

CONSULTATION PAPERS

NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION

A

Consultation Paper*

on

ENLARGEMENT OF FUNDAMENTAL RIGHTS

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on

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INTRODUCTION

1. The working of the Constitution during the last fifty one years has manifested the need to afford greater protection to fundamental rights, for example by express inclusion in the Chapter on Fundamental Rights of certain human rights which have been judicially deduced or by removing or modifying certain provisions of the Constitution which in their actual operation have weakened the protection to fundamental rights - for example, preventive detention, article 31-B and the Ninth Schedule.

2. The objective of the Commission and its Advisory Panel is to strengthen fundamental rights. With that end in view public opinion is sought to be elicited regarding various articles guaranteeing fundamental rights and questions have been formulated for that purpose.

3. The Commission would like to make it abundantly clear that it is seeking the views and opinions of the public by circulation of this consultation paper and nothing therein should be considered as the Commission's views or recommendations.

4. References have been made in the paper mainly to the International Covenant on Civil and Political Rights 1966 [ICCPR]. The reason is that our country has acceded to the ICCPR on 10th April 1979. The ICCPR is considered as the International Bill of Rights.

5. The reference to the Constitution of the Republic of South Africa is because it is the most recent of the national Constitutions. It has been framed by a developing country which was also the victim of colonialism and which has experienced the worst form of racial discrimination in the form of apartheid.

I. ARTICLE 12 OF THE CONSTITUTION

6. Constitutional guarantees for the human rights of our people was one of the persistent demands of our leaders throughout the freedom struggle. It was made as far back as in 1895 in the Constitution of India Bill, popularly called the Swaraj Bill, which was inspired by Lokmanya Tilak. The demand was repeated in Mrs. Annie Besant's Commonwealth of India Bill finalised by the National Convention of Political Parties in 1925, by the Motilal Nehru Committee in 1928 at the Karachi Session of the Indian National Congress in 1932, and by the Tej Bahadur Sapru Committee in 1944-1945.

7. The immaculate premise of human rights is that an individual is not a mere mass of molecules but there is a spiritual spark in every individual irrespective of race, religion, caste, color, sex or status. The philosophy of human rights is that human personality is precious and invaluable. It is not expendable. Human rights flow from the common humanity and the inherent dignity of every human being and the equal and inalienable rights of all members of the human family. Human Rights are not gifts conferred by the State. Constitutions and laws do not create human rights. They are enacted to protect human rights which inhere in individuals antecedent to constitutions and the laws. Fundamental Rights are essential for development of the human personality and for full realization of the human potential.

8. The subject of fundamental rights was extensively discussed in the Constituent Assembly. Thereafter the Assembly guaranteed in Part III of the Constitution a fairly comprehensive array of basic human rights covering a wide spectrum such as equality, freedom of expression, assembly and association, freedom of movement, freedom to carry on profession or business, freedom of conscience and freedom of religion. There are guarantees against retrospective criminal laws, double jeopardy and self-incrimination and against deprivation of life and personal liberty. Minorities are guaranteed linguistic and cultural rights, and the right to establish and administer educational institutions of their choice.

9. Fundamental rights occupy a pride of place in our Constitution. According to Dr. Radhakrishnan they were a pledge to our people and a pact with the civilised world.

10. Fundamental rights are judicially enforceable. Any law which is violative of any fundamental rights is void [article 13(1) and (2) of the Constitution]. The right to approach the Supreme Court directly for enforcement of fundamental rights is guaranteed as a fundamental right by article 32 of the Constitution, which was described by Dr. Ambedkar as the heart and soul of the Constitution. Enforcement of fundamental rights has provided great protection and given relief to our people.

11. In India fundamental rights guaranteed by the Constitution, in the absence of specific constitutional provisions, are mainly enforceable against 'the State', which is defined in article 12 of the Constitution as follows:

"12. Definition – In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all

local or other authorities within the territory of India or under the control of the Government of India”.

12. Courts have ruled that where there is pervasive or predominant governmental control or significant involvement in the activities, such bodies, entities and organisations fall within the definition of “the State”. As a result of judicial interpretation, “the State” has been held to include statutory bodies such as insurance corporations,^{1[1]} nationalised banks,^{2[2]} airline corporations,^{3[3]} electricity boards,^{4[4]} educational institutions^{5[5]} and societies^{6[6]} whose composition and administration are predominantly controlled by the government. Consequently the reach and extent of protection of fundamental rights has been widened and greater protection has been afforded especially in the area of employment against discriminatory practices.

