



# Major changes for India's constitution?

A constitutional review commission took more than two years to report, but the critics say its recommendations are merely cosmetic.

BY PRASENJIT MAITI

**A** commission in India has made a sweeping set of proposals to amend the country's constitution – changes that could have major impacts on the Union Parliament, state legislative assemblies and electoral and judicial systems. Former Chief Justice M.N. Venkatachaliah, the head of the Constitution Review Commission, gave the federal government his final report on March 31. Yet before the ink was dry, critics were calling the commission's proposals inadequate.

For parliament, the commission recommended electing the Prime Minister and the Chief Minister of each state on the floors of their legislatures and banning defections from a party or coalition by representatives, individually or *en masse*. To deal with corruption in parliament, the report called for changing parliamentary immunity so it could not cover accepting bribes to vote or speak in parliament, and banning representatives from running for public office for one year if they are charged with an offence carrying a five-year prison term.

On the question of sectarian divisions, the recommendations were to outlaw electoral campaigning on caste or religious lines, to treat Sikhism, Buddhism and Jainism as religions distinct from Hinduism in the constitution, and to create tribunals to enforce the system of job quotas in the public and banking sectors for disadvantaged castes (who number 270 million.)

In the area of economic powers, the commission called for making expropriations by the state legal only for a public purpose, establishing an Inter-State Trade and Commerce Commission, and defining the taxation and fiscal competencies of the Union Government and the state governments.

In all, the commission proposed 249 changes to India's constitution. In many other federal countries, such a list would be unimaginable because of requirements for referenda or for the

consent of the states or provinces. But in India, a vote of two-thirds of the members of both houses of the legislature is all that is required, provided that a majority of members of each house is present.

The commission, which started its work in January, 2000, was supposed to report a year later, but was given an eight-month extension to complete its work (*as reported in **Federations**, Vol. 1, No. 4, May 2001.*) It actually took seven months longer than that.

Media reports and debates have taken aim at the commission's report, accusing it of opting for cosmetic facelifts instead of drafting a new policy roadmap for India's federal political culture and entrenching the country's networks of decentralized governance.

## **How to represent the grassroots**

India today has a multicultural, multiparty and fractured democracy. A major question in federal politics in India is whether to replace the first-past-the-post election system. Critics have argued that it is more suited to the two-party politics of the USA or Britain, and should be discarded in favour of some form of proportional representation.

So many new actors have made their presence felt in the recent past that it is neither fair nor even-handed to prevent them from entering the marketplace of politics by requiring them to win elections in single-member constituencies. For instance, civil rights and grassroots movements have emerged, among them *Narmada Bachao Andolan* or Save the River Narmada Movement, which has opposed the damming of the Narmada River. Such movements have shifted the initiative to resolve India's problems of development and democracy from the domain of the state to the domain of the civil society. But the commission's report has not addressed the issue of representation.

## **President's Rule and Emergency rule**

The commission has, however, recommended revising the controversial practice called "President's Rule" in India. This is one in a section of nine articles in the Indian constitution authorizing the Union (or central) Government to assume some form of "emergency powers", in case of "war or external aggression or armed rebellion" or "imminent danger thereof" [See Box on Emergency powers]. President's Rule allows the President of India to assume all the powers of a state government himself, or to place the powers of that state under the control of parliament if "the government of the State cannot be carried on in accordance with the provisions of this Constitution".

The commission took aim at the practice of President's Rule:

"President's Rule was imposed in 13 cases even though the Ministry [of the state] enjoyed majority support in the Legislative Assembly. These cover instances where . . . [it] . . . was invoked to deal with intra-party problems or for considerations not relevant for the purpose of that article."

The commission recommended revising the constitution to allow parliament to hold a special session in which it could revoke President's Rule in any case, and that no state legislature should be dissolved by President's Rule until parliament has approved such a move.

## **From a religious to a secular society**

The report offers few solutions to India's problems in moving from a religious to a secular society. This is now especially relevant, as Gujarat has experienced one of the worst outbreaks of communal violence in the country since independence in 1947. After a Muslim mob burned a train carrying Hindu activists in February, killing 60

## Emergency powers

Emergency powers that suspend civil liberties and other constitutional rights have been used often in India during the last 30 years:

