NOTES OF MEMBERS

CONTENTS

1. Note of Justice Shri B.P. Jeevan Reddy

2. Note of Dr. Subhash C. Kashyap

3. Note of Shri C.R. Irani

4. Note of Smt. Sumitra G. Kulkarni

Dissenting Note by Justice B.P. Jeevan Reddy, Member,

National Commission to Review the Working of the Constitution

1. Superior Judiciary

A Consultation Paper was prepared and circulated by the Commission. The Consultation Paper dealt with the appointment and removal of the Judges of the High Courts and the Supreme Court and the transfer of the Judges of the High Court.

The paper was considered by the Commission on 18-12-2001 when I was not present on account of my absence from India and certain decisions were taken regarding the procedure for appointment. After I returned, and at the instance of the members, including myself, a special session (15th meeting of the Commission) was convened from 5th to 8th January, 2002, to consider this issue and two other controversial issues. So far as the procedure for appointment of Judges to the High Courts and the Supreme Court was concerned, there was a sharp division of opinion at the special session/meeting. The first question put to vote was whether there should be any change in the existing procedure. By a majority of six to four, it was decided that no change is called for in the existing procedure. In this view of the matter, the necessity of constituting a National Judicial Commission for the said purpose and/or its composition did not come up for consideration. It may be remembered that this session/meeting was attended by all the members and the Chairman of the Commission. One should have thought that this decision was final. But when the draft Report prepared by the Editorial Committee was being finalized, the said issue was re-opened again, even though all the members were not present. There appears to have been a change in the opinion of some members meanwhile on this subject. With some members absent, the Commission now decided in its Sixteenth meeting held from 25th

February, 2002 to 1st March, 2002, that a National Judicial Commission should be constituted with a particular composition. In my opinion, there was no occasion or justification for re-opening an issue which was considered and decided upon at a special session/meeting of the Commission convened specially to consider this issue along with two other controversial issues. In view of the change of opinion by some members and absence of some other members, I did not call for a division and voting, yet, my view is that the very re-opening of the said issue was not called for and not justified in the circumstances aforestated. In my view, the existing procedure relating to the appointment of Judges to the High Courts and the Supreme Court should be allowed to work for some more years – it is hardly nine years since it is in vogue before one can consider a change. There is no material before the Commission warranting a change in the existing procedure.

2. Liability of the State in Torts

An elaborate Consultation Paper was prepared and circulated by the Commission on this subject and in the light of the responses received, a draft report was also prepared for consideration of the Commission. However, when the draft report came up for consideration of the Commission during its Fifteenth meeting held from 5th to 8th January, 2002, the very subject was dropped on the ground that the draft report (and the Consultation Paper) did not suggest any amendments to the Constitution and it merely recommended enactment of a law; it was observed

by some members that this issue need not be considered by the Commission and that it is a more appropriate subject for, may be, the Law Commission of India to consider.

In my view, the ground upon which the said subject was dropped was not tenable or justified. The recommendations being made by the Commission do not all pertain to the amendment of the Constitution; in deed, a large majority of them pertain to amendment of laws or enactment of new laws. If so, dropping of this subject on the aforesaid ground is inconsistent with the principle underlying the majority of its recommendations. Secondly, as pointed in the Consultation Paper and the draft Report, the law on the subject, evolved by the decisions of the Courts, is wholly unsatisfactory and is putting the rights of the citizens in serious jeopardy. Though Article 300 of the Constitution contemplates a law being made on the subject clarifying the position and, notwithstanding the repeated observations of the Supreme Court and the High Courts, neither the Parliament nor the State Legislatures have deemed it fit to enact a law. In my opinion, there could be no principled opposition to making a recommendation by the Commission for enactment of a law clarifying the State's liability in the matter of torts committed by its officers and the exemptions to that rule (including the defence of 'exercise of sovereign powers'). Such a recommendation would have been salutary and would have advanced the public interest.

[*Justice* B.P. JEEVAN REDDY]

Member, N.C.R.W.C.

Dated: 21 March, 2002.

ADDITIONAL NOTE

to the Report of the

National Commission to Review the Working of the Constitution.

By C R Irani

I request that this Note be read in conjunction with my signature to the Report of the Commission.