13. Again there are private, non-State entities which discharge important quasi-governmental or important public functions, which have repercussions on the life and welfare of the community. Such entities and bodies can be regarded as “the State” as would appear from the concurring opinion of Justice Mathew. “Institutions engaged in matters of high public interest or performing public functions are, by virtue of the nature of the functions performed, government agencies. Activities which are too fundamental

1[1] *Life Insurance Corporation v. Manubhai D. Shah*, AIR 1993 SC 171

2[2] *M.K. Agarwal v. Gurgaon Gramin Bank*, AIR 1988 SC 286; *Chairman, Prathama Bank, Moradabad v. Vijay Kumar*, AIR 1989 SC 1977

3[3] *Air India International v. Nergesh Meerza*, AIR 1981 SC 1829; *Lena Khan v. Union of India*, 1987 (2) SCC 402

4[4] *Rajasthan State Electricity Board v. Mohan Lal*, AIR 1967 SC 1857

5[5] *Ajay Hasia v. Khalid Mujib Sehravardi & Ors.*, 1981 (1) SCC 722

6[6] *B.S. Minhas v. Indian Statistical Institute*, 1983 (4) SCC 582

to the society are by definition too important not to be considered government function".7[7]

14. In the UK Human Rights Act 1998 the definition of public authority includes "any person certain of whose functions are functions of a public nature" [Section 6(3)(b)].

15. It is a matter for consideration whether the definition of "the State" should be widened to include such non-State entities and make them subject to the discipline of fundamental rights. The consequence will be not to make all actions and decisions of non-State entities subject to judicial review but only those acts or omissions which are violative of fundamental rights guaranteed in Part III of the Constitution.

16. Another matter for consideration is whether the judiciary should be included in the definition of "the State" in article 12.

17. Divergent views have been expressed by the Supreme Court on the question whether a judicial order can be violative of a fundamental right.8[8]

18. In the UK Human Rights Act 1998 the definition of public authority includes "a court or tribunal". The provisions of section 6(3)(a) and (b) are reproduced in Annexure-I.

19. The Bill of Rights in the South African Constitution applies to the judiciary by virtue of Article 8(1) which is reproduced in **Annexure I**.

20. Another strand of thought is that the inclusion of the judiciary in the definition of 'the State' should be confined to article 21 of the Constitution which guarantees that "no person shall be deprived of his life or personal liberty except according to procedure established by law". It is article 21 which is mainly invoked in the case of judicial orders. The controversy has centered round the question whether a judicial order which is without jurisdiction can be challenged as violative of article 21 of the Constitution.

Your views and responses are elicited on the following :

QUESTION: 1 Should the definition of "the State" in article 12 be expanded to include (a) statutory corporations, other bodies and institutions in which there is substantial State financial assistance or predominant State control and involvement; (b) Non-

7[7] *Sukhdev Singh v. Bhagatram*, AIR 1975 SC 1331, 1355

8[8] *Naresh Shridhar Mirajkar v. State of Maharashtra*, AIR 1967 SC 1. *Contra dicta* in *Antulay v. Naik*, 1988 (2) SCC 602.

State entities, bodies and institutions which perform quasi-governmental or public functions which have repercussions on the life and welfare of the community?

QUESTION: 2

Should it be provided in the Constitution that a judicial order which is without jurisdiction and null and void can be violative of the fundamental right guaranteed by article 21?

II. ARTICLE 14 – EQUALITY BEFORE LAW

21. It is proposed to add a new clause, say clause (2) to article 14 after re-numbering it as clause (1) thereof, to bring out the full amplitude and scope of the general guarantee under article 14. The proposed inclusion of article 14(2) is in the following terms:

Article 14(2): Equality includes the full and equal enjoyment of all rights and freedoms. Nothing in article 14 shall prevent the State from making any provision or adopting any measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, for the purpose of achievement of equality”.

22. The prohibited heads of discrimination in articles 15 and 16 of the Constitution are at present restricted to religion, race, caste, sex or place of birth.

23. It is proposed that these heads be extended so as to include ethnic or social origin; colour; age; language; political or other opinion; property; birth.

24. This would be in keeping with the Constitution of the Republic of South Africa 1996 [Section 9(3)], as also with the International Covenant on Civil and Political Rights 1966 [ICCPR] [article 26], which India has ratified. [See **Annexure - II** for these provisions]

25. In order to clarify that discrimination whether direct or indirect is prohibited and to give it a wide operation the following clause is proposed to be added :

Discrimination shall include any distinction, exclusion, restriction or preference based on race, religion, caste, sex or place of birth, ethnic or social origin, colour, age, language, political or other opinion, property, birth, which has the purpose or effect of nullifying or impairing the enjoyment or exercise on an equal footing of rights, benefits and entitlements in the political, economic, social, cultural or any other field of public life.

26. A similar provision is contained in the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 [CEDAW] (Part I Article 1) and in International Convention on the Elimination of All Forms of Racial Discrimination, 1965 [CERD] (Part I Article 1).

QUESTION 1: Whether article 14(2) be added after article 14(1) in the following terms?

Article 14(2): Equality includes the full and equal enjoyment of all rights and freedoms. Nothing in article 14 shall prevent the State from making any provision or adopting any measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, for the purpose of achievement of equality”.

QUESTION 2: Whether the prohibited heads of discrimination be extended and the following heads may be added?

Ethnic or social origin; colour; age; language; political or other opinion; property; birth.

QUESTION 3: Whether to give the guarantee against non-discrimination a wide operation the following clause may be added?

