee under suspension has to follow the service rules as they were applicable to him while in regular service.[66]

(7) Protection of employees who acquire disability during service

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 provides that no person can be dispensed with, reduced in rank, if he acquires disability during his service. If he is not suitable for the post he was holding, he could be shifted to some other post with same pay scale and service benefits. If no such post is available he

64. *The Times of India*, 26th March, 1997, p. 1.

65. *State of Haryana* v. *Rai Chand Jain*, (1997) 5 SCC 167. The government had allowed arrears for 38 months prior to the decision of the court.

66. *The Tribune*, Sept. 23, 2003, p. 2.

may be kept on a supernumerary post unless a suitable post is available or he attains the age of superannuation, whichever is earlier. However, government may exempt, by notification, any establishment from these provisions.

(8) Judicial review of departmental proceedings

In *Kumaon Mandal Vikas Nigam Ltd.* v. *Girja Shankar Pant*[67], the Supreme Court extended Court's jurisdiction to departmental proceedings. This will go a long way in protecting government servants from any possible harassment. In this case the inquiry officer had finalised the report against the alleged delinquent government servant without giving him the copies of the documents which showed irregularities committed by him and was given no chance to defend himself in the proceedings. Upholding the Allahabad High Court order quashing the departmental inquiry findings against the employee, the Apex Court observed that judicial review of administrative action is feasible and same has its application to the fullest extent in even departmental proceedings where it is found that the recorded findings are based on no evidence or the findings are totally perverse or legally untenable.

(9) Exceptions to the rule of reasonable opportunity to defend

Proviso to Article 311(2) lays down three exceptions to the rule of reasonable opportunity to defend. Therefore, in the following three cases a civil servant can be dismissed or removed or reduced in rank without any notice and hearing.

(1) Where a civil servant is dismissed on conduct which led to his conviction in a criminal charge, conviction means the final conviction because an appeal is merely the continuation of the original proceeding therefore, if a person is acquitted by the appellate court, he is not convicted at all.[68] This provision applies even if a person is released on probation after he has been found guilty.[69] The Supreme Court held that the word 'penalty' under Rule 14(*i*) of the Railway Servants (Discipline and Appeal) Rules, 1968 which provides for the same exception as is provided in Article 311(2)(*a*) does not refer to a sentence awarded to the accused on his conviction but it merely indicates the nature of penalty which could be imposed by the disciplinary authority if the delinquent employee had been found guilty of conduct which led to his conviction on a criminal charge.[70]

67. CA. No. 5747 of 1998, dt. 18-10-2000.
68. *R.S. Dass* v. *Divisional Supdt.*, AIR 1960 All 538.
69. *Divl. Personnel Officer* v. *T.R. Challapan*, (1976) 3 SCC 190: 1976 SCC (L&S) 398: AIR 1975 SC 2216; *UOI* v. *Tulsiram Patel*, (1985) 3 SCC 398: 1985 SCC (L&S) 672: AIR 1985 SC 1416.
70. *Divl. Personnel Officer* v. *T.R. Challapan*, (1976) 3 SCC 190: 1976 SCC (L&S) 398: AIR 1975 SC 2216.

However, acquittal in criminal case does not automatically entitle a person to reinstatement. It is open to the competent authority to direct an enquiry before reinstatement.[71]

Under clause (*a*) of the second proviso to Article 311(2) if a government servant has been convicted on a criminal charge by the Court but if the sentence has been suspended a bail has been granted by the appellate Court it should not be a bar for taking action by the administration. In the same manner if a government servant has been convicted by the trial Court, there is no prohibition that the administration should wait for the result of appeal or revision before taking action so that the employee may not continue in service if he has been convicted on a criminal charge.[72]

In *Challapan*[73] the highest Bench further held even after his conviction by a criminal court, the delinquent civil servant is entitled to hearing, no matter summary in nature, at least on the quantum of punishment. The rationale behind this proposition was that it is just possible that the employee may have been convicted on a minor or technical charge. However, the correctness of this law was doubted by many from the very beginning. Therefore, in *Union of India* v. *Tulsiram Patel*[74], the Apex Court overruled *Challapan*[75] and held that before punishing delinquent civil servant on this conviction by a criminal court the punishing authority must consider the circumstances of the case, judgment of the criminal court, entire conduct of civil servant, gravity of the offence committed, impact on the administration, whether the offence is of technical or trivial nature and extenuating circumstances, if any, but this has to be done ex parte by the authority himself without hearing the employee.

However, even after *Tulsiram Patel*[76] the doors of the court are not completely closed. The order of the government dismissing an employee, without hearing, on his conviction on a criminal charge can still be challenged in a court of law if the impugned order is arbitrary, or grossly excessive, out of all proportion to the offence committed or not warranted by the facts and circumstances of the case. The impugned order can also be challenged on the ground of non-application of mind by the government to the factors laid down by the court in *Tulsiram Patel*[77] as mentioned in the above para. Therefore, the Supreme Court, even after its decision in *Tulsiram*

71. *Dhananjay* v. *Chief Executive Officer, Zilla Parishad, Jalna,* (2003) 2 SCC 386.
72. *Dy. Director of Collegiate Education (Admn.)* v. *S. Nagoor Meera,* (1995) 3 SCC 377.
73. *Ibid.*
74. *UOI* v. *Tulsiram Patel,* (1985) 3 SCC 398: 1985 SCC (L&S) 672: AIR 1985 SC 1416.
75. *Divl. Personnel Officer* v. *T.R. Challapan,* (1976) 3 SCC 190: 1976 SCC (L&S) 398: AIR 1975 SC 2216.
76. *UOI* v. *Tulsiram Patel,* (1985) 3 SCC 398. *See* also *Shankar Dass* v. *UOI,* (1985) 2 SCC 358: 1985 SCC (L&S) 444: AIR 1985 SC 772.
77. *Ibid.*

Patel[78] denying any hearing to the civil servants in case of their dismissal, removal or reduction in rank on the basis of their conviction by a criminal court, has not left them without a remedy.

(2) Second exception to the rule of reasonable opportunity is that where it is impracticable to hold enquiry, a civil servant can be dismissed, or removed or reduced in rank without any notice or hearing. But before taking action under this exception it is necessary that disciplinary authority must be satisfied on the question of impracticability and the reasons for its satisfaction must be recorded in writing. 'Impracticability of hearing' is a question of fact and hence a justiciable issue. Therefore, if it can be shown that the hearing was practicable the order of disciplinary authority shall be quashed. No matter clause (3) of Article 311 makes the decision of the government on the question of 'impracticability of hearing' as final nevertheless 'final' is not so final that the courts cannot do anything within the parameters of law relating to the privilege of the government to withhold documents, court can decide on the question of impracticability of hearing. The apex Court in *Tulsiram Patel*[79] observed, "Whether it was practicable to hold the enquiry or not must be judged in the context of, whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (*b*). What is requisite is that the holding of the enquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation." Discretion dispensing with the enquiry on the ground of impracticability should not be exercised improperly, for insufficient reasons or reasons which are not germane to the issue of dispensing with the enquiry.[80] However, the authority has to reach the decision of dispensing with the enquiry ex parte. Therefore, even in this area of denial of reasonable opportunity, a civil servant is not without a remedy. The same law was reiterated by the Supreme Court in *Satyavir Singh* v. *Union of India*[81]. In this case the appellants who were employees of the Research and Analysis Wing (RAW) resented the introduction of identity card system introduced by the Counter Intelligence Section (CIS), a branch of RAW, for going from one floor to the other as a security measure. This resentment later on took an ugly turn. There were violent demonstrations and the officers were made hostages. Situation became so tense that the police had to be called in to release the hostages. Under these circumstances witnesses were not available and service of the notice was not practicable. Therefore, delinquent employees were dismissed without hearing under Rule 19 of the

78. *UOI* v. *Tulsiram Patel*, (1985) 3 SCC 398: 1985 SCC (L&S) 672: AIR 1985 SC 1416.
79. *Ibid.*
80. *Workmen* v. *Hindustan Steel Ltd.*, 1984 Supp SCC 554: 1985 SCC (L&S) 260: AIR 1985 SC 251.
81. (1985) 4 SCC 252.

Central Services Rules read with clause (*b*) of Article 311(2) of the Constitution. Court came to the conclusion that where an atmosphere of violence or of general indiscipline and insubordination prevails action under Article 311(2)(*b*) can be legitimately taken.