1) Some aspects of the question of restricting eligibility to high public offices on the part of foreign-born nationals require to be elaborated in order to avoid misunderstandings. I would like to clarify that on the occasions on which this matter was discussed in my presence, I could not shake off the impression that we, in the Commission, feared that any endorsement of the view canvassed by our colleague, Purno Sangma, although on merits, would be interpreted as being directed against one individual. I had urged that it should be possible to de-link the question from individuals and it would be wrong to proceed that this would not be possible. Our decisions ought not to be influenced by possible or even probable reactions. It is also true that the division on the issue was at the instance of my friend Sangma and this was the only occasion that I can recall when an issue was so decided. As we have recorded faithfully in the Report the

issue is important, in these days of multiple citizenship and we do not need to wait for a Fujimori case to arise before deciding that the safeguards in the American Constitution deserve a fuller and more public debate.

2) I am seriously concerned at the abuse of the provisions of law relating to criminal defamation by politicians and others. I wish to offer some illustrations from my personal experience in the last few months and years:

a) In January 2000, the RSS unit in Delhi send us a letter complaining of an article by AG Noorani, a respected commentator, on the RSS organisation, published that month. The letter is promptly published in full and without comment. On 14 March 2000, a criminal complaint is filed before a Magistrate in Midnapore District of West Bengal. Then follow 11 hearings and the matter is still pending in March 2002. On the same facts another functionary of the RSS in Delhi, files a criminal complaint in the Tees Hazari Courts in Delhi on 29 February 2000. Some of the defendants are not given exemption from personal appearance and the issue goes to Delhi High Court, where the judge rejects the terms suggested by the RSS for settlement and finally disposes of the entire matter by a consent order on terms acceptable to us on 25 February 2002. It had taken 19 hearings.

However the Midnapore Magistrate is still considering the terms endorsed by the Delhi High Court.

b) Jyoti Basu the West Bengal chief minister, at a time when he had resigned and had been asked to continue in office, sought and was

denied sanction to file a prosecution by the Governor and later by the State Cabinet but nevertheless ordered his own departmental secretary to issue the sanction letter. It included three statements, which were false to the knowledge of the signatory, i.e. – that the papers were sent to the Governor, that he did apply his mind to it and that he did sanction the prosecution. The official is now the State's new Chief Secretary. The words complained of were in an Editorial *Unending Violence* –and read as follows:-

> Just as in 1981 Basu justified the burning alive of 18 Ananda Margis in Bijan Setu which assured that the police did not proceed, now he and his party are defending the killing of Trinamul supporters for being anti-socials.

The judgment of the Hon. Mr Justice Kundu of the City Sessions Court, held that the sanction was invalid; the whole editorial should have been read and not a single sentence out of context; and that in any event there was no defamation of Jyoti Basu on a plain reading of the words complained of. Further, the judge held that by referring to the five cases filed in the Anada Marg case, all of which resulted in acquittal on the admission that witnesses were either not available or had turned hostile, the Public Prosecutor had not advanced his case. The summons had been issued on 7th November 2000 and judgment delivered on 18 May 2001. It was decided on our Application that there was no case to answer, otherwise it would have been prolonged further. Jyoti Basu suffered no inconvenience and the case was conducted at the expense of the state.

c) Prafulla Kumar Mahanta, when he was chief minister of Assam, similarly abused the provisions of the Criminal Procedure Code to get the Government of Assam to launch a criminal prosecution for an editorial, which criticised him in the discharge of his official duties. As in the case of Jyoti Basu, the sanction was purportedly granted by the Governor of Assam; when, it was stated, the papers were placed before him but His Excellency the Governor has confirmed to me later that he knew nothing about it! The case was filed in October, 1997, in the court of the Sessions Judge, Guwahati, several witnesses were examined; the High Court did not entertain an Application on several pretexts and finally the new Government of Tarun Gogoi directed the Public Prosecutor that *the complainant* (the state of Assam) *was not interested to proceed with the case any further – in the changed circumstances.* It was withdrawn in November 2001 that is after four years and considerable expense and inconvenience. Let it be noticed that the proceedings were withdrawn in *the changed circumstances,* confirming that the prosecution was mala fide and motivated but Mahanta has suffered no inconvenience.

d) Sahara India Ltd were investigated by the Reserve Bank of India and several restrictions were imposed on them in the matter of collecting deposits from the public. We published two reports, based entirely on the Press Note issued by the RBI and confirmed by the Income-Tax authorities. We made no value judgments. In June 1997, Sahara India filed a criminal defamation case in the Alipore Court in Kolkata. The trial began, witnesses including myself were examined; after several hearings and arguments, the magistrate acquitted all the accused holding that no offence was committed. This was in 2002, after five years.

e) Sanchayani Savings and Investments (India) Ltd. file a criminal complaint of defamation in the Court of a Magistrate in Nagpur for publishing a report on the Reserve Bank of India's action taken to stop violation of the Bank's guidelines. Magistrate takes cognisance despite the fact that both complainant and The Statesman are based in Calcutta and issues summons. The case commences in June 1999 and is pending in the High Court for quashing.