Discrimination shall include any distinction, exclusion, restriction or preference based on race, religion, caste, sex or place of birth, ethnic or social origin, colour, age, language, political or other opinion, property, birth, which has the purpose or effect of nullifying or impairing the enjoyment or exercise on an equal footing of rights, benefits and entitlements in the political, economic, social, cultural or any other field of public life.

III. INCLUSION OF JUDICIALLY DEDUCED FUNDAMENTAL RIGHTS IN PART III OF THE CONSTITUTION

27. As a result of judicial decisions certain fundamental rights, which are not explicitly mentioned in Part III of the Constitution which guarantees fundamental rights, have been inferred or deduced from the specified guaranteed fundamental rights. These judicially deduced fundamental rights are:

- A. Freedom of the Press;9[9]
- B. Freedom of Information;10[10]
- C. Prohibition of torture and cruel, inhuman or degrading treatment or punishment;11[11]

9[9] *Romesh Thappar v. State of Madras*, 1950 SCR 594; *Brij Bhushan v. State of Delhi*, 1950 SCR 605; *Bennett Colemann & Co. v. Union of India*, AIR 1973 SC 106

10[10] *S.P. Gupta & Ors. v. President of India & Ors.*, AIR 1982 SC 149

11[11] *Sunil Batra v. Delhi Administration*, 1978 (4) SCC 494 at 518-9 [para 52]; 579 [para 241]

- D. Right to travel abroad and return to one's country;12[12]
- E. Remedy for violation of article 21;13[13]
- F. Right to privacy;14[14]
- G. Right to free elementary education up to age of 14;15[15]
- H. Right to a clean and healthy environment;16[16]
- I. Right to have access to courts;17[17]
- J. Legal aid18[18]

28. Many of these judicially deduced fundamental rights find a place in the ICCPR as well as in the Constitution of the Republic of South Africa. These rights afford greater protection to our people. At present they are the outcome of judicial interpretation of different Articles of the Constitution. In order to consolidate and impart finality to the beneficial interpretation of the highest court in the land, it would be advisable to specifically incorporate these rights in Part III of the Constitution.

[A&B] Freedom of the Press & Freedom of Information

12[12] *Satwant Singh v. A.P.O., New Delhi*, AIR 1967 SC 1836; *Maneka Gandhi v. Union of India*, 1978 (1) SCC 248.

13[13] *Nilabati Behera v. State of Orissa*, AIR 1993 SC 1960; *D.K. Basu v. State of West Bengal*, 1997 (1) SCC 416

14[14] *R. Rajagopal v. State of Tamil Nadu & Ors.*, 1994 (6) SCC 632

15[15] *Unnikrishnan v. State of Andhra Pradesh*, 1993 (1) SCC 645

16[16] *Virender Gaur v. State of Haryana*, 1995 (2) SCC 577

17[17] *All India Judges' Association v. Union of India*, 1993 (4) SCC 288 at 298 para 14

18[18] *Madhav Hoskot v. State of Maharashtra*, AIR 1978 SC 1548

These freedoms are the bedrock of democracy. In a majority of national Constitutions freedom of the press is guaranteed in specific terms. It is felt that our Constitution should also expressly include freedom of the press and the right to information as guaranteed fundamental rights in Part III. As pointed out above, the Right to Know and the right to information have been spelled out by the Supreme Court in *S.P. Gupta's*^{19[19]} case.

QUESTION: 1 Whether Freedom of the Press and Freedom of Information may be specifically incorporated in Part III of our Constitution for example in the following terms?

Article 19(1): All citizens shall have the right:
(a) to freedom of speech and expression which shall include the freedom of the press and other media, the freedom to hold opinion and to seek, receive and impart information and ideas regardless of frontiers.

At present the specified heads of restriction in article 19(2) are: "the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence".

QUESTION: 2 In light of the suggested expansion of article 19(1)(a) whether another head of restriction may be added, namely, preventing the disclosure of information received in confidence?

[C] Torture and inhuman, degrading and cruel treatment or punishment grossly violate human dignity. There is no express provision in the Constitution prohibiting torture or cruel and degrading treatment and punishment. Our Supreme Court has deduced this freedom from a reading of article 21, article 14 and the Preamble to our Constitution which recognizes human dignity as the base of all human rights. A majority of national Constitutions have a provision prohibiting torture and cruel, inhuman and degrading treatment and punishment. The Universal Declaration of Human Rights 1948 [UDHR] and the International Covenant of Civil and Political Rights 1966 [ICCPR] also prohibit such acts by Articles 5 and 7 respectively. [For text see **Annexure III**].

QUESTION: Whether a specific article may be incorporated in Part III of the Constitution for example in the following terms?

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

[D] Right to travel abroad and return to one's country. This right has been spelt out by our Supreme Court in its decisions in *Satwant Singh*^{20[20]} and *Maneka Gandhi*^{21[21]} on

^{19[19]} Supra note 10.

^{20[20]} Supra note 12

^{21[21]} Ibid

its interpretation of article 21 of the Constitution. This right finds a place in the Universal Declaration of Human Rights [UDHR] Article 13(2) as well as in the ICCPR [Article 12 (2), (3) & (4)]. See **Annexure IV** for these provisions.