The Supreme Court in *Chandigarh Administration* v. *Ajay Manchanda*[82] further held that unless there are sufficient evidences on record to prove that departmental enquiry is not practicable the plea cannot be lightly accepted otherwise lower ranking officers will have no protection against senior officers who will always accept the easy course. In this case in pursuant of a complaint of extortion the government had passed the order of dismissal against a police officer dispensing with the departmental enquiry on the ground of unpracticability. The enquiry officer confirmed the complaint as true and also confirmed that due to threats complainant is reluctant to pursue the case and witnesses are not willing to depose and therefore, opined that enquiry is not practicable. It was held that it is not a sufficient material to conclude that enquiry is not practicable. The Supreme Court held that proviso 2 of Art. 311 of the Constitution is based on public policy and is conceived in public interest to be employed in public good subject to judicial review. This proviso will apply where government servant deserves the punishment of dismissal, removal or reduction in rank. Every case is to be treated on its own merit. The authority must record reason that why enquiry is not practicable. These reasons may not be communicated to the delinquent public servant. The finality clause in Art. 311 does not mean final as to bar judicial review. Even when power is subjective, it is not beyond judicial review.[83]

However, in such cases Court does not sit as an appellate authority so as to substitute its own view for that of the disciplinary authority. But Court can direct the authority to exercise its discretion though it cannot direct it to exercise its discretion in a particular manner where the reasons for dispensing with the enquiry are found to be not proper, Court would normally direct the authority to hold the enquiry, keeping in view the facts and circumstances of each case.[84]

(3) The third exception to the rule of reasonable opportunity to defend is given in Article 311(2)(*c*). It lays down that where the President or the Governor, as the case may be, is satisfied that in the interest of the security of State it is not expedient to provide hearing then hearing may be dispensed with. 'Satisfaction' of the President or the Governor is in the constitutional sense which means that such satisfaction may be arrived at by anyone authorised under the Rules of Business.[85] President or the Governor need not

82. (1996) 3 SCC 753; *Union Territory of Chandigarh* v. *Mohinder Singh*, (1997) 3 SCC 68.

83. See *S.R. Bommai* v. *UOI*, (1994) 3 SCC 1; *A.K. Kaul* v. *UOI*, (1995) 4 SCC 73.

84. *Indian Railway Construction Co.* v. *Ajay Kumar*, (2003) 4 SCC 579.

record reasons for their decision as is required under Article 311(2)(*b*). Security of State, amongst other, may involve situations like disobedience and insubordination on the part of members of police.[86] The Supreme Court further clarified that what is required under clause (*c*) is not the satisfaction of the President or the Governor, as the case may be, that the interest of the security of the State is or will be affected but his satisfaction that in the interest of the security of the State, it is not expedient to hold an enquiry as contemplated by Article 311(2).[87]

No matter there is no requirement for recording of reasons by the President/Governor for its satisfaction that it is not practicable to hold enquiry but this does not dispense with the obligation to satisfy the court/tribunal that the satisfaction was arrived at after taking into account relevant facts and circumstances and was not vitiated by mala fides and was not based on extraneous or irrelevant considerations. The government is obliged to produce such material, which may justify its decision even if it claims a privilege to produce certain documents under Sections 123 and 124 of the Evidence Act. The court will be within its right to look into the record for the purpose of determining whether the satisfaction has been vitiated for any reasons mentioned by the appellants. Thus, satisfaction of the President/Governor under Art. 311(2)(*c*) is not immune from judicial review, however, the scope of judicial review shall be limited as indicated in *S.R. Bommai*[88] to the situations of mala fide and extraneous or irrelevant considerations.[89]

Therefore, in cases falling under clauses (*a*), (*b*) and (*c*) of Article 311(2) hearing of any kind to the delinquent employee is prohibited. Court further held that no matter Article 14 is the constitutional guardian of the principles of natural justice but when it is expressly excluded by Article 311(2) clauses (*a*), (*b*) and (*c*) its requirement cannot be read in Article 14 simply because it is not just possible to afford an enquiry under the circumstances. However, if the decision in any of the three clauses is, based on extraneous ground or grounds have no nexus to the situation envisaged in that clause or is mala fide, the doors of the court shall be open wide. In such situations Article 14 which guarantees protection against arbitrary State action will also be attracted.

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85. *Samsher Singh* v. *State of Punjab*, (1974) 2 SCC 831: 1974 SCC (L&S) 550: AIR 1974 SC 2192. *See* also *UOI* v. *Sripati Ranjan*, (1975) 4 SCC 699: 1975 SCC (L&S) 397: AIR 1975 SC 1755, overruling *B.K. Sardari Lal* v. *UOI*, (1971) 1 SCC 411: AIR 1971 SC 1547.

86. *Satyavir Singh* v. *UOI*, (1985) 4 SCC 252.

87. *UOI* v. *Tulsiram Patel*, (1985) 3 SCC 398: 1985 SCC (L&S) 672: AIR 1985 SC 1416.

88. (1994) 3 SCC 1.

89. *A.K. Kaul* v. *UOI*, (1995) 4 SCC 73.

Rule-making power of the Legislature or the executive under Article 309 is subject to Article 311, therefore, any attempt to negativate the exclusionary effect of Article 311(2) will be void. What the Constitution has prohibited cannot be allowed by any ordinary law-making power.[90]

Now *Tulsiram Patel*[91] though has completely overruled *Chellappan*[92] which had allowed a limited enquiry on the question of nature and extent of the penalty imposed and had also legitimized of possibility of service rules conferring a right of hearing in situations covered under clauses (*a*), (*b*) and (*c*) of Article 311(2), yet judicial review of governmental action under Articles 32 and 226 is not completely barred and hence a civil servant can still be sure of court's protection from the arbitrary and mala fide exercise of governmental power. At the most *Tulsiram Patel*[93] sounds like the bell of a fire-brigade which wakes up people at midnight and causes annoyance but it also saves them from burning alive. Fact remains that without discipline no nation can progress.

(10) Disciplinary proceedings against judges of the subordinate courts

Article 235 lays down that the control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court. Article 227 further provides that every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. The combined effect of these Articles is that the High Courts have been vested of disciplinary control over members of State Judicial Services in the subordinate courts. This was necessary in order to maintain independence and integrity of the judiciary.

No matter the members of the State Judicial Services are appointed by the Governor and hence in view of Article 311(1) only the Governor has the authority to impose major penalties of removal or dismissal or reduction in rank yet in view of Article 235 Governor cannot conduct disciplinary proceedings apart from the High Court. Therefore, the power to institute enquiry against members of State Judicial Services vests in the High Court and on the basis of the recommendations of the High Court, Governor will take action. Governor has no discretion to disagree or modify the recommendations of the High Court. Even Public Service Commission need not

90. *A.K. Kaul* v. *UOI*, (1995) 4 SCC 73.

91. *Ibid.*

92. *Divl. Personnel Officer, S. Rly.* v. *Challappan*, (1976) 3 SCC 190: 1976 SCC (L&S) 398: (1976) 1 SCR 783.

93. *U.O.I.* v. *Tulsiram Patel*, (1985) 3 SCC 398: 1985 SCC (L&S) 672: AIR 1985 SC 1416.

be consulted. This was clarified by the apex Court in *Baldev Raj* v. *Punjab and Haryana High Court*[1]. In this case, after an enquiry against a sub-judge, High Court had recommended removal but the government in consultation with the Public Service Commission reinstated the judge. Apex Court held that the recommendation of the High Court is binding on the government. Similarly, the government has no power to order compulsory retirement of a judicial officer unless the High Court recommends so.[2]

(C) ADMINISTRATIVE SERVICE TRIBUNALS

For a long time a search was going on for a mechanism to relieve the courts, including High Courts and the Supreme Court, from the burden of service litigation which formed a substantial portion of pending litigation. As early as 1958 this problem engaged the attention of the Law Commission which recommended for the establishment of tribunals consisting of judicial and administrative members to decide service matters.[3] In 1969 Administrative Reform Commission also recommended for the establishment of civil service tribunals both for the Central and State civil servants.[4] Central Government appointed a committee under the Chairman of Justice J.C. Shah of the Supreme Court of India in 1969 which also made similar recommendation. In 1975, Swarn Singh Committee again recommended for the setting up of service tribunals.[5] The idea of setting up service tribunals also found favour with the Supreme Court of India which in *K.K. Dutta* v. *Union of India*[6] advocated for setting up of service tribunals to save the courts from avalanche of writ petitions and appeals in service matters. In the meantime various States[7] had established their own service tribunals. Service Tribunal was also established in Andhra Pradesh in 1973 by the Thirty-second Constitution Amendment.