I emphasise that these are illustrative examples and not by any means exhaustive. They demonstrate how the provisions of the Criminal Procedure Code are being misused and which has a chilling effect on the freedom of speech and expression. The specific inclusion of Freedom of the Press in the Fundamental Rights, recommended by the Commission, is small consolation if it is not matched with removal of criminal defamation from the statue book. Failing that or, I would like to hope, pending that, immediate action should be taken to require anyone complaining of defamation to enter the witness box first to prove that he or she has a reputation capable of being defamed. It follows that provisions of the Criminal Procedure Code allowing public servants or those who *have been* public servants to shelter behind state governments to harass those in the press who are doing their duty should be deleted. These provisions are – Section 199 (2), (3), (4) and (5) and consequential provisions.

3) It is now my unpleasant duty to refer to something that has happened for which I have no explanation. When we were working on the Chapter on Fundamental Rights we were very clear that our objective was to leave existing Rights inviolate and indeed to see whether we could enlarge and strengthen them. When we

received the draft of the final Report however we found the following paragraph numbered 3.22.2. It read:-

> *In regard to Articles 29 and 30, the Commission recommends that the cultural and educational rights available under the Articles should be available equally to all groups in society so that there is no discrimination between communities or social groups in the matter of establishment and maintenance of educational institutions, etc.*

Article 29 already extends to *any section of citizens….* So it is not clear what was intended but the effect of this on Article 30 would be to extinguish at one stroke the rights of minorities to establish and administer educational institutions of their choice. My colleague, Soli Sorabjee, who was abroad at the time appears to have spotted this at the same time as I did. I emphasise that as soon as the draft final Report came up before a meeting of the Commission, all members present promptly agreed to delete this paragraph but the fact remains that it appeared in bold type and was reflected in the Summary of Recommendations. Apart from the seriousness of this incident, I have two other comments to make. One, the abbreviation appears in the Summary of Recommendations also - whoever was responsible did not even stop to think that – etc – is wholly inappropriate in any statute let alone in the Constitution of the country! The other is to enter a caveat. We have not had the opportunity to examine the whole of the revised final draft thoroughly because of time constraints. While this is understandable in the circumstances I must state that I cannot be sure that another incident of this nature has not disfigured our work in some other part. I attribute no motives and accuse no one. I merely draw attention to something that is not, to my mind explained as a typographical error or a misunderstanding.

Subject to the foregoing Note, I have pleasure in signing this Report.

C.R. Irani

March 21, 2002

Note by Dr. Subhash C. Kashyap, Member of the Commission and Chairman of its Drafting and Editorial Committee.

1. It is with extreme reluctance and a deep sense of sadness that I am constrained to pen this note to qualify the report of the Commission of which in the words of the Chairman I was "the principal author" as the Chairman of the Drafting and Editorial Committee.

2. My sadness at the results becomes more poignant because for nearly ten years, I had personally crusaded for a review of the working of the Constitution and appointment of a Commission for the purpose. Five books, a host of articles in national dailies and several seminars and conferences all over the country suggesting, *inter alia,* setting up of such a body

preceded the appointment of the Commission. Finally, in pursuance of the national agenda for good governance, the NCRWC was appointed by the President in February 2000.

3. The Commission was entrusted with a historic task of great responsibility. It was expected to act independently and objectively, without fear or favour and with a sense of serving the best interests of the country and thereby helping the Government and the Parliament of India to consider desirable reforms in the working of the Constitution within the parameters of the parliamentary system and the basic structure of the Constitution. I had the pleasure of defending the appointment and work of the Commission at dozens of seminars and conferences in different parts of India during the last two years (without any cost to the Commission).