Fundamental right guaranteed under article 21 is guaranteed to every person, viz. citizen and non-citizen alike.

QUESTION: Whether right to travel abroad and return to one's country be specifically incorporated as a fundamental right subject to restrictions for example in the following terms?

- 21A (1) Every person has the right to leave and return to one's country.
- (2) Nothing in clause (a) shall prevent the State from making any law imposing reasonable restrictions in the interest of the sovereignty and integrity of India, security of India and friendly relations of India with any foreign country.

[E] **Remedy for violation of article 21.** The Supreme Court of India has, in the case of Nilabati Behera²²[22] and in D.K. Basu²³[23] ruled that a person whose fundamental right under article 21 has been violated has a right to monetary compensation as a remedy in public law.

It may be mentioned that Article 9(5) of the ICCPR provides that "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". India entered a reservation to article 9(5) when it ratified the ICCPR. The Supreme Court in D.K. Basu has observed that after its pronouncement in Nilabati Behera the reservation has no effect.

It is proposed that an enforceable right to compensation for violation of article 21 be specifically incorporated in Part III of the Constitution, as for example in the following terms:

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

QUESTION: Whether an enforceable right to compensation should be provided for example in the following terms?

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

²²[22] *Nilabati Behera*, Supra note 13

²³[23] *D.K. Basu*, Supra note 13

[F] **Privacy** is recognized as one of the most invaluable human rights. The right to privacy has been described as “the right to be let alone”. The object of privacy is to protect one’s “inviolable personality”. It is said that an intrusion on privacy threatens that liberty just as assault, battery or imprisonment. It is an offence to personal dignity. Privacy finds a place in the ICCPR. [For text of the provisions regarding Privacy in the ICCPR See **Annexure V**].

Right to privacy like any other fundamental rights cannot be absolute and should be subject to reasonable restrictions.

QUESTION: Whether the Right to Privacy may be specifically included as a fundamental right and subject to reasonable restrictions for example in the following terms?

- (1) Every person has the right to respect for his private and family life, his home and his correspondence.
- (2) Nothing in clause (1) shall prevent the State from making any law imposing reasonable restrictions on the exercise of the right conferred by clause (1), in the interest of national security, public safety or for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

[G] **Right to free Education.** The importance of education cannot be overemphasized. "Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is a primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities".²⁴[24]

Article 45 of our Constitution in the Chapter on Directive Principles requires the State to “endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years”. This provision has not been implemented.

Our Supreme Court in its decision in *Unnikrishnan*²⁵[25] has deduced it as a fundamental right.

The right to education has been accorded the status of a fundamental right by Article 29 in the South African Constitution [For text see **Annexure VI**].

²⁴[24] General Comment No.13 of the Committee on Economic, Social and Cultural Rights.

²⁵[25] Supra note 15.

QUESTION: Whether the right to free education may be specifically included in the Constitution for example in the following terms?

(a) Every child shall have the Right to Free Elementary Education from the age of five years until he completes the age of fourteen years; (b) Every person shall have the right to education beyond the age of 14 years within the limits of the State's economic capacity and development.

[H] **Right to clean and healthy environment.** The expression "life" in article 21 has been interpreted by the Supreme Court as the right to live in a clean and hygienic environment.^{26[26]} Clean and healthy environment has a direct impact on the lives and well being of our people. The South African Constitution has included this right in its Bill of Rights by article 24. [See **Annexure VII** for this provision].

QUESTION: Whether the right to clean and healthy environment may be specifically incorporated in the Chapter of Fundamental Rights for example in the following terms?

Every person has the right

- (a) to an environment that is not harmful to his health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generation, through reasonable legislative and other measures that -
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

[I] **Right to have access to courts.** Right to access to Courts is a human right. The right to 'access to courts' entails the right to disposal of a case within a reasonable time. Excessive delay in disposal of cases leads to denial of this basic human right, erodes the credibility of the justice delivery system and leads to the emergence of extra legal system of administration of justice frequently dominated by the mafia. Access to courts will be meaningful only if there is reasonably quick 'access to justice'.

Article 34 of the Bill of Rights in the South African Constitution provides rights to access to courts. [For text see **Annexure VIII**].

QUESTION: Whether the right to have access to courts may be incorporated as a fundamental right for example in the following terms?

The right of access to courts shall be deemed to include the right to a reasonably speedy and expeditious disposal of all cases before all courts, tribunals or other fora and the State shall take all reasonable steps to achieve the above objective.

^{26[26]} Supra note 16

[J] Legal aid is also essential for effective enforcement of the fundamental rights of the needy and the indigent. article 39A in the Directive Principles of our Constitution reads as follows:

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

By a liberal interpretation of article 21, the Supreme Court in the case of *Madhav Hoskot*²⁷[27] held that free legal services to the poor and needy is an essential element of any “reasonable, fair and just” procedure and ruled: “(1) Where the prisoner is disabled from engaging a lawyer, on reasonable grounds such as indigence or incommunicado situation, the court shall, if the circumstances of the case, the gravity of the sentence, and the ends of justice so require, assign competent counsel for the prisoner’s defence, provided the party does not object to that lawyer; (2) The State which prosecuted the prisoner and set in motion the process which deprived him of his liberty shall pay to assigned counsel such sum as the court may equitably fix”.²⁸[28]

QUESTION: Whether article 39A of the Directive Principles, which deals with equal justice and free legal aid may be suitably incorporated in Part III of the Constitution?