It was against this backdrop that Parliament passed Constitution (Forty-second Amendment) Act, 1976 which added Part XIV-A in the Constitution. Articles 323-A and 323-B enabled Parliament to constitute administrative tribunals for dealing with certain matters specified therein. Article 323-A provided that Parliament may by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services

1. (1976) 4 SCC 201: 1976 SCC (L&S) 571: AIR 1976 SC 2490.
2. *State of Haryana* v. *Inder Prakash*, (1976) 2 SCC 977: 1976 SCC (L&S) 372: AIR 1976 SC 1841.
3. XIV REPORT OF REFORM OF JUDICIAL ADMINISTRATION, (1958).
4. REPORT ON PERSONNEL ADMINISTRATION, 1969.
5. *Perspective*, (1986) 1 SLJ (Journal Section), pp. 1-5.
6. (1980) 4 SCC 38: 1980 SCC (L&S) 485: AIR 1980 SC 2056.
7. Gujarat, 1973, Uttar Pradesh, 1975, Rajasthan, 1976, Assam, 1977. In Bihar Act was passed in 1982 but the tribunal was never established.

and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of Government of India or of any corporation owned or controlled by the government. Parliament was further empowered to prescribe by law the jurisdiction, power, authority and procedure of such tribunals and also to exclude the jurisdiction of all courts except that of the Supreme Court under Article 136.[8] Empowered by these enabling provisions of the Constitution Parliament enacted Administrative Tribunals Act, 1985[9] for the establishment of administrative service tribunals for deciding service disputes of civil servants of the Centre as well as of the States which was amended in 1986.

Section 4(1) of the Act provides for the establishment of Central Administrative Tribunals. It also empowers the Central Government to establish an administrative tribunal for any State on receipt of such a request to establish an administrative tribunal for any State by the State Government. Section 5 provides for the composition of tribunals and benches thereof. According to sub-section (*i*) of Section 5 each tribunal shall consist of a Chairman and such number of Vice-Chairman and other members as the appropriate government may deem fit. Section 5(2) further provides that a bench shall consist of one judicial member and an administrative member. Section 5(4)(*b*) authorises the Chairman to transfer the Vice-Chairman of a Bench or other members thereof to any other Bench.

Section 6(1)(2) and (3) of the Act prescribes qualifications for appointment as Chairman, Vice-Chairman, Judicial Member and Administrative Members. A person shall not be qualified for appointment as the Chairman unless he is or has been a judge of the High Court or has, for at least two years, held the post of a Secretary to the Government of India or any other post under the Central or State Government carrying a scale of pay which is not less than that of a Secretary of the Government of India. Therefore, a retired person can also be appointed as Chairman of the Administrative Tribunal if he fulfils any of the above qualifications.

Similarly, a person shall not be qualified for appointment as Vice-Chairman unless he is or has been a judge of a High Court, or Secretary to the Government of India or State carrying the scale of pay not less than that of Secretary to the Government of India, or held the post as Additional Secretary to the Government of India, or has, for a period of not less than 3 years, held office as a Judicial Member or an Administrative Member.

The qualifications for appointment as Judicial Member are laid down in sub-section (3) of Section 6 of the Act. It lays down that a person shall not be qualified for appointment as a Judicial Member unless he is, or has

8. Arts. 323-A(2)(*d*) and 323-B(3)(*d*).
9. [illegible] effect on November 1, 1985.

been, or is qualified to be, a judge of a High Court; or has been a member of the Indian Legal Service and has held a post of Grade I of that Service for at least three years.

For the appointment of an Administrative Member it is necessary that he has for at least for two years, held the post of an Additional Secretary to the Government of India or any other post under the Central or State Government carrying a scale of pay which is not less than that of an Additional Secretary to the Government of India or has, for at least three years, held the post of a Joint Secretary to the Government of India or any other post under the Central or State Government carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India. In addition to this he must have adequate administrative experience.[10]

The appointment of Chairman, Vice-Chairman and every other member of the Central Administrative Tribunal is to be made by the President of India in consultation with the Chief Justice of India. Similarly the appointment of Chairman, Vice-Chairman and other members of an Administrative Tribunal for a State is to be made by the President of India in consultation with the Chief Justice of India and the Governor of the concerned State.[11]

The tenure of office of the Chairman and Vice-Chairman has been fixed as 5 years or 65 years of age whichever is earlier and for members 62 years. Central Administrative Tribunal (Salaries and Allowance and Conditions of Service of Chairman, Vice-Chairman and Members) Rules, 1985 framed under Section 35(2)(*c*) of the Act provide under Rule 5 that Chairman, Vice-Chairman and Members on appointment to the tribunal, if they are in Central or State service would seek retirement from that service and that in the case of a sitting judge of a High Court who is appointed as Chairman or Vice-Chairman, his service in the Tribunal shall be treated as actual service within the meaning of para 11(*b*)(*i*) of Part D of the Second Schedule to the Constitution. Rule 5 further provides that on retirement he shall be entitled to receive pension and gratuity in accordance with the retirement rules applicable to him. Under Section 10 of the Act Central Government has power to prescribe by rules the salaries, allowances and other terms and conditions of service including pension, gratuity and other retiral benefits. However these cannot be changed to the disadvantage of the person after his appointment as Chairman, Vice-Chairman or Member of the Tribunal.

Chairman, Vice-Chairman or Member of a Tribunal can resign from office by notice in writing under his hand addressed to the President of India. However, the resigner shall continue to hold office until the expiry of three months from the date of receipt of such notice by the President or until a

10. 6(3-A) and (B) of the Act.
11. 6(4) to (7). *See* also *S.P. Sampath Kumar* v. *UOI*, (1987) 1 SCC 124.

person is duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest or unless he is permitted by the President to relinquish his office sooner.[12]

In the same manner sub-section (2) of Section 9 of the Act lays down the procedure for removal. It lays down that the Chairman, Vice-Chairman or any Member could be removed from office by the President of India on ground of proved misbehaviour or incapacity. For this purpose an enquiry is required to be made by a judge of the Supreme Court after such Chairman, Vice-Chairman or other Member had been informed of the charges against him and he has been given a reasonable opportunity of being heard in respect of those charges. Procedure for such an enquiry can be regulated by the Central Government by framing rules.[13]

Section 11 of the Act further provides that the Chairman, Vice-Chairman and any Member of a State or Central Tribunal, on ceasing to hold such office, shall become ineligible for further employment under the Government of India, the Government of State including employment under any other authority within the territory of India or under the control of the government or under any corporation or society owned or controlled by the government. However, a Chairman, Vice-Chairman or any Member of the Central Administrative Tribunal can be appointed as Chairman, Vice-Chairman or Member of the State Tribunal and vice versa. Furthermore, after ceasing to hold office such functionaries cannot appear, act or plead before any tribunal where they were Chairman, Vice-Chairman or Member.

Besides the establishment of Central and State Administrative Tribunals the Act makes provision for the establishment of Joint Administrative Tribunal for two or more States on the request of such States.[14] Sub-section (5) of Section 4 inserted by the Administrative Tribunals (Amendment) Act, 1986 provides that the Central Government may designate all or any of the members of Bench or Benches of the State Administrative Tribunal as member of the Bench or Benches of the Central Administrative Tribunal and vice versa.

According to Section 5(1), each Tribunal shall consist of a Chairman, and such number of Vice-Chairmen and Judicial and Administrative Members as the appropriate government may deem fit. However, subject to the other provisions of the Act, the jurisdiction, powers and authority of the Tribunal may be exercised by Benches of such Tribunal. Each Bench is to consist of one Judicial Member and one Administrative Member.[15] Chairman has also been given power to transfer a member from one Bench to another.

12. S. 9 of the Act.
13. S. 9(3) of the Act.
14. S. 4(3) of the Act.
15. S. 5(2) of the Act.

Section 14 of the Act confers jurisdiction, powers and authority on the Central Administrative Tribunal and provides that from 1st November, 1985 the Tribunal shall exercise all the jurisdiction, powers and authority exercisable immediately before that day by all courts, except the Supreme Court, in relation to recruitment, matters concerning recruitment and all service matters of Central civil servants. Section 15 confers similar jurisdiction on State Administrative Tribunal. Even the pending cases on 1st November, 1985 stand transferred to the Tribunal.[16] The language of Section 14(1) is wide enough to cover all service matters concerning the persons covered under the Act where the allegation is the violation of Article 311 or any service rule framed under Article 309 of the Constitution including Articles 14 and 16. Therefore, even in cases of infringement of fundamental rights of the civil servants the forum will be the Tribunal. Thus Tribunal has authority to decide the constitutionality of any statute, rule regulation or notification.[17] For this purpose Tribunal can exercise all jurisdiction, power and authority exercisable by all courts including the writ jurisdiction of High Courts under Article 226 of the Constitution.

Ordinarily the Tribunal shall not admit an application unless the applicant has exhausted the remedy available under the service rules.[18] A period of limitation of one year is also provided for making an application from the date on which the final order was made by the government against the civil servant.[19] Tribunal has power to punish for its own contempt.[20]

Tribunal can be moved by filing an application before the Registrar of the Tribunal along with the prescribed fee of Rs 50 and relevant documents.[21] On receipt of application, the Tribunal shall, if satisfied after such enquiry as it may deem necessary, that the application is a fit case for adjudication or trial by it, admit such application; but where the Tribunal is not so satisfied, it may summarily reject the application after recording its reasons.[22] Applicant can even send application through post and can plead the case with or without an advocate.[23]

Act provides for a informal and non-technical trial procedure. Tribunal is not bound by the technical rules of Civil Procedure Code but is only required to act in conformity with the rules of natural justice.[24] However,

16. S. 29. *See* also *UOI* v. *Ganesh Khalashi*, CAT case No. 747/1990 (B). It was held that transfer took place by operation of law irrespective of actual transfer.
17. *J.B. Chopra* v. *UOI*, (1987) 1 SCC 422.
18. S. 20.
19. S. 21.
20. S. 17.
21. S. 2.
22. S. 19(3).
23. S. 23.
24. S. 22.