4. The positive outcome of the whole exercise is that it has been possible to see through the Commission a number of very significant suggestions and to arrive at unanimity in several matters. The most important recommendations made by the Commission are those concerning electoral processes and political parties, Union-State Relations, Decentralization and Devolution and parliamentary reforms. The entire Commission is in full agreement on matters like (1) the election of the Leader of the House by the Lok Sabha/State Assembly and appointment of such leader as P.M./C.M., (2) constructive vote of no-confidence, (3) freedom of the press and other media and freedom of information as fundamental rights, (4) truth in public interest as good defence in contempt of court cases, (5) ridding the election process of evils like booth capturing, bogus voting, criminalisation and spreading caste and communal hatred, (6) maintenance and audit of election and political party accounts and declaration of assets and liabilities by candidates for election and those holding public office, (7) limiting by law the size of Councils of Ministers, (8) disqualifying all defectors – individual or group – and (9) rotation of reserved seats.

5. The Commission also recommends (1) examination of the issue of prescribing a minimum of 50% plus vote for winning an election, (2) discouraging independent candidates, (3) regulating by law the registration, recognition and functioning of parties, (4) codification of parliamentary privileges, (5) discontinuation of MP LAD Scheme, and (6) measures for combating corruption and confiscation of ill-gotten property.

6. The following comments and reservations in regard to some of the chapters may be noted :-

(i) It was decided by the Commission that each chapter of the Report would not exceed 15 to 20 pages and that unnecessary quotations particularly from foreigners would be avoided. It was, however, left to the Chairperson himself to prepare and finalise the Introductory chapter on the 'The Basic Approach and Perspective".

(ii) In regard to Chapter 3 titled 'Fundamental Rights, Directive Principles and Fundamental Duties', I would like to iterate some of the unanimous decisions of the Drafting and Editorial Committee (DEC) which were as follows:

(a) "It may be neither necessary nor proper to include in the text of our Constitution all the provisions of international conventions etc., for, where acceptable, many of these can be adopted by ordinary legislation. Also, enlargement of fundamental rights through judicial verdicts does not

always call for constitutional amendments, for judicial interpretations and verdicts are amenable to review by courts themselves."

(b) "The Commission noted that the ultimate aim of affirmative action of reservation should be to raise the levels of capabilities of people of the disadvantaged sections and to bring them at par with the other sections of society. Reservations should not separate certain sections from others and should not become a permanent feature of Indian society. In this connection, it is important to recall that Dr. Ambedkar was opposed to reservations for Scheduled Castes in perpetuity. He would have liked it to be for forty years instead of ten years but thereafter he did not want Parliament to have the power to extend it by law because he did not like the dalit class stigma on Indian society to become permanent. Unfortunately, during the last fifty years and more, reservations have not enabled these disadvantaged sections come closer to others to desired levels. Reservations have also not really benefited those sections for whom these were meant. In many instances, these have been monopolized by certain privileged sections within those groups."

(c) "In regard to articles 29 and 30, the Commission recommends that the cultural and educational rights available under the articles should be available equally to all groups in society so that there is no discrimination between communities or social groups in the matter of establishment and maintenance of educational institutions, etc."

It is difficult to understand why some members of the Commission could not agree to the Drafting and Editorial Committee's unanimous suggestion of extending to all religious and linguistic groups without any discrimination the right to establish and administer educational institutions of their choice insofar as this could be done without in any way adversely affecting the existing rights of minorities.

(d) Similarly, the other suggestion of the Drafting and Editorial Committee unanimously arrived at to give to the members of the armed forces the option to vote by proxy seems to have been rejected without any reasons being assigned.

(iii) Para 3.20.2 of the Report recommends that besides every child having the right to free education until he completes the age of 14 years, every girl and members of the Scheduled Castes/Scheduled Tribes will have a judicially enforceable fundamental right to education until the age of 18 years. It is doubtful whether the actual costs of providing free and compulsory education to nearly half of India's population upto the age of 18 years have been worked out before making such recommendation.