- **Maintenance of Internal Security Act of 1971** – revamped when Prime Minister Indira Gandhi's Indian National Congress proclaimed the 1975-1977 Emergency; repealed in 1977
- **44th Amendment Act of 1977** – the new Janata Government revised the grounds for an Emergency from "internal disturbance" to "armed rebellion"
- **National Security Act of 1980** – passed by a Congress (Indira) government to allow arrests without warrant on suspicion of endangering national security
- **Essential Services Maintenance Act of 1981** – allowed banning strikes and lockouts in 16 economic sectors that provide critical goods and services
- **National Security Amendment Act of 1984** – a response to the secessionist Khalistan Movement of Punjab; allowed detention of prisoners for up to one year
- **Terrorist Affected Areas (Special Courts) Ordinance of 1984** – extended powers of detention to security forces in Punjab; allowed secret tribunals
- **Terrorist and Disruptive Activities (Prevention) Act of 1987** – allowed police to tap telephones, censor mail and conduct raids in cases of security threats
- **59th Amendment Act of 1988** – for the state of Punjab, added "internal disturbance" as grounds for Emergencies and raised the maximum period of imprisonment from six months to three years
- **Prevention of Terrorism Act of 2002** – BJP government bill passed on March 26; allows the confiscation of property from suspected terrorists and detention for up to 90 days without trial

passengers, a campaign of "religious cleansing" was begun by self-styled Hindu militant activists in which more than 800 people, mostly Muslims, were killed. The Prime Minister and the Union Home Minister have not made any real attempt to dismiss the partisan Chief Minister of Gujarat despite a nationwide demand to do so.

The report is silent on other areas of serious concern such as the scope of federal powers, citizenship, accountability in public affairs, and transparency of the administration. Many believe that these gaps promote the interests of the central government at the cost of the state governments, especially now that the ruling Bharatiya Janata Party happens to rule only a handful of politically insignificant states in the country. In the giant state of Uttar Pradesh the BJP only managed to keep power by allying itself with its ideological opposite, the Bahujan Samaj, a party that seeks to promote the interests of the "backward" classes.

### Dealing with corruption

Before their final report, the commission was scathing about corruption. The commission's consultation paper on "Election law, processes and reform options," issued in January, 2001, pulled no punches:

"... There are constant references to 3 MPs, viz. money power, muscle power and mafia power and to 4Cs, viz. criminalisation, corruption, communalism, and casteism.

"Also, majority of our representatives are elected by a minority of votes cast thereby making their representative credentials doubtful. The result is that the legitimacy of our political process gets seriously compromised."

The commission's final recommendations fall far short of these ringing words. Punishment of parliamentarians who accept bribes is a step in the right direction, but it is a remedy for only one part of a much larger problem.

The commission has even revised its original recommendations that intended to restrict "privileges" of High Court and Supreme Court judges. Its report is silent so far as post-retirement judicial appointments are concerned. It has even suggested that the Parliament should amend existing laws to allow High Court judges to retire at 65 and Supreme Court judges at 68. But the government could use this change to employ retired judges in partisan political roles. India's enquiry commissions and fact-finding committees are more often than not chaired by sitting or retired High Court and Supreme Court judges. The commission is itself a case in

point. Reports are usually sent to cold storage by the government and further action is seldom taken even if such reports are tabled in the Union Parliament.

Four commission employees charged that someone at the commission made changes to the report after the approval of a supposedly final draft of the report by the staff. One of those changes concerned the appointment of Supreme Court judges. Subhash Kashyap, the Chairman of the Constitution Review Commission Drafting Committee, and ex-Secretary General of the Lok Sabha (House of the People, the Lower House of the Parliament), was one of those four dissenters.

Sumitra Gandhi Kulkarni is another dissenter who has alleged that the commission did not initiate any public dialogue during the course of its deliberations. For instance, there were only 13 seminars sponsored by the commission. There were 67 people who responded to the questionnaires prepared by the commission, and 670 representations by individuals and organizations, out of a population of more than one billion.

### Unresolved issues

The commission's report has also bypassed the contentious issue of barring individuals of foreign descent (in particular, Sonia Gandhi of the Indian National Congress, the Opposition leader in the Lower House of the Union Parliament) from holding important constitutional posts in the country. The report has recommended that this issue should only be decided in the course of a national dialogue. This proposal has been criticized by a senior lawyer, Vinod Kanth, of the Patna High Court in Bihar. Some suspect that the ruling BJP may even prefer to have this issue settled on the streets, even if it means risking a conflict of the scale of the Gujarat riots.

Even what critics call the modest constitutional reforms recommended by the Commission may not see the light of day. The ruling BJP has been losing state elections throughout the country and is in a weakened position in parliament. Will it have either the political will or clout to get the two-thirds majority needed for constitutional amendments?

To read the commission's report online, go to <http://lawmin.nic.in/ncrwc/finalreport.htm>