Tribunal shall have the powers of a civil court under Civil Procedure Code in respect of matters specified in the Act.[25] Normally tribunal cannot pass ex parte interim order but under certain circumstances it can grant interim order for a period not exceeding 14 days.[26] On application, Chairman has power to transfer a case from one Bench to another.[27] The decision of the Tribunal shall be by majority but if the members are equally divided the matter may be referred to the Chairman.[28] Because the Tribunal exercises the jurisdiction of the High Court it can issue writs but generally Tribunals do not issue writs. Order passed by the Tribunal shall be final and shall not be called in question in any court including High Court except the Supreme Court by way of special leave petition under Article 136 of the Constitution,[29] because Administrative Tribunal set up under the Act is a substitute of and supplemental to the High Court in service matters.[30]

As a necessary consequence to this the tribunals are not under the writ jurisdiction of the High Court and are not bound by their decisions, no matter they may have a persuasive value.

With the deletion of Section 2(*b*) from the Administrative Tribunals Act, 1985 by the 1986 Amendment the jurisdiction of the Tribunal has been extended to 'workman' within the meaning of the Industrial Disputes Act provided that at the same time he is also a government servant. Thus it created a little confusion because in such a case a workman who is also a government servant or an employee of an institution notified under S. 14(2) of the Administribunal Tribunals Act has been brought under the dual jurisdiction of the Tribunal and the Industrial Tribunal and Labour Courts. This duality confusion was however, settled by the Central Administrative Tribunal in *A. Padmavalley* v. *CPWD and Telecom*[31] Tribunal clarified that the Administrative Tribunals are not substitute for the authorities under the Industrial Disputes Act and hence their jurisdictions cannot be regarded as concurrent, therefore a person seeking relief under the Labour Law must exhaust the remedies available under that law before approaching the Administrative Tribunal. As regards the extent of power of the tribunal, it was held that as a substitute of the High Court, the tribunal can exercise the power of judicial review as was exercised by the High Court under Article 226 of the Constitution.

25. S. 22.
26. S. 24.
27. S. 25.
28. S. 26.
29. S. 27.
30. *J.B. Chopra* v. *UOI*, (1987) 1 SCC 422: AIR 1987 SC 357.
31. (1990) 3 SLJ 544 (CAT) Hyd.

Tribunal has inherited the jurisdiction of the High Court in service matter, therefore, in exercise of its power of judicial review it cannot interfere with the penalty imposed by the disciplinary authority on the ground that it is disproportionate to the proved misconduct if the findings as to misconduct are supported by legal evidence.[32]

Act does not provide for any appeal or review of the order of the Tribunal except that a person aggrieved may file special leave petition before the Supreme Court. However, after the decision of the Apex Court in *L. Chandra Kumar* v. *Union of India*[33], Service Tribunals have been brought under the jurisdiction of High Court and their decision now shall be appealable before the High Courts also.

Even though the judgment in the above case does not ipso facto apply to the Jammu and Kashmir Constitution, but the ratio of the case applies to the exercise of jurisdiction by the Jammu and Kashmir High Court. Thus the Central government employees working in the State of Jammu and Kashmir cannot bypass the jurisdiction of Central Administrative Tribunal.[34] CAT has exclusive jurisdiction, as a Court of first instance, in relation to service matters concerning employees of the Kendriya Vidyalaya posted in the State of Jammu and Kashmir.

Under Section 15 Administrative tribunal has power to interfere with the findings of inferior tribunal, however such power is limited to cases where inferior tribunal has allowed inadmissible evidence or has prevented evidence or has based its conclusion or an erroneous view of law or that the conclusion is such which no reasonable can draw on the existing material on record.[35]

Section 3(*q*)(*v*) of the Act gives wide jurisdiction to the tribunal by using the expression "any other matter whatsoever". But wide does not mean unlimited. The Apex Court in *Union of India* v. *Rasila Ram*[36] held that matter relating to eviction of unauthorised occupants from government quarters does not come within the purview and jurisdiction of Administrative Tribunals. In the same manner Tribunal cannot interfere with the discretionary jurisdiction of the state in matters relating to determination of conditions of service, alteration thereof by amending rules, constitution, classification or abolition of posts, cadres, or categories of service, amalgamation, bifurcation of departments, reconstitution, restructuring of patterns etc. However, this is subject to limitations and restrictions envisaged in the Constitution.[37]

32. *Union of India* v. *Parma Nanda*, (1989) 2 SCC 177.
33. (1997) 3 SCC 261.
34. *Kendriya Vidyalaya Sangthan* v. *Subash Sharma*, (2002) 4 SCC 145.
35. *Secy to Govt. of T.N.* v. *Thiru M. Sannasi*, (2001) 10 SCC 517.
36. (2001) 10 SCC 623.
37. *P.U. Joshi* v. *Accountant General*, (2003) 2 SCC 632.

In order to provide expeditious justice the Act does not provide for any execution proceedings. The orders of the Tribunal are implemented in the same manner in which the impugned order would have been implemented. The legal sanction behind an order of the Tribunal lies in the power of the Tribunal to punish for its own contempt.

(1) Constitutional validity of the Administrative Tribunals Act, 1985

Constitutional validity of this Act was challenged before the Supreme Court in *S.P. Sampath* v. *Union of India*[38] on the ground that the exclusion of judicial review of the High Court violated the basic structure of the Constitution. Negativating the contention the court held that no matter the judicial review which is the basic feature of the Constitution cannot be violated but it is within the power of Parliament to amend the Constitution so as to substitute in place of High Court another alternative mechanism of judicial review provided it is not less efficacious than the High Court.

The whole question of constitutionality of the Administrative Service Tribunals Act, 1985 once again came under the scrutiny of the Apex Court in the pace-setting case of *L. Chandra Kumar* v. *Union of India*[39]. The court in this case held that *Sampat Kumar* was decided against the background that the litigation before the High Courts had exploded in an unprecedented manner and therefore, alternative inquisitional mechanism was necessary to remedy the situation. But it is self-evident and widely acknowledged truth that tribunals have not performed well, hence drastic measures were necessary in order to elevate their standard by ensuring that they stand up to constitutional scrutiny. Court further held that because the constitutional safeguards which ensure the independence of the judges of the Supreme Court and the High Courts are not available to the members of the tribunals, hence, they cannot be considered full and effective substitute for the superior judiciary in discharging the function of constitutional interpretation. Against this backdrop the court came to the conclusion that Administrative Tribunals cannot perform a substitutional role to the High Court, it can only be supplemental. Therefore, clause 2(*d*) of Art. 323-A and clause 3(*d*) of Art. 323-B of the Constitution, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Arts. 226, 227 and 32 of the Constitution were held unconstitutional and for the same reason Section 28 of the Administrative Tribunals Act, 1985 which contains "exclusion of jurisdiction" clause was also held unconstitutional.[40]

38. (1987) 1 SCC 124.

39. (1997) 3 SCC 261.

40. Same applies to W.B. Taxation Tribunal Act, 1987, Rajasthan Taxation Tribunal Act, 1995, T.N. Land Reforms (Fixation of ceiling on Land Amendment Act, 1985 and T.N. Taxation Special Tribunal Act, 1992.

It was further observed by the court that the power of judicial review of the Constitutional Courts is a part of the inviolable basic structure of the Constitution which cannot be ousted. However, service tribunals shall continue to be the courts of first instance in service matters and no writ can be directly filed in the writ courts on matters within the jurisdiction of tribunals. Though the two judge bench, one of whom must be a judicial member, of the tribunal can determine the constitutionality of any statutory provision yet it cannot determine the constitutionality of the Administrative Tribunal Act, 1985. But the exercise of this power shall be subject to the scrutiny by the Division Bench of the High Court within whose jurisdiction the Tribunal is situated. By bringing back the Tribunals within the jurisdiction of the High Courts the court served two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Arts. 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication by the tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter. In view of this decision the existing provision of direct appeals to the Supreme Court under Art. 136 of the Constitution also stands modified. Now the aggrieved party will be entitled to move the High Court and from the decision of the Division Bench of the High Court he can move the Supreme Court under Art. 136 of the Constitution. The court saved the constitutionality of S. 5(*b*) by providing that whenever a question involving the constitutionality of any provision arises it shall be referred to a two-member Bench, one of whom must be a judicial member.

Through this classical case the court has, in one sense, tried to save the jurisdiction of constitutional courts from encroachment by the Legislature by invoking the doctrine of "Basic Features of the Constitution."