IV. PREVENTIVE DETENTION

29. **Preventive detention** finds a place in article 22 of the Constitution. Preventive detention, that is detention without trial, is a negation of the Rule of Law and the principle of fair trial. A person is deprived of his or her liberty and incarcerated on the basis of suspicion. It is an anathema to some minds. Some regard it as a necessary evil in certain situations where it is not possible to secure evidence of witnesses who are unwilling to testify because of threat to their lives and their family members. Experience shows that preventive detention has been frequently misused. It also provides a pretext for the law enforcement agencies not to carry out thorough investigations under the existing law and to conveniently resort to laws

²⁷[27] Supra note 18

²⁸[28] Ibid at 1557

providing for preventive detention. It is also felt that there should be a reasonable ceiling on the maximum period of detention which at present in certain circumstances can extend to two years.

30. Under article 22(4) of the Constitution, the Advisory Board to review detention can consist of persons who are or have been, or are qualified to be Judges of a High Court. It is a matter for consideration whether the Advisory Board should compose only of sitting and not retired High Court judges.

QUESTION: 1 (a) Whether preventive detention should be abolished or (b) whether recourse to preventive detention should be had only when there is a declaration of emergency under article 352 of the Constitution or (c) there is internal disturbance in the country?

QUESTION: 2 If ultimately it is decided to retain preventive detention whether (a) maximum period of detention should not exceed six months and (b) the Advisory Board to review cases of preventive detention should be composed entirely of sitting High Court judges?

V. RIGHT TO PROPERTY

31. **Right to property** was a guaranteed fundamental right under article 19(1)(f) and article 31 of the Constitution. Despite constitutional amendments aimed at preventing judicial interventions with regard to compensation for acquisition of property, legislations were struck down on the ground of violation of article 31(2) because of inadequacy of compensation. By Constitution (Forty-fourth Amendment) Act, 1998 article 19(1)(f) and article 31 were deleted from the Chapter on Fundamental Rights.

Article 300A was enacted in these terms:

“300A. Persons not to be deprived of property save by authority of law – No person shall be deprived of his property save by authority of law”.

32. Article 300A merely embodies the principle that there should be a law for deprivation of property. There is no requirement of public purpose or payment of any sum for acquisition of property.

33. It is a matter for consideration whether article 300A may be amended making the existence of public purpose a requirement for acquisition and also providing for payment of a sum which is not illusory. In the light of previous experience it is felt that an express provision be enacted excluding judicial intervention regarding the quantum of payment, except where it is illusory.

34. Article 12 of the ILO Convention No.107 to which India is a signatory provides that the tribal populations shall not be removed from their habitual territories without their free consent except in accordance with the national laws and regulations for reasons relating to national security or in the interest of national economic development or of the health of the said populations. The Convention also provides that in case where the removal of tribal populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands they previously occupied.

35. It is for consideration that it may be further provided that in a case where the deprivation of property takes place because of acquisition of agricultural and homestead lands, the persons so deprived of their lands where they belong to weaker sections shall be provided with lands of quality at least equal to the lands they previously occupied or otherwise adequately rehabilitated.

QUESTION: Whether article 300A may be amended by adding at the end for example the following words?

Deprivation or acquisition of property shall be only for a public purpose and upon payment of a sum which is not illusory. No deprivation or acquisition of property shall be invalidated on the ground that the sum awarded is inadequate unless the same is patently illusory :

Provided further that no deprivation or acquisition of agricultural and homestead land belonging to weaker sections shall be done without providing the persons so deprived, lands of quality at least equal to the lands such persons previously occupied or otherwise adequately rehabilitated.

VI. RIGHTS OF CHILDREN

36. There is no specific article in Part III of our Constitution dealing with rights of children. The UN Convention on the Rights of the Child 1989 has been ratified by India. The Convention consists mainly of four types of rights: (i) the participation of children in decisions affecting their own destiny; (ii) the protection of children against discrimination and all forms of neglect and exploitation; (iii) the prevention of harm to children; and (iv) the provision of assistance for their basic needs.

QUESTION: Whether children's right falling under the heads of non-discrimination, best interests of child, right to life, survival and development and the needs of the child may be specifically incorporated in the Constitution, preferably as article 23A?

