

COMMITTEE ON THE WELFARE OF
SCHEDULED CASTES AND
SCHEDULED TRIBES

(2005-2006)

(FOURTEENTH LOK SABHA)

FIFTH REPORT

ON

MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES AND PENSIONS
(DEPARTMENT OF PERSONNEL AND TRAINING)

ACTION TAKEN BY THE GOVERNMENT ON THE
RECOMMENDATIONS CONTAINED IN THE SIXTEENTH REPORT
(THIRTEENTH LOK SABHA) OF THE COMMITTEE ON THE WELFARE
OF SCHEDULED CASTES AND SCHEDULED TRIBES ON THE
MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES AND PENSIONS
(DEPARTMENT OF PERSONNEL AND TRAINING) – EXAMINATION OF
ORDERS PERTAINING TO RESERVATION FOR SCHEDULED CASTES
AND SCHEDULED TRIBES IN SERVICES.

Presented to Lok Sabha on _____

Laid in Rajya Sabha on _____

LOK SABHA SECRETARIAT
NEW DELHI

August, 2005 / Bhadrapada, 1927(Saka)

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**COMPOSITION OF THE COMMITTEE ON THE WELFARE OF
SCHEDULED CASTES AND SCHEDULED TRIBES (2005-2006)**

Dr. Satyanarayan Jatiya - Chairman

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3. Shri M. Appadurai
4. Shri Shingada Damodar Barku
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2. Dr. (Smt.) Paramjit Kaur Sandhu - Additional Secretary
3. Shri R.C. Ahuja - Joint Secretary
4. Shri Gopal Singh - Deputy Secretary
5. Ms. J.C. Namchyo - Under Secretary
6. Shri Joginder Singh - Committee Officer

INTRODUCTION

I, the Chairman, Committee on the Welfare of Scheduled Castes and Scheduled Tribes having been authorised by the Committee to finalise and submit the report on their behalf, present this Fifth Report (Fourteenth Lok Sabha) on action taken by the Government on the recommendations contained in their Sixteenth Report (Thirteenth Lok Sabha) on the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) regarding examination of orders pertaining to reservation for Scheduled Castes and Scheduled Tribes in services.

2. The draft Report was considered and adopted by the Committee on 16th August, 2005 (Appendix - I).

3. The Report has been divided into the following chapters: -

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|-----|---|
| I | Report |
| II | Recommendations/Observations, which have been accepted by the Government. |
| III | Recommendations/Observations which the Committee do not desire to pursue in view of replies of the Government. |
| IV | Recommendations/Observations in respect of which replies of the Government have not been accepted by the Committee and which require reiteration. |
| V | Recommendations/Observations in respect of which final replies of the Government have not been received. |

4. An analysis of the Action Taken by the Government on the recommendations contained in the Sixteenth Report of the Committee is given in the Appendix - II. It would be observed therefrom that out of 56 recommendations made in the report, 6 recommendations i.e. 11 per cent have been accepted by the Government. The Committee do not desire to pursue 23 recommendations i.e. 41 per cent of the total recommendations in view of the replies of the Government. There are 20 recommendations i.e. 36 per cent in respect of which replies of the Government have not been accepted by the Committee and require further reiteration. In respect of 7 recommendations i.e. 12% final replies of the Government have not been received.

NEW DELHI
August, 2005
Bhadrapada, 1927 (Saka)

DR. SATYANARAYAN JATIYA
Chairman
Committee on the Welfare
of Scheduled Castes and
Scheduled Tribes

CHAPTER – I

REPORT

1.1 This Report of the Committee on the Welfare of Scheduled Castes and Scheduled Tribes deals with the action taken by the Government on the recommendations contained in their Sixteenth Report (Thirteenth Lok Sabha) on the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel & Training) regarding “Examination of orders pertaining to reservation for Scheduled Castes and Scheduled Tribes in services”.