Moving in the same directions the Supreme Court in *State of T.N.* v. *S. Thangavel*[41], held that the members of the Tribunal are not judges and their order is not a judgment or decree under Section 2(9) of the Civil Procedure Code, 1908. At best their statements can be construed to be only orders for the purpose of decision arrived at by the Tribunal under the Administrative Tribunal Act, 1985. Keeping in view the subordinate status of the Tribunal, the Delhi High Court recently held that Central Administrative Tribunal cannot entertain a public interest litigation.[42]

The Apex Court has now finally settled the question of jurisdiction of the Tribunals in labour matters by holding that Administrative Tribunal has no jurisdiction to adjudicate upon the finding of an Industrial Tribunal that a person is an workman. Tribunal cannot assume jurisdiction by holding that

41. (1997) 2 SCC 349.
42. Cabinet Secretary extension case, 1998.

the department in which the employee was working was not an industry.[43] Thus the duality of jurisdiction in labour matters has now been abolished.

It is also now authoritatively laid down that the doctrine of precedent applies to the Administrative Tribunals also. The court held that whenever an application under S. 19 of the Act, 1985 is filed which involves a question already concluded by an earlier decision, the tribunal must take into account that decision as precedent and decide accordingly. If the Tribunal dissents then the matter must be referred to a larger bench.[44]

(2) Working of the Administrative Service Tribunals

System of Administrative Service Tribunals has now come to stay. Service Tribunals started functioning in November 1985, and since then sixteen years have passed which is a sufficient period for any meaningful evaluation of system. Unfortunately much research has not been undertaken in this area. However, from whatever material is available, a few significant from whatever trends in the working of service tribunals, especially the Central Administrative Tribunal, may be discussed.[45]

At present there are two categories of service tribunals, one constituted by the States under their own legislations and the other constituted under the Central Legislation, Administrative Tribunals Act, 1985. There was a third category also in which a service tribunal had been established in Andhra Pradesh through the amendment of the Constitution in 1976 which was abolished in 1989. While the States of Uttar Pradesh, Rajasthan, Gujarat and Assam have established service tribunals under their own laws, the States of Orissa, Himachal Pradesh, Karnataka, Madhya Pradesh, Tamil Nadu and Maharashtra have established tribunals for their employees under the Central legislation. A Central Administrative Tribunal (CAT) has also been established for Central Government employees. This Tribunal works in eighteen places through its Benches. Besides these, Circuit Benches are also held at other places particularly where the seat of High Court is located.

The basic purpose behind the establishment of these tribunals was to provide expeditious justice to the civil servants which was not available through the traditional system. How far this purpose has been achieved is the moot question. If available data is any indicator, the trend which was discouraging in the beginning has now shown encouraging trends.

43. *Ajay D. Panalkar* v. *Pune Telecom Deptt.*, (1997) 11 SCC 469.

44. *K. Ajit Babu* v. *UOI*, (1997) 6 SCC 473.

45. One such research in the area is, "*Tribunalisation of Justice in India: A study of Growth and Development of Service Tribunals*". A doctoral thesis by Dr O.P. Chauhan under the supervision of the author, (1992).

Table

Institution, Disposal and Pendency of cases in the Central Administrative Tribunal (1985—Sept. 2000)

Year	Filed during the year	Disposal during the year	Pendency at the end of the year
1985 (November)	2963	30	2933
1986	23177	8934	17175
1987	19410	15084	21502
1988	19425	13769	27138
1989	18602	13986	31774
1990	19283	15495	35562
1991	21623	17552	39632
1992	25184	23782	41035
1993	27067	28074	40028
1994	26230	26409	39849
1995	25789	23668	41970
1996	23584	20667	44887
1997	23098	21981	46004
1998	21911	18394	49521
1999	22944	24566	47899
2000 (up to Sept. 2000)	18768	23210	43457
Grand Total	**339058**	**295601**	**43457**

(Official statement received from the office of the Central Administrative Tribunal on 27-12-2000).

Figures given above indicate that on November 1, 1985 when the Tribunal came into existence 2963 cases were transferred to it which were pending in various courts and this increased pendency figure to 2933 cases. These figures further indicate that after initial hesitation, disposal rate has shown encouraging trends. Out of the total cases filed till date 87% cases have been disposed of. It is indicated that 13% cases which are pending are for the reasons beyond the control of the Tribunal. Main reason seems to be that for the past seven or eight years a good number of posts of vice-chairman and other members have not been filled by the government. The working of the State Service Tribunals shows similar trend.

Nevertheless, for the survival of service tribunals as a system, it is of paramount importance that the substitute institution 'the Tribunal' must be a worthy successor of the High Court in all respect.[46]

It is widely acknowledged that due to infirmities in the appointment process of the members of the tribunals, and the absence of constitutional safeguards which can ensure their independence, Administrative Tribunals have not been able to perform a substitutional role to the High Courts whose jurisdiction was transferred to them. Therefore, in order to improve the functioning of the tribunals, besides bringing them under the jurisdiction of the High Courts, the Apex Court has made some significant suggestions.[47]

1. The appointment of administrative members may continue but there is need for changes in respect of appointments and supervision of their functioning by an independent authority. Since the selection committee is now headed by the judge of the Supreme Court to be nominated by the Chief Justice of India, there is reason to believe that the administrative members will be selected on the basis of merit and suitability.
2. Until a wholly independent agency for administration of all tribunals can be set up, it is desirable that all such tribunals should be under a single nodal ministry like the Law Ministry.
3. It would be open to the Ministry to appoint an independent supervisory body to oversee the working of the tribunals.
4. If need arises there may be separate supervisory authorities for the Central and State Tribunals.
5. Such a supervisory authority will ensure that the independence of the members of the tribunals is maintained. To that extent, the procedure for selection of the members of the tribunal, the manner in which funds are allocated for the functioning of the tribunals and all other consequential details will have to be taken care of.

After the Administrative Tribunals have been brought back within the jurisdiction of the High Courts the suggestion of the Supreme Court for the Constitution of an administrative supervisory authority, if operationalised, would go a long way in firmly establishing Tribunals as a supplemental dispute resolution mechanism.

PROPOSED AREAS OF DISCUSSION

1. Desirability of providing measures for the protection of civil servants through the medium of the Constitution may be discussed.
2. Doctrine of pleasure is feudal in origin, therefore has no relevance in democratic India. Doctrine of pleasure may be discussed as imparted into the Indian Constitution.

46. *Per* Misra, J., in *Sampath Kumar* v. *UOI*, (1987) 1 SCC 124, 139.
47. *L. Chandra Kumar* v. *UOI*, (1997) 2 SCC 349.

3. The right to reasonable opportunity of hearing may be discussed with the help of changing contents of the rules of natural justice.
4. It is said that *Tulsiram Patel* is like a fire-brigade truck which though awakens people during night but also saves them from burning. Case may be discussed in all its aspect. After this case whether any constitutional amendment is desirable?
5. If an Enquiry Officer misconducts himself, can any enquiry be instituted against him even if he is exercising a quasi-judicial function? The concept of accountability in the exercise of quasi-judicial function may be discussed.
6. After the abolition of second opportunity from the disciplinary proceedings against a government servant by the 42nd Constitution Amendment Act, 1976, is it necessary that the report of the Enquiry Officer be supplied to the delinquent government servant and he be given an opportunity to represent against it? Constitutionality of such a measure if provided by an ordinary law of the Legislature subordinate legislation may be discussed.
7. Administrative Tribunals Act, 1985 is a boon for the civil servants. In the light of this statement, working of the Administrative Service Tribunals may be discussed. Suggestions may be discussed for improving the working of these tribunals.
8. Role of Central Administrative Tribunal whether confined to judicial review? Against this backdrop jurisdiction of the service tribunals may be discussed.

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APPENDIX

The Lokpal Bill, 2003

A Bill to provide for the establishment of the institution of Lokpal to inquire into allegations of corruption against public functionaries and for matters connected therewith

Be it enacted by Parliament in the Forty-ninth Year of the Republic of India as follows:—

Statement of Objects and Reasons.—In its interim report on the "Problem of Redress of Citizens' Grievances" submitted in 1966, the Administrative Reforms Commission recommended, *inter alia*, the setting up of an institution of Lokpal.

2. To give effect to this recommendation of the Administrative Reforms Commission, a Bill called the "Lokpal and the Lokayuktas Bill, 1968" was introduced in the Fourth Lok Sabha in 1968. The Bill was considered by a Joint Committee of the two Houses of Parliament and the Bill, as reported by the Joint Committee, was passed by the Lok Sabha in 1969. While this Bill was pending in Rajya Sabha, the Fourth Lok Sabha was dissolved and consequently, the Bill lapsed. In 1971, the Bill passed by the previous Lok Sabha was re-introduced in the Lok Sabha as the "Lokpal and Lokayuktas Bill, 1971". This Bill also lapsed on the dissolution of the Fifth Lok Sabha.