VII. ARTICLE 31B AND THE NINTH SCHEDULE

37. **Article 31B and the Ninth Schedule** were introduced by the Constitution (First Amendment) Act in 1951 with a view to immunise laws dealing with agrarian or land reforms from challenge on the ground of violation of fundamental rights. The occasion for the First Amendment was the invalidation of laws dealing with abolition of *zamindari* and land reforms by the Patna and Allahabad High Courts. In the beginning only 13 Acts and Regulations were included in the Ninth Schedule. Thereafter the list of laws has grown enormously. Experience has shown that laws which are not in any manner connected with land reforms or agrarian reforms have been included in the Ninth Schedule in order to avoid judicial scrutiny of their constitutionality on the ground of violation of fundamental rights. For example, (i) The Industries (Development and Regulation) Act, 1951; (ii) The Monopolies and Restrictive Trade Practices Act, 1969; and (iii) The Foreign Exchange Regulation Act, 1973. This is contrary to the purpose and object of article 31B.

QUESTION: Whether article 31B be suitably amended to provide that the laws in the Ninth Schedule which enjoy immunity from challenge on the ground of violation of fundamental rights will be those laws which in pith and substance relate to agrarian or land reforms or laws relating to social security, quantum of reservation and laws which give effect to the Directive Principles of State Policy in articles 39(b) and 39(c)? [For text of articles 39(b) and 39(c) see **Annexure IX**].

VIII. CAPITAL PUNISHMENT

38. Supreme Court has upheld the constitutionality of capital punishment in *Bachan Singh*²⁹[29]. There is a growing body of national and international opinion against capital punishment. The Second Optional Protocol to the International Covenant on Civil and Political Rights 1966 aiming at the abolition of the Death Penalty was adopted by the General Assembly in 1989 [A/RES/44/128] and entered into force on 11th July 1991. [For relevant parts of the Second Optional Protocol of ICCPR see Annexure X].

39. The Supreme Court has ruled that death penalty should be imposed in the rarest of rare cases³⁰[30]. An element of subjectivity is inevitable in that determination. How does one determine which case is “rare” – leave alone “rarest of the rare”? In practice, it is the judge’s perception which ultimately tilts the balance for or against imposition of such a sentence.

QUESTION: (a) Should capital punishment be abolished? (b) If it is to be retained should its retention be confined to certain grave offences like waging war against the government [Section 121 of the IPC], sedition [124A of the IPC] or terrorist acts?

IX. ARTICLE 359 AND 359-1A OF THE CONSTITUTION

40. The Supreme Court in the case of *A.D.M. Jabalpur*³¹[31] ruled that the consequence of a Presidential Order passed under article 359 whilst a proclamation of emergency is in operation was that all fundamental rights stood suspended during emergency.

29[29] *Bachan Singh v. State of Punjab*, 1980 (2) SCC 684

30[30] *Machhi Singh & Ors. v. State of Punjab*, 1983 (3) SCC 470 at 489

31[31] *A.D.M. Jabalpur v. Shukla*, AIR 1976 SC 1207

41. Thereafter the Constitution was amended by Constitution (Forty-Fourth) Amendment Act and it was provided by article 359-1A that articles 20 and 21 cannot be suspended when a proclamation of emergency is in operation.

42. Under Article 4(2) of the International Covenant on Civil and Political Rights 1966 [ICCPR] no derogation is permissible even during an emergency which threatens the life of the nation in respect of certain human rights specified therein. [See **Annexure XI** for the text of Article 4]. It is apparent that under ICCPR more fundamental rights/human rights have been made non-suspendable/non-derogable.

43. Under Article 2 (2) of ICCPR "each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant".

44. Apart from and independently of the ICCPR it is a matter for consideration whether Article 17 of the Constitution which abolishes untouchability and forbids its practice and Article 24 of the Constitution which prohibits employment of children under the age of 14 years in any factory or mine or other hazardous employment be made non-suspendable by amendment of Article 359.

QUESTION: 1 Whether article 17 and article 24 of the Constitution be made non-suspendable during the operation of a proclamation of emergency?

45. It is a matter for consideration whether Article 359-1A may be amended so as to bring it in conformity with the requirements of ICCPR?

QUESTION: 2 Should Article 359-1A be amended to provide that Articles 23 and 25 of the Constitution cannot be suspended by a Presidential Order passed under Article 359 whilst a proclamation of emergency is in operation?

QUESTIONNAIRE
ON
ENLARGEMENT OF FUNDAMENTAL RIGHTS

I ARTICLE 12 OF THE CONSTITUTION

No. 1 Should the definition of “the State” in article 12 be expanded to include (a) statutory corporations, other bodies and institutions in which there is substantial State financial assistance or predominant State control and involvement;

YES NO

(b) Non-State entities, bodies and institutions which perform quasi-governmental or public functions which have repercussions on the life and welfare of the community?

YES NO

No. 2 Should it be provided in the Constitution that a judicial order which is without jurisdiction and null and void can be violative of the fundamental right guaranteed by article 21?

YES NO

II ARTICLE 14 – EQUALITY BEFORE LAW

No. 3 Whether article 14(2) be added after article 14(1) in the following terms?

Article 14(2): Equality includes the full and equal enjoyment of all rights and freedoms. Nothing in article 14 shall prevent the State from making any provision or adopting any measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, for the purpose of achievement of equality”.

YES NO

No. 4 Whether the prohibited heads of discrimination be extended and the following heads may be added?

Ethnic or social origin; colour; age; language; political or other opinion; property; birth.