(iv) In regard to Chapter 4 titled 'Electoral Process and Political Parties', I would like to iterate the following unanimous decisions of the Drafting and Editorial Committee which were based on the decisions taken by the whole Commission earlier with one Member expressing some reservations in regard only to (a):

(a) "The second approach which the Commission recommends for adoption, suggests that **we should only have representatives who win on the basis of 50%+1 vote. If, in the first round, nobody gets over 50% then there should be a run-off contest the very next day or soon thereafter between the top two candidates so that one of them will win on the basis of over 50% of the votes polled.** Several representations from organisations and individuals favoured this option to achieve the objective of better representation. The Chief Election Commissioner confirmed that the task of run-off elections can be managed. Actually, the run-off vote is like a re-poll in certain constituencies. There is no revision of electoral rolls, no fresh nominations, no fresh campaigning or the like. It is the same polling booth with the

same administration and therefore there are no complications of heavy costs or fresh security arrangements. There are substantial advantages of following the policy of 50%+1 vote. On the one hand, it resolves the problem of representation. On the other, it also makes it in the self-interest of various political parties to widen their appeal to the electorate. It can help push political rhetoric in a direction that the mobilizing language might take on comparative "universal" tones as opposed to "sectoral" tones of the present day. With the need to be more broad based in their appeal, issues that have to do with good governance rather than with cleavages and narrow identities might start to surface in the political vocabulary. With EVMs we can easily plan on a two-day election all over the country. The second day may be for run-offs. This means that at the end of the day, through the use of computer technology, the constituency will know whether someone has won by getting over 50% or that a run-off is necessary. If it is the latter, the announcement would mention the names of the two candidates. The final results can be announced with all others. If implemented properly, this suggestion has the potential of forcing political parties and candidates to think of strategies to obtain over 50% votes in the first election itself. This will discourage the non-serious candidates and fringe players from jumping in the fray and it will encourage making of pre-election agreements between parties and this should lead to moderation and stability. Also, while on the first occasion, there may be many run offs, with each successive election the number may be reduced to only a few.

The proposal evoked favourable response from the people. Also, it found overwhelming support in the Commission and the general feeling was that this one proposal had the greatest potential of service to the cause of national integration and ridding Indian politics of the scourge of casteism and communalism."

(b) "Some scholars and concerned citizens suggested that voting should be made a citizenship obligation. Voting is compulsory in many countries. Many eminent Indians including the distinguished former President and elder statesman, Shri R. Venkataraman strongly favoured making voting compulsory. He suggested that the responsibility of ensuring that all the voters exercise their franchise may be entrusted to Panchayats at the village level. "The advantage of compulsory voting is that the voter realises that he is

not conferring a favour on the candidate but exercising his duty as a citizen." **The Commission recommends that voting be made compulsory as a fundamental citizenship obligation under the law."**

(c) "After careful consideration of all the aspects of the problem, the Commission reached the conclusion that only recognised national parties and pre-poll alliances (*i.e.* those that secure at least 10% of the votes cast) should be allotted common symbols to contest elections to Lok Sabha. This would, by prompting pre-poll alliances, automatically consolidate the vote and help in evolving some sort of federal parties or alliances providing more stable governments."

(d) "Section 60 of the Representation of the People Act, 1951, inter alia, makes a provision enabling the persons of the armed forces to cast their votes through postal ballot. It is reported that there have been inordinate delays in delivery of the postal ballots sometimes resulting in disenfranchising the personnel of the armed forces. Some suggestions have been made to the effect that as an alternative at their option, the members of the armed forces may be allowed to cast their vote by appointing someone as proxy. **The Commission recommends that by making necessary changes in the Representation of the People Act, 1951, the facility of voting either by proxy or the existing postal ballot system, may be provided to members of the armed forces."**

(v) In para 4.31.2 of the Report, there is a serious typographical error which seems to suggest that national parties or alliances may be allowed to contest elections only for State legislatures or Council of States. Actually, it should read as follows:

"Only parties or pre-poll alliances of political parties registered as national parties or alliances with the Election Commission be allowed a common symbol to contest elections for the Lok Sabha. State Parties may be

allowed common symbols to contest elections for State Legislatures and the Council of States (Rajya Sabha)."

It is hoped this correction would be made in the Report before it is submitted even though several members have already signed it.

(vi) Para 4.21 of the Report as already signed by some of the members, *inter alia*, reads as follows :

"At the same time, the other point of view put forward was that denial of the said high offices solely on account of the fact that the person was not a natural born citizen of India or his parents or grand parents were not citizens of India, would deprive worthy citizens from occupying these high offices".