3. A fresh Bill called the "Lokpal Bill, 1977" was introduced in the Lok Sabha in 1977. This Bill was referred to a Joint Committee of both the Houses of Parliament which submitted its report in July, 1978. When the Bill, as reported by the Joint Committee, was under consideration of the Lok Sabha, the Lok Sabha was prorogued and was subsequently dissolved. Consequently that Bill also lapsed.

4. The Lokpal Bill, 1985 was introduced in the Lok Sabha and subsequently withdrawn. The Lokpal Bill, 1989 which sought to include the office of Prime Minister also within the jurisdiction of the Lokpal which was to be a three Member body lapsed with the dissolution of the Lok Sabha.

5. The Lokpal Bill, 1996 was introduced in the Lok Sabha on 13-9-1996. Thereafter, it was referred to the Department-related Parliamentary Standing Committee on Home Affairs for examination and report. The Standing Committee presented its report to the Parliament on 9-5-1997. Before the Government could finalise its stand on the various recommendations of the Committee, the Lok Sabha was dissolved on 4-12-1997 and the Bill also lapsed.

6. The Lokpal Bill, 1998 provides for setting up the office of Lokpal with a Chairperson and two Members for a fixed tenure. With a view to ensuring that the Lokpal is able to act independently and discharge its functions without fear or favour, the Bill provides that the Chairperson/Member of Lokpal shall not be removed from his office, except by an order made by the President on the ground of proved misbehaviour or incapacity after an inquiry made by a Committee consisting of the Chief Justice of India and two other Judges of the Supreme Court next to the Chief Justice in seniority in which the Member had been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. It is also provided that the Chairperson and other Members shall be appointed by the President by warrant under his hand and seal on the recommendations of a Committee consisting of the Vice-President of India, as Chairman, Prime Minister, Speaker of Lok Sabha, Minister of Home Affairs, Leader of the House to which the Prime Minister does not belong, Leader of Opposition in Lok Sabha and Leader of Opposition in Rajya Sabha as members. Under the Scheme of the Bill, the Lokpal will inquire into complaints alleging that a public functionary

as defined in the Bill has committed an offence punishable under the Prevention of Corruption Act, 1988 and the expression "public functionary" covers, Prime Minister, Ministers, Ministers of State, Deputy Ministers and Members of Parliament. It seeks to carry out in this respect the object and purpose of the recommendations of the Administrative Reforms Commission for enabling the Citizen to have recourse to a convenient and effective forum for determination of complaints and thereby save him from pursuing his remedy through the process of Courts, which may prove expensive or dilatory and may not facilitate in speedy determination. The Bill also seeks to make special provisions for discouraging frivolous, vexatious and false complaints. The Bill also provides for declaration of assets and liabilities by Members of Parliament and their family members, annually. The Notes on clauses explain the provisions contained in the Bill.

7. The Bill seeks to achieve the above objects.

CHAPTER I

PRELIMINARY

1. Short title and commencement.—(1) This Act may be called the Lokpal Act, 1998.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions.—In this Act, unless the context otherwise requires,—

(*a*) "Chairperson" means the Chairperson of the Lokpal;

(*b*) "competent authority", in relation to—

(*i*) the Prime Minister, means the House of the People;

(*ii*) a member of the Council of Ministers, other than the Prime Minister, means the Prime Minister;

(*iii*) a member of Parliament, other than a Minister, means the Council of States in the case of member of that Council and the House of the People in the case of a member of that House;

(*c*) "complaint " means a complaint alleging that a public functionary has committed any offence punishable under the Prevention of Corruption Act, 1988;

(*d*) "Lokpal" means the institution established under Section 3;

(*e*) "Member" means a Member of the Lokpal;

(*f*) "prescribed" means prescribed by rules made under this Act;

(*g*) "public functionary" means a person who—

(*i*) holds or has held the office of the Prime Minister, Minister, Minister of State or Deputy Minister of the Union;

(*ii*) is or has been a Member of either House of Parliament.

CHAPTER II

MACHINERY FOR INQUIRIES

3. Establishment of Lokpal.—As from the commencement of this Act, there shall be established, for the purpose of making inquiries in respect of complaints under this Act, an institution to be called the "Lokpal".

(2) The Lokpal shall consist of—

(*a*) a Chairperson who is or has been a Chief Justice or a Judge of the Supreme Court;

(*b*) two Members who are or have been the Judges of the Supreme Court or the Chief Justices of the High Courts.

(3) The Chairperson and every other Member shall, before entering upon his office, make and subscribe before the President, or a person appointed in that behalf by the President, an oath or affirmation in the form set out in the Schedule.

4. Appointment of Chairperson and other Members.—(1) The Chairperson and other Members shall be appointed by the President by warrant under his hand and seal:

Provided that every appointment under this sub-section shall be made after obtaining the recommendations of a Committee consisting of—

(*a*)	the Vice-President of India	—	Chairman;
(*b*)	the Prime Minister	—	member;
(*c*)	the Speaker of the House of the People	—	member;
(*d*)	the Minister in-charge of the Ministry of Home Affairs in the Government of India	—	member;
(*e*)	the Leader of the House other than the House in which the Prime Minister is a member of Parliament	—	member;
(*f*)	the Leader of the Opposition in the House of the People	—	member;
(*g*)	the Leader of the Opposition in the Council of States	—	member:

Provided further that no sitting Judge of the Supreme Court or sitting Chief Justice of a High Court shall be appointed except after consultation with the Chief Justice of India.

(2) No appointment of a Chairperson or a Member shall be invalid merely by reason of any vacancy in the Committee.

5. Chairperson and Members to be ineligible to hold other office.—The Chairperson or a Member shall not be a member of Parliament or a member of the Legislature of any State or Union territory and shall not hold any office of trust or profit (other than his office as the Chairperson or a Member) or be connected with any political party or carry on any business or practise any profession and accordingly, before he enters upon his office, a person appointed as the Chairperson or a Member, as the case may be, shall, if—

(*a*) he is a member of Parliament or of the Legislature of any State or Union territory, resign such membership; or

(*b*) he holds any office of trust or profit, resign from such office; or

(*c*) he is connected with any political party, sever his connection with it; or

(*d*) he is carrying on any business, sever his connection (short of divesting himself of ownership) with the conduct and management of such business; or

(*e*) he is practising any profession, cease to practise such profession.

6. Term of office and other conditions of service of Chairperson and Members.—(1) The Chairperson and every other Member shall hold office as such for a term of three years from the date on which he enters upon his office or until he attains the age of seventy years, whichever is earlier:

Provided that he may—

(*a*) by writing under his hand addressed to the President, resign his office; or

(*b*) be removed from his office in the manner provided in Section 7.

(2) On ceasing to hold office, the Chairperson and every other Member shall be ineligible for—

(*i*) reappointment in the Lokpal; and

(*ii*) further employment to any office of profit under the Government of India or the Government of a State.

(3) The salary, allowances and other conditions of service of—

(*i*) the Chairperson shall be the same as those of the Chief Justice of India;

(*ii*) other Members shall be the same as those of a Judge of the Supreme Court:

Provided that such salary be in addition to any pension to which the Chairperson or a Member may be entitled in respect of any previous service under the Government of India or under the Government of a State and no deduction shall be made from such salary on the ground of his having received any retirement gratuity, or on the ground that he received the commuted value of a portion of the pension in respect of his previous service:

Provided further that the salary, allowances and pension payable to, and other conditions of service of, the Chairperson and other Members shall not be varied to his disadvantage after his appointment.

7. Removal of Chairperson or Members.—The Chairperson or a Member shall not be removed from his office except by an order made by the President on the ground of proved misbehaviour or incapacity after an inquiry made by a Committee consisting of the Chief Justice of India and two other Judges of the Supreme Court next to the Chief Justice in seniority, in which the Chairperson or the Member had been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

8. Member to act as Chairperson or to discharge his functions in certain circumstances.—(1) In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the President may, by notification, authorise one of the Members to act as the Chairperson until the appointment of a new Chairperson to fill such vacancy.

(2) When the Chairperson is unable to discharge his functions owing to absence on leave or otherwise, such one of the Members as the President may, by notification, authorise in this behalf, shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties.

9. Staff of Lokpal.—(1) The Lokpal shall, for the purpose of assisting it in the discharge of its functions (including verification and inquiries in respect of complaints) under this Act, appoint a Secretary and such other officers and employees as the President may determine, from time to time, in consultation with the Lokpal.

(2) Without prejudice to the provisions of sub-section (1), the Lokpal may, for the purpose of dealing with any complaints or any classes of complaints, secure—

(*i*) the services of any officer or employee or investigating agency of the Central Government or a State Government with the concurrence of that Government, or

(*ii*) the services of any other person or agency.

(3) The terms and conditions of service of the officers and employees referred to in sub-section (1) and of the officers, employees, agencies and persons referred to in sub-section (2) (including such special conditions as may be considered necessary for enabling them to act without fear or favour in the discharge of their functions) shall be such as the President may determine, from time to time, in consultation with the Lokpal.