YES

NO

No. 5 Whether to give the guarantee against non-discrimination a wide operation the following clause may be added?

Discrimination shall include any distinction, exclusion, restriction or preference based on race, religion, caste, sex or place of birth, ethnic or social origin, colour, age, language, political or other opinion, property, birth, which has the purpose or effect of nullifying or impairing the enjoyment or exercise on an equal footing of rights, benefits and entitlements in the political, economic, social, cultural or any other field of public life.

YES

NO

III INCLUSION OF JUDICIALLY DEDUCED FUNDAMENTAL RIGHTS IN PART III OF THE CONSTITUTION

[A&B] Freedom of the Press & Freedom of Information

No. 6 Whether Freedom of the Press and Freedom of Information may be specifically incorporated in Part III of our Constitution for example in the following terms?

Article 19(1): All citizens shall have the right:
(a) to freedom of speech and expression which shall include the freedom of the press and other media, the freedom to hold opinion and to seek, receive and impart information and ideas regardless of frontiers.

YES

NO

No. 7 In light of the suggested expansion of article 19(1)(a) whether another head of restriction may be added, namely, preventing the disclosure of information received in confidence?

YES

NO

[C] Torture and inhuman, degrading and cruel treatment or punishment

No. 8 Whether a specific article may be incorporated in Part III of the Constitution for example in the following terms?

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

YES

NO

[D] **Right to travel abroad and return to one's country.**

No. 9 Whether right to travel abroad and return to one's country be specifically incorporated as a fundamental right subject to restrictions for example in the following terms?

- (a) Every person has the right to leave and return to one's country.
- (b) Nothing in clause (a) shall prevent the State from making any law imposing reasonable restrictions in the interest of the sovereignty and integrity of India, security of India and friendly relations of India with any foreign country.

YES

NO

[E] **Remedy for violation of article 21**

No. 10 Whether an enforceable right to compensation should be provided for example in the following terms?

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

YES

NO

[F] **Privacy**

No. 11 Whether the Right to Privacy may be specifically included as a fundamental right and subject to reasonable restrictions for example in the following terms?

- (1) Every person has the right to respect for his private and family life, his home and his correspondence.
- (2) Nothing in clause (1) shall prevent the State from making any law imposing reasonable restrictions on the exercise of the right conferred by clause (1), in the interest of national security, public safety or for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

YES

NO

[G] Right to free Education.

No. 12 Whether the right to free education may be specifically included in the Constitution for example in the following terms?

(a) Every child shall have the Right to Free Elementary Education from the age of five years until he completes the age of fourteen years; (b) Every person shall have the right to education beyond the age of 14 years within the limits of the State's economic capacity and development.

YES

NO

[H] Right to clean and healthy environment.

No. 13 Whether the right to clean and healthy environment may be specifically incorporated in the Chapter of Fundamental Rights for example in the following terms?

Every person has the right
(a) to an environment that is not harmful to his health or well-being;
and
(b) to have the environment protected, for the benefit of present and future generation, through reasonable legislative and other measures that -
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

YES

NO

[I] Right to have access to courts.

No. 14 Whether the right to have access to courts may be incorporated as a fundamental right for example in the following terms?

The right of access to courts shall be deemed to include the right to a reasonably speedy and expeditious disposal of all cases before all courts, tribunals or other fora and the State shall take all reasonable steps to achieve the above objective.

YES

NO

[J] **Legal aid.**

No. 15 Whether article 39A of the Directive Principles, which deals with equal justice and free legal aid may be suitably incorporated in Part III of the Constitution?

YES

NO

IV PREVENTIVE DETENTION

No. 16 (a) Whether preventive detention should be abolished or (b) whether recourse to preventive detention should be had only when there is a declaration of emergency under article 352 of the Constitution or (c) there is internal disturbance in the country?

YES

NO

Suggestions

No. 17 If ultimately it is decided to retain preventive detention whether (a) maximum period of detention should not exceed six months and (b) the Advisory Board to review cases of preventive detention should be composed entirely of sitting High Court judges?

YES

NO

V RIGHT TO PROPERTY

No. 18 Whether article 300A may be amended by adding at the end for example the following words?

Deprivation or acquisition of property shall be only for a public purpose and upon payment of a sum which is not illusory. No deprivation or acquisition of property shall be invalidated on the ground that the sum awarded is inadequate unless the same is patently illusory.

Provided further that no deprivation or acquisition of agricultural and homestead land belonging to weaker sections shall be done without providing the persons so deprived, lands of quality at least equal to the lands such persons previously occupied or otherwise adequately rehabilitated.

YES

NO

VI RIGHTS OF CHILDREN

No. 19 Whether children's right falling under the heads of non-discrimination, best interests of child, right to life, survival and development and the needs of the child may be specifically incorporated in the Constitution, preferably as article 23A?