This seems to imply or suggest that natural born citizens of India are not "worthy" and only those not born in India or of Indian parentage are "worthy". It is, therefore, suggested that the para may be modified before submission of the Report to read as follows:

"At the same time, the other point of view put forward was that denial of the said high offices solely on account of the fact that the person was not a natural born citizen of India or his parents or grand parents were not

citizens of India, might deprive some citizens from occupying these high offices even if they were otherwise worthy and acceptable".

(iv) The Chapter 7 of the Report is titled 'The Judiciary'. This chapter particularly is seriously flawed and distorted. The much needed Judicial Reform issues have not been even touched or these got deleted in the final draft. In matters like appointment of judges, the approach in the final chapter is heavily and unconstitutionally weighed in favour of the judges themselves selecting their own colleagues thereby striking at the legitimate powers of the Executive and the Parliament and disturbing the delicate balance in the polity.

The Report of the Drafting and Editorial Committee which was unanimous in all matters, *inter alia*, contained the following useful observations:

> "The Commission took into account the consultation paper, the responses thereto and the views of eminent persons like the former President of India and some of the former Chief Justices of India including the one who delivered the majority judgement in the second judges case. When the matter came to be discussed before the Commission, divergent views were advanced and cited. According to one former C.J.I. (Justice E.S. Venkataramaiah), in the interpretation placed by the majority of judges on article 124, the "text of the Constitution seems to have been departed from. …….. The interpretation now given neutralises the position of the President and makes article 74 which requires the President to act on the aid and advice of the Council of Ministers irrelevant. ……. The construction now placed by the court makes the Supreme Court and the High Courts totally undemocratic. While in a parliamentary democracy

the President may be a mere constitutional head when the power is exercised by him on the advice of the Council of Ministers he cannot be asked to play the same limited role where the Chief Justice of India who is not an elected representative advises him. One cannot ignore that this may lead on a future occasion to tyranny in another unexpected place… The new meaning given by the Supreme Court appears to be beyond the scope of mere interpretation and virtually amounts to re-writing the relevant constitutional provisions……"*****.

"Obviously there has been some rethinking on the subject. A former C.J.I. (Justice J.S. Verma) seemed to have revised his opinion and favoured "a review" in the light of the experience after the verdict in the *Second Judges'* case inasmuch he came to advocate that the intent of the Constitution was not to accord "primacy to either" the judiciary or the executive, the "responsibility" of both was "to find the most suitable person for appointment" and this could best be done by a "National Judicial Commission, representing all wings, headed by the Vice President/ Prime Minister/ Chief Justice of India". *****

"The Judiciary, the Legislature and the Executive are the creatures of the Constitution and it is the Constitution, which is supreme. The Constitution is what it says and there should not be any attempt to alter it by an interpretative process by any of the limbs of the state. Power to interpret or declare the law does not include any power to change or make the law. It is a *fortiori* when a question arises as to in which of the limbs,

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* E.S. Venkataramaih, *The Working of Indian Democratic Polity – An Appraisal*, Dr. Zakir Hussain Educational & Cultural Foundation and Indian Institute of Public Administration, New Delhi.

* J.S. Verma, The Judiciary and Judicial Reforms in *Political Reforms: Asserting Civic Sovereignty*, Konark, New Delhi 2001, pp.145-180.

the Constitution has vested the power of appointment. When it involves questions as to whether the power is in the Judiciary or Legislature or Executive, the Supreme Court's approach has to be in the following manner as observed by the Supreme Court *In Re Special Reference 1 of 1964* [1965(1) SCR 413 at 446] *"*... Legislators, Ministers and Judges all take oath of allegiance to the Constitution for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe allegiance……". Also, it was noted that there is no country whose constitution provides for vesting the power of appointment of judges of superior courts in the judiciary itself. In this context, there was a general consensus in the Commission on the desirability of suggesting the mechanism of the National Judicial Commission to ensure that the power of appointment of judges was not exercised arbitrarily either by the executive or the judiciary."

The above observations are reiterated for consideration by the powers that be.

(viii) In Chapter 5 of the Report devoted to 'Parliament and State Legislatures' as already signed by some of the Members, the last sentence in para 5.21.5 reads "the Commission recommends the setting up of a study Group of Parliament outside Parliament". It should actually read, "The Commission recommends the setting up of a 'Study of Parliament Group' outside Parliament. It is suggested that the correction may be carried out before the submission of the Report.

There may be some other similar typographical, factual or inadvertent errors. These may be taken care of.