(4) In the discharge of their functions under this Act, the officers and employees referred to in sub-section(1) and the officers, employees, agencies and persons referred to in sub-section (2) shall be subject to the exclusive administrative control and direction of the Lokpal.

CHAPTER III

JURISDICTION AND PROCEDURE IN RESPECT OF INQUIRIES

10. Jurisdiction of Lokpal.—(1) Subject to the other provisions of this Act, the Lokpal shall inquire into any matter involved in, or arising from, or connected with, any allegation made in a complaint.

(2) The Lokpal may inquire into any act or conduct of any person other than a public functionary in so far as it considers if necessary so to do for the purpose of its inquiry into any such allegation:

Provided that the Lokpal shall give such person a reasonable opportunity of being heard and to produce evidence in his defence.

(3) No matter in respect of which a complaint may be made under this Act shall be referred for inquiry under the Commissions of Inquiry Act, 1952.

11. Matters not subject to jurisdiction of Lokpal.—(1) The Lokpal shall not inquire into any matter concerning any person if the Chairperson or any other Member has any bias in respect of such matter or person and if any dispute arises in this behalf, the President shall, on an application made by the party aggrieved, obtain, in such manner as may be prescribed, the opinion of the Chief Justice of India and decide the dispute in conformity with such opinion.

(2) The Lokpal shall not inquire into any complaint if the complaint is made after the expiry of ten years from the date on which the offence mentioned in such complaint is alleged to have been committed.

12. Complaints.—(1) Any person other than a public servant may make a complaint under this Act to the Lokpal.

Explanation.—For the purpose of this sub-section, "public servant" means—

(*a*) any person who is a member of a Defence service or of a civil service of the Union or a State or of an all-india service or holds any post connected with Defence or any civil post under the Union or a State;

(*b*) any person in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company, as defined in Section 617 of the Companies Act, 1956;

(*c*) any person in the service of any other institution, concern or undertaking which is established by or under a Central, Provincial or State Act or which is controlled, or financed wholly or substantially by funds provided, directly or indirectly, by the Central Government or a State Government.

(2) The complaint shall be in the prescribed form and shall set forth particulars of the offence alleged and shall be accompanied by fees prescribed, if any, an affidavit in support of such particulars and a certificate in the prescribed form in respect of the deposit under sub-section (3) or, if the complainant is unable to make the deposit, an application for exemption from the requirement as to such deposit.

(3) The complainant shall deposit such sum of money in such manner and with such authority or agency as may be prescribed for disposal under Section 25.

(4) Notwithstanding anything contained in the foregoing sub-sections, any letter written to the Lokpal or, as the case may be, the appropriate authority by a person in any jail or other place of custody or in any asylum or other place for insane persons may, if the Lokpal or, as the case may be, the appropriate authority is satisfied that it is necessary so to do, be treated as a complaint made in accordance with the provisions of this section.

(5) Notwithstanding anything contained in any other enactment, it shall be the duty of a police officer or other person in-charge of any jail or other place of custody or of any asylum or other place for insane persons to forward, without opening, any letter addressed to the Lokpal or the appropriate authority by a person imprisoned or detained in such jail, place of custody, asylum or other place, to the Lokpal or the appropriate authority without delay.

Explanation.—For the purposes of this section, "the appropriate authority" means any of the authorities which the Lokpal may, by general or special order, in writing, determine to be the appropriate authorities.

13. Preliminary scrutiny of complaints by Lokpal.—(1) If the Lokpal is satisfied, after considering a complaint and after making such verification as it deems appropriate that—

(*a*) the complaint is not made within a period of ten years as specified in sub-section (2) of Section 11; or

(*b*) the complaint is manifestly false and vexatious,

the Lokpal shall dismiss the complaint after recording its reasons therefor and communicate the same to the complainant and to the competent authority.

(2) The procedure for verification in respect of a complaint under sub-section (1) shall be such as the Lokpal deems appropriate in the circumstances of the case and in particular, the Lokpal may, if it deems it necessary so to do, call for the comments of the public functionary concerned.

14. Procedure in respect of inquiries.—(1) If, after the consideration and verification under Section 13 in respect of a complaint, the Lokpal proposes to conduct any inquiry, it—

(*a*) shall forthwith forward a copy of the complaint to the competent authority;

(*b*) may make such orders as to the safe custody of documents relevant to the inquiry as it deems fit;

(*c*) shall, at such time as it considers appropriate, forward a copy of the complaint to the public functionary concerned and afford him an opportunity to represent his case.

(2) Every inquiry shall be conducted by the Chairperson and the Members sitting jointly and the place in which such inquiry is conducted shall be deemed to be an open court to which the public generally may have access so far as the same can conveniently contain them:

Provided that in exceptional circumstances and for reasons to be recorded in writing, such inquiry may be conducted *in camera*.

(3) The Lokpal shall hold every such inquiry as expeditiously as possible and in any case complete the inquiry within a period of six months from the date of receipt of the complaint:

Provided that the Lokpal may, for reasons to be recorded in writing, complete the inquiry within a further period of six months.

(4) Save as aforesaid, the procedure for conducting any such inquiry shall be such as the Lokpal considers appropriate in the circumstances of the case.

15. Evidence.—(1) Subject to the provisions of this section, for the purpose of any inquiry (including the verification under Section 13), the Lokpal—

(*a*) may require any public servant or any other person who, in its opinion, is able to furnish information or produce documents relevant to such inquiry, to furnish any such information or produce any such document;

(*b*) shall have all the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908, in respect of the following matters, namely:—

(*i*) summoning and enforcing the attendance of any person and examining him on oath;

(*ii*) requiring the discovery and production of any document;

(*iii*) receiving evidence on affidavits;

(*iv*) requisitioning any public record or copy thereof from any court or office;

(*v*) issuing commissions for the examination of witnesses or documents; and

(*vi*) such other matters as may be prescribed.

(2) A proceeding before the Lokpal shall be deemed to be a judicial proceeding within the meaning of Section 193 of the Indian Penal Code.

(3) No obligation to maintain secrecy or other restriction upon the disclosure of information obtained by or furnished to Government or any public servant, whether imposed by any enactment or by any provision of law whatever shall apply to the disclosure of information for the purposes of any inquiry (including the verification under Section 13) under this Act.

(4) The Government or any public servant shall not be entitled, in relation to any such inquiry or verification under Section 13 to any such privilege in respect of the production of documents or the giving of evidence as is allowed by any enactment or by any provision of law whatever in legal proceedings.

Explanation.—For the purposes of this section, "public servant" shall have the same meaning as in Section 21 of the Indian Penal Code.

16. Search and seizure.—(1) If the Lokpal has reason to believe that any document which, in its opinion, will be useful for, or relevant to, any inquiry under this Act, are secreted in any place, it may authorise any officer subordinate to it, or any officer of an investigating agency referred to in sub-section (2) of Section 9, to search for and to seize such documents.

(2) If the Lokpal is satisfied that any document seized under sub-section(1) would be evidence for the purpose of any inquiry under this Act and that it would be necessary to retain the document in its custody, it may so retain the said document till the completion of such inquiry:

Provided that where any document is required to be returned, the Lokpal shall return the same after retaining copies of such document duly authenticated thereof.

(3) The provisions of the Code of Criminal Procedure, 1973, relating to searches shall, so far as may be, apply to searches under this section subject to the modification that sub-section (5) of Section 165 of the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the words "Lokpal or any officer authorised by it" were substituted.

17. Reports.—(1) After the conclusion of inquiry, the Lokpal shall determine whether all or any of the offences alleged in the complaint have or has been proved to its satisfaction and by report in writing shall communicate its findings to the complainant, the public functionary and the competent authority.

(2) The Speaker, in the case of the Prime Minister or a member of the House of the People and the Chairman of the Council of States in the case of a member of that Council shall, as soon as may be after the receipt of report under sub-section (1), cause the same to be laid before the House of the People, or the Council of States, as the case may be, while it is in session, and if the House of the People or the Council of States, as the case may be, is not in session, within a period of one week from the reassembly of the said House or the Council, as the case may be.

(3) The competent authority shall examine the report forwarded to it under sub-section (1) and communicate to the Lokpal, within a period of ninety days from the date of receipt of the report, the action taken or proposed to be taken on the basis of the report.

(4) The Lokpal shall present annually to the President a consolidated report on the administration of this Act and the President shall, as soon as may be after and in any case not later than ninety days from the receipt of such report, cause the same, together with an explanatory memorandum, to be laid before each House of Parliament.

Explanation.—In computing the period of ninety days referred to in this sub-section, any period during which Parliament or, as the case may be, either House of Parliament, is not in session, shall be excluded.