YES

NO

VII ARTICLE 31B AND THE NINTH SCHEDULE

No. 20 Whether article 31B be suitably amended to provide that the laws in the Ninth Schedule which enjoy immunity from challenge on the ground of violation of fundamental rights will be those laws which in the pith and substance relate to agrarian or land reforms or laws relating to social security, quantum of reservation and laws which give effect to the Directive Principles of State Policy in articles 39(b) and 39(c)? [For text of articles 39(b) and 39(c) see **Annexure IX**].

YES

NO

VIII CAPITAL PUNISHMENT

No. 21 (a) Should capital punishment be abolished? (b) If it is to be retained should its retention be confined to certain grave offences like waging war against the government [Section 121 of the IPC], sedition [124A of the IPC] or terrorist acts?

YES

NO

IX ARTICLE 359 OF THE CONSTITUTION

No. 22 Should article 359-1A be amended to provide that articles 23 and 25 of the Constitution cannot be suspended by a Presidential Order passed under article 359 whilst a proclamation of emergency is in operation?

YES

NO

No. 23 Whether article 17 and article 24 of the Constitution be made non-suspendable during the operation of a proclamation of emergency?

YES

NO

U. K. Human Rights Act, 1998

Section 6: - Acts of Public Authorities

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

- (2) Sub-Section (1) does not apply to an act if -
 - (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
 - (b) in the case of one or more provisions of, or made under primary legislation which cannot be read or given effect in a way which is compatible with the convention rights, the authority was acting so as to give effect to or enforce those provisions.

- (3) In this section 'public authority' includes -
 - (a) a court or tribunal, and
 - (b) any person certain of whose functions are functions of a public nature.

But does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

- (4) In sub-section (3) 'Parliament' does not include the House of Lords in its judicial capacity.

- (5) In relation to a particular act, a person is not a public authority by virtue only of sub-section (3)(b) if the nature of the act is private.

- (6) 'An act' includes a failure to act but does not include a failure to -

- (a) introduce in, or lay before, Parliament a proposal for legislation; or
- (b) make any primary legislation or remedial.

The Constitution of the Republic of South Africa 1996

Article 8 (1): Application

The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of State.

ANNEXURE – II

The Constitution of the Republic of South Africa 1996

Article 9 (3): The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.

International Covenant on Civil and Political Rights 1966

Article 26: all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ANNEXURE – III

Universal Declaration of Human Rights of December 10, 1948

Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

International Covenant on Civil and Political Rights 1966

Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

ANNEXURE – IV

Universal Declaration of Human Rights of December 10, 1948

Article 13 (2): Everyone has the right to leave any country, including his own, and to return to his country.

International Covenant on Civil and Political Rights 1966

Article 12 (2): Everyone shall be free to leave any country, including his own.

Article 12 (3): The above mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (order public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

Article 12 (4): No one shall be arbitrarily deprived of the right to enter his own country.

ANNEXURE – V

International Covenant on Civil and Political Rights 1966

Article 17 (1): No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.

ANNEXURE – VI

The Constitution of the Republic of South Africa 1996

Article 29:

- (1) Everyone has a right -
 - (a) to a basic education, including adult basic education; and
 - (b) to further education, which the State, through reasonable measures, must make progressively available and accessible.
- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the State must consider all reasonable educational alternatives, including single medium institutions, taking into account -
 - (a) equity;
 - (b) practicability; and
 - (c) the need to redress the results of past socially discriminatory laws and practices.

ANNEXURE – VII

The Constitution of the Republic of South Africa 1996

Article 24: Everyone has the right –

- (a) to an environment that is not harmful to their health or well being; and
- (b) to have the environment protected, for the benefit of present and future generation, through reasonable legislative and other measures that –
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of national resources while promoting justifiable economic and social development.

ANNEXURE – VIII

The Constitution of the Republic of South Africa 1996

Article 34: Access to Courts and Tribunals and Speedy Justice: –

- (1) Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or tribunal or forum or where appropriate, another independent and impartial court, tribunal or forum.
- (2) The right to access to courts shall be deemed to include right to reasonably speedy and effective justice in all matters before the courts, tribunals or other forum and the States shall take all reasonable steps to achieve the above object.

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ANNEXURE – IX

The Constitution of India

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Article 39: Certain principles of policy to be followed by the State – The State shall, in particular, direct its policy towards securing –

- (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
- (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

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ANNEXURE – X

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Second Optional Protocol to the International Covenant on Civil and Political Rights 1966 - [Relevant extracts]

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Article (1) :

- (1) No one within the jurisdiction of a State Party to the present Protocol shall be executed.
- (2) Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Article (2):

- (1) No reservation is admissible to the present Protocol except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in times of war pursuant to a conviction for a most serious crime of a military nature committed during war time.

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ANNEXURE – XI

International Covenant on Civil and Political Rights 1966

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Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

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Note:

Article 6 is with regard to Right to life. Article 7 is with reference to torture, or cruel, inhuman or degrading punishment. Article 8 deals with prohibition against slavery. Article 11 proscribes imprisonment merely on the ground of inability to fulfil a contractual obligation. Article 15 prohibits retrospective operation of criminal laws. Article 16 provides that everyone shall have the right to recognition everywhere as a person before the law. Article 18 guarantees the right to freedom of thought, conscience and religion.