(ix) Attention is also invited to the decision taken by the Commission at its 14th Meeting held on 14-18 December, 2001. Para 16 of the minutes records that

"There shall be a National Judicial Commission for making recommendation as to the appointment of a Judge of the Supreme Court (other than the Chief Justice of India), a Chief Justice of a High Court and a Judge of any High Court."

"The composition of the National Judicial Commission would be as under:

a) The Vice-President of India

b) The Chief Justice of India

c) Two senior-most Judges of the Supreme Court, next to the Chief Justice

d) The Union Minister for Law & Justice."

"The National Judicial Commission shall meet as a round table. While meeting for making recommendation as to the appointment of a Judge of a High Court, the Chief Justice of the concerned High Court shall also be associated as a Member of the Commission."

"Proposals for appointment of Judges should originate either from the Chief Justice of India or the Chief Justice of a High Court, as the case may be."

"The retirement age of High Court and Supreme Court Judges should be uniform and it can be 65 years."

"The retired judges should not be appointed to any paid appointment under the Government. However, even for post-retirement non-paid assignments, it is recommended that, to eliminate room for irrelevant considerations, it would be appropriate to provide as a matter of law that where a retired Judge is sought to be appointed to a Tribunal/Commission or similar other body, such appointment should be made in consultation with the concerned Chief Justice. In the case of appointment of a retired Judge/Chief Justice of the Supreme Court, the Chief Justice of India will be consulted and in the case of appointment of a judge/Chief Justice of the High Court, the Chief Justice of that Court should be consulted. Such a course would help in eliminating irrelevant considerations and would also facilitate appointment of appropriate persons to these bodies."

"As regards the transfer of Judges, it should be as a matter of policy and the power under article 222 and its exercise in appropriate cases should remain untouched. The President would transfer a Judge from one High Court to any other High Court after consultation with a committee comprising the Chief Justice of India and the two senior-most Judges of the Supreme Court."

(x) At the 11th meeting of the Commission held on 15-18 September, 2001, the following suggestions about the 'The Judiciary" were made for being taken up for discussion by the Commission at the appropriate time.

"(i) Intensive training and orientation programmes should be organized for the members of the Judiciary at all levels at the time of their entry.

(ii) There should be refresher courses for upgradation of training and orientation programmes at regular intervals during the service for judicial officers from the lowest to the highest courts.

(iii) Similar training camps need to be organized for the lawyers for improving their professional skills and responsibilities.

(iv) There should be regulation of fee of the lawyers on the basis of their classification as categories, say A, B, C, etc.

(v) Cash payment of professional fees to the lawyers should be made illegal.

(vi) Limits should be prescribed on adjournments in courts.

(vii) The Judgments given by the Courts should not be unduly lengthy. Plurality and prolixity of judgments should be discouraged.

(viii) There should be only one judgment, whether unanimous or by a majority. There need not be any concurring or dissenting judgments.

(ix) Written arguments should be permitted and encouraged.

(x) The judges should not make laws or amend the Constitution by interpreting the same. The function of working of the Constitution and applying its provisions has been entrusted to various functionaries such as Speaker, Police and Magistrates, in addition to the Judges.

(xi) There should not be any summer or winter vacations for courts as these are colonial legacies.

(xii) A minimum of 220 days of working of the courts should be ensured in a calendar year.

(xiii) Fixed time schedules should be prescribed for clearing the arrears of cases.

(xiv) There should be time bound disposal of the cases.

(xv) The age limit for retirement should be increased for the judges of High Court and Supreme Court uniformly, say 70 years or 75 years and simultaneously judges should not be allowed to take up any paid appointments after their retirement.

(xvi) There should be increased use of alternative modes of resolution of disputes.

(xvii) Lawyers should encourage out-of-court settlement of disputes.

(xviii) There should be better use of the latest technological devices in the working of the courts.

(xix) The court procedures have to be made more citizen friendly.

(xx) The accountability to people applies as much to the judiciary as to the legislators.

(xxi) Neither the Parliament nor the Supreme Court is supreme under our Constitution as the duties and powers of each organ have been defined and delimited under the Constitution. In case of any doubt about the supremacy, it has to be vested in Parliament, which represents the will of the people."

The above suggestions are reiterated.