1.2 The Sixteenth Report was presented to Lok Sabha on 27 August, 2001. It contained 56 recommendations/observations. Replies of the Government in respect of these observations/recommendations have been examined and may be categorised as under: -

- (i) Recommendations / Observations which have been accepted by the Government (Sl. Nos. 14, 46, 47, 48, 50 and 51)
- (ii) Recommendations / Observations which the Committee do not desire to pursue in the light of the replies received from the Government (Sl. Nos. 2, 3, 6, 9, 17, 19, 20, 21, 22, 26A, 26B, 27, 28, 29, 29A, 30, 36, 37, 38, 39, 40, 42 and 43).

- (iii) Recommendations /Observations, replies to which have not been accepted by the Committee and need reiteration (Sl. Nos. 1, 10, 11, 12, 13, 13A, 23, 24, 25, 26, 31, 32, 33, 34, 35, 41, 44, 45, 49 and 52).
- (iv) Recommendations / Observations in respect of which final replies of the Government have not been received (Sl Nos. 4, 5, 7, 8, 15, 16 and 18).

1.3 The Committee will now deal with the Action taken replies of the Government on the Recommendations/Observations, which have not been accepted by the Committee and need reiteration or merit comments.

Recommendation (Sl No. 1, Para 1.14)

1.4 The Committee had noted that the representation of SCs and STs in various Departments and Public Sector Undertakings of the Government of India has not reached the prescribed level of reservation even after 50 years of Independence. Substantial shortfalls of SCs in Groups A and B and of STs in all categories of posts still exist in Departments and Public Sector Undertakings of the Government. The implementation of the constitutional safeguards, provided to SCs and STs in services is done through executive orders while the reservation policy in force has yet to show results in achieving adequate representation of SCs and STs in services. The Committee observed that pursuant to certain Supreme Court judgments the Ministry of Personnel, Public Grievances

and Training issued a spate of Office Memoranda in 1997 withdrawing a number of facilities that were available to SCs and STs and thus completely set aside the reservation policy. The Committee had opined that those Office Memoranda were anti-reservation and, therefore, unconstitutional *in toto*. The Committee had, therefore, recommended that the Government should withdraw those Office Memoranda and bring in a comprehensive legislation in the shape of Reservation Act to avoid recurrence of such incidents and to fulfill the prescribed percentage of reservation for SCs and STs in all grades and cadres. They had further recommended that the Act be included in the Ninth Schedule of the Constitution so that the Judiciary might not have any access to it.

1.5 The Government in their reply have stated that the representation of SCs and STs in the services (excluding sweepers) as on 1.1.2000 is approximately 16.27% and 6.22% respectively. It has further been stated that the representation of SCs is more than 15% in Group 'C' and 'D' posts. There is, however, shortfall of SCs in Group A and B posts. In case of Scheduled Tribes, it has been reported that their representation in all the Groups is less than 7.5%.

1.6 It has also been stated that Government are alive to the situation of inadequate representation of SCs and STs in services and have provided for various relaxations and concessions to them so as to complete their quota in the services. In the case of direct recruitment, SCs/STs get concessions like relaxation in upper age limit by five years, exemption

from payment of examination/application fee, relaxation in qualifications regarding experience at the discretion of UPSC/Competent authority, relaxation in standards of suitability, separate interviews, etc. Likewise in the case of promotion they get concessions like extension of zone of consideration to five times the number of vacancies in case suitable SC/ST candidates are not available within the normal zone of consideration, relaxation in minimum qualifying marks/standard of evaluation, relaxation in upper age limit by five years where upper age limit for promotion is prescribed not exceeding 50 years, etc. In order to fill up backlog/carried forward vacancies reserved for SCs/STs, special recruitment drives were conducted in 1989, 1990, 1991, 1993, 1995 and 1996. There is a ban on de-reservation of posts reserved for SCs/STs in case of direct recruitment. SC/ST candidates appointed on their own merit are not adjusted against posts reserved for them. Thus Government have been taking all possible steps to ensure that posts reserved for SCs/STs go to these categories only and their representation in services is increased.

1.7 It has further been added by the Ministry that five OMs issued in 1997 were in accordance with the Law of the land and the Constitutional mandate available to the Executive, as interpreted by the Supreme Court, at that point of time. However, some of the provisions had adversely affected