CHAPTER IV
DECLARATION OF ASSETS AND LIABILITIES

18. Declaration of assets by members of Parliament.—(1) Every member of Parliament shall furnish a return of all assets owned by him and members of his family and all liabilities incurred by him and the members of his family before the Lokpal within a period of ninety days, from the date he enters upon his office and thereafter every year within a period of ninety days from the commencement of each financial year in such form as may be prescribed.

Explanation.—For the purpose of this sub-section, the family shall include the spouse and dependent children of such Member.

(2) The Lokpal shall report the details of returns filed under sub-section (1) to the Speaker of the House of the People or the Chairman of the Council of States, as the case may be.

(3) If a member of Parliament does not furnish a return under sub-section (1) or furnishes a return which is false in material particulars or furnishes a return after the expiry of the period specified in that sub-section, the Lokpal shall make a complaint in writing to the Speaker in the case of a member of the House of the People or to the Chairman of the Council of States in the case of a member of the Council of States.

(4) If a member of Parliament fails to furnish a return under sub-section (1), he shall not sit or vote as a member of either House of Parliament until he furnishes such return and a written communication is received by the Speaker or the Chairman, as the case may be, from the Lokpal to that effect.

CHAPTER V
MISCELLANEOUS

19. Expenditure on Chairperson and Members to be charged on the Consolidated Fund of India.—The salaries, allowances and pensions payable to, or in respect of, the Chairperson and Members of the Lokpal, shall be expenditure charged on the Consolidated Fund of India.

20. Intentional insult or interruption to Lokpal.—(1) Whoever intentionally offers any insult, or causes any interruption, to the Lokpal while the Lokpal or any of its Members is making any verification or conducting any inquiry under this Act, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both.

(2) The provisions of sub-section (2) of Section 199 of the Code of Criminal Procedure, 1973, shall apply in relation to an offence referred to in sub-section (1) as they apply in relation to an offence referred to in sub-section (2) of the said section, subject to the modification that no complaint in respect of such offence shall be made by the Public Prosecutor except with the previous sanction of the Lokpal.

21. Power of Lokpal to try certain offences.—(1) When any such offence as is described in sub-section (1) of Section 20 is committed in the view or presence of the Lokpal, the Lokpal may cause the offender to be detained in custody and may, at any time on the same day, take cognizance of the offence and, after giving the offender a reasonable opportunity of showing cause why he should not be punished under this section, try such offender summarily, so far as may be, in accordance

with the procedure prescribed for summary trials under the Code of Criminal Procedure, 1973, and sentence him to simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

(2) In every case tried under this section, the Lokpal shall record the facts constituting the offence with the statement (if any) made by the offender as well as the finding and the sentence.

(3) Any person convicted on a trial held under this section may appeal to the Supreme Court.

(4) The provisions of this section shall have effect notwithstanding anything contained in the Code of Criminal Procedure, 1973.

22. Action in case of false complaints.—(1) Every person who makes any complaint which is held by the Lokpal to be false shall be punishable as provided in sub-section (2).

(2) When any offence under sub-section (1) is committed, the Lokpal may take cognizance of the offence and after giving the offender a reasonable opportunity of showing cause why he should not be punished for such offence, try such offender summarily, so far as may be, in accordance with the procedure prescribed for summary trials under the Code of Criminal Procedure, 1973 and sentence him to imprisonment for a term which shall not be less than one year but which may extend to three years and also to fine which may extend to fifty thousand rupees and may also award, out of the amount of fine, to the public functionary against whom such false complaint has been made, such amount of compensation as the Lokpal thinks fit.

23. Application of Act 2 of 1974.—Subject to the other provisions of this Act and subject to the modification that for the purpose of transfer of any case under Section 22, the provisions of Section 406 of the Code of Criminal Procedure, 1973, shall alone apply, the provisions of the said Code shall apply to the proceedings before the Lokpal under Section 22 and for the purposes of the said provisions of that Code and the said proceedings, the Lokpal shall be deemed to be a Court of Session and shall have all the powers of a Court of Session.

24. Conferment of additional functions on Lokpal.—(1) The President may, by order in writing and subject to such conditions or limitations as may be specified in the order, require the Lokpal to inquire into any allegations (being an allegation in respect of which a complaint may be made) specified in the order in respect of a public functionary and subject to the provisions of Section 13, the Lokpal shall comply with such order.

(2) When the Lokpal is to make any inquiry under sub-section (1), the Lokpal shall exercise the same powers and discharge the same functions as it would in the case of any inquiry made on a complaint under this Act and the provisions of this Act (except Section 22) shall apply accordingly.

25. Disposal of deposit and payment of compensation or reward.—(1) The sum deposited by a complainant in pursuance of the provisions of Section 12 shall,—

(*a*) in a case where the complaint is dismissed under sub-section (1) of Section 13, stand forfeited to the Central Government;

(*b*) if the Lokpal, for reasons to be recorded in writing so directs, be utilised for compensating the public functionary complained against; and

(*c*) in any other case, be refunded to the complainant.

(2) If the Lokpal is satisfied that—

(*a*) all or any of all allegations made in a complaint have or has been substantiated either wholly or partly; and

(*b*) having regard to the expenses incurred by the complainant in relation to the proceedings in respect of such complaint and all other relevant circumstances of the case the complainant deserves to be compensated or rewarded,

the Lokpal shall determine the amount which shall be paid to the complainant by way of such compensation or reward and the Lokpal shall determine the person by whom the said compensation or reward shall be paid after giving that person a reasonable opportunity of being heard.

26. Persons likely to be prejudicially affected to be heard.—If, at any stage of the inquiry, the Lokpal—

(*a*) considers it necessary to inquire into the conduct of any person; or

(*b*) is of opinion that the reputation of any person is likely to be prejudicially affected by the inquiry,

the Lokpal shall give to that person a reasonable opportunity of being heard in the inquiry and to produce evidence in his defence:

Provided that nothing in this section shall apply where the credit of a witness is being impeached.

27. Protection of action taken in good faith.—(1) No suit, prosecution or other legal proceedings shall lie against the Lokpal or against any officer, employee, agency or person referred to in Section 9, in respect of anything which is in good faith done or intended to be done under this Act.

(2) Save as otherwise provided in this Act, no proceedings or decision of the Lokpal shall be called in question in any Court.

28. Power to delegate.—The Lokpal may, by general or special order in writing, and subject to such conditions and limitations as may be specified therein, direct that any powers conferred or duties imposed on it by or under this Act [except the powers under the proviso to sub-section (3) of Section 12, the power to dismiss a complaint under sub-section (1) of Section 13, the powers to close cases and make reports under Section 18 and the powers under Section 23] may also be exercised or discharged by the officers, employees and agencies referred to in Section 9, as may be specified in the order.

29. Power to make rules.—(1) The President may, by notification in the Official Gazette, make rules for the purpose of carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for—

(*a*) the manner in which the President shall obtain the opinion of the Chief Justice of India under sub-section (1) of Section 11;

(*b*) the form in which complaints may be made under sub-section(2) of Section 12 and the fees, if any, which may be charged in respect thereof;

(*c*) the manner in which and the authorities or agencies with whom deposits shall be made under sub-section (3) of Section 12 and the form in which certificates shall be furnished in respect of such deposits;

(*d*) the matters referred to in sub-clause (*vi*) of clause (*b*) of sub-section (1) of Section 15;

(*e*) the form in which return has to be furnished under sub-section (1) of Section 18;

(*f*) any other matter which is to be or may be prescribed.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule, or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

30. Removal of doubts.—For the removal of doubts, it is hereby declared that nothing in this Act shall operate to confer or enable the conferring of any jurisdiction on the Lokpal to make any inquiry—

(*a*) into any allegation against or any act or conduct of—

(*i*) the President, the Vice-President or the Speaker of the House of the People;

(*ii*) the Chief Justice or any other Judge of the Supreme Court;

(*iii*) the Comptroller and Auditor-General of India, the Chief Election Commissioner or other Election Commissioner or the Chairman or any other Member of the Union Public Service Commission; or

(*b*) upon its own knowledge or information.

31. Saving.—Nothing contained in this Act shall be construed as affecting the constitution of, or the continuance of functioning or exercise of powers by, any Commission of Inquiry appointed under the Commissions of Inquiry Act, 1952 before the commencement of this Act and no complaint shall be made under this Act in respect of any matter referred for inquiry to such Commission before such commencement.

32. Consequential amendment of Act 60 of 1952.—In Section 3 of the Commissions of Inquiry Act, 1952, in sub-section(1), for the words "The appropriate Government may", the words, brackets and figures "Subject to the provisions of sub-section (3) of Section 10 of the Lokpal Act, 1998, the appropriate Government may" shall be *substituted*.

THE SCHEDULE

[*See* Section 3(3)]

I,.....having been appointed Chairperson/Member of the Lokpal, do swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will duly and faithfully and to the best of my ability, knowledge and judgement perform the duties of my office without fear or favour, affection or ill-will.

SUBJECT INDEX