7. The chapter on the Pace of Socio-economic Change and Development is largely ill conceived and likely to cause tremendous damage to the social fabric and unity of the nation. The recommendations in this Chapter would strike at the roots of economic development and nation building efforts. These go counter to the basic preambular principles including those of justice, equality and fraternity. Perhaps some of the recommendations made unwittingly are bound to be detrimental to the interests of the scheduled castes and minorities in particular and the people at large in general.

8. While no comments are being made on what went wrong in the procedure, priorities and perspective, it may be put on record that several of the recommendations now forming part of the report go directly counter to the clear decisions of the Commission on which the unanimously adopted draft report of the Drafting and Editorial Committee was based.

9. The Commission was appointed to review the working of the Constitution, I believe, so as to strengthen Indian polity and contribute to national rejuvenation. Unfortunately, as the minutes of the Commission in Volume II would show, before passing on the work to the Drafting and Editorial Committee only three meetings of the Commission (13th, 14th and 15th held late in November 2001 to early January, 2002) were devoted to any substantive discussion on the subject of the working of the Constitution. The three extensions brought the term of the Commission to over two years but the total period that the Commission itself and its Drafting and Editorial Committee could devote to the actual task was hardly three months. After the Draft Report was submitted to the Commission in time by the Drafting and Editorial Committee, the third extension for the Commission was sought and obtained without the Commission taking any such decision. It was during this third extended period that some of the decisions of the Commission arrived at after due deliberation and incorporated in the Draft Report were changed and several new points added.

10. If the independence, primacy and supremacy of the judiciary in its sphere is important – and doubtless it is important – so is the independence, primacy and supremacy of the Parliament in its sphere. After all, Parliament is the supreme representative institution of the people. The powers and functions of all the three organs of the State are only as defined and delimited by the Constitution which binds all the three of them equally. The purpose of recommending any amendments can only be to ensure control over any tendencies of any organ claiming overall supremacy or arbitrary powers disturbing the basic balance in polity. The effort has to be to make all the three organs more citizen-friendly and people-oriented rather than judge, lawyer, administrator or M.P./M.L.A interest-oriented.

11. Unfortunately, in some vital matters, certain recommendations have not found place in the final Report simply because one of the Members had some reservations. Also, some highly controversial matters of doubtful legitimacy have found place in the final report because of the

insistence of one Member and the fear of a dissent from him while a matter very dear to one of the Members and which as many as 5 Members supported could not find place among the positive recommendations and this led to the resignation of the Hon'ble Member concerned. Also, while in some matters decisions were taken by majority, in others unanimity was insisted upon. In my humble opinion, it would have been better not to have relatively more exclusive focus only on the wish-list or demands of some individuals or groups and to think of the interest of the nation at large.

12. Lastly, I would like to mention that I had taken the liberty of reproducing large portions of my own earlier copyrighted writings and books published before the setting up of the Commission. I hereby accord my 'No Objection' to all such reproductions and use.

13. I would thank all the Hon'ble Members of the Commission for their indulgence, courtesy and consideration extended to me. In particular, I am most beholden to the Hon'ble Chairperson who has gone out of the way to say some of the nicest things about me personally. I shall always cherish my association with all the Hon'ble Members and look forward to their enduring friendship and companionship in the service of the nation.

(Subhash C. Kashyap)

I, Sumitra Gandhi Kulkarni am signing this document with grave concerns and reservations. My concerns and reservations should be a part of the record of this Commission's work and its final report. My signature on this final report is conditional to the reservations and concerns as highlighted below:

1. The Commission was set up to contemplate the challenges faced by the existing Constitution in dealing with issues that India will face in the 21st century and beyond – and consequently make recommendations in areas where the Constitution can be strengthened. This commission was not setup as a platform for fence sitting. We as members were expected to identify, debate and finally take a stand on issues – We have not done justice to this task as was expected of us.

2. I have always believed that for a Constitution to be an effective framework for governance it must first be a framework for unification. I believe in a Unified and truly Secular India. However, the Commission debates seemed often to reduce the Constitution to being a platform for divisiveness and not unification.

3. The Commission did not initiate or promote sincere debate in the public with regards to the issues that it was contemplating. The efforts was more to "evade and defer" instead of to "identify issues, table them for debate and to deal with them".

I feel that the Government met its promise to the People of India with regards to initiating a review of the Constitution, but I feel disappointed that the Commission failed both the People and the Government by not delivering a top quality effort.

(Sumitra Gandhi Kulkarni)

11.3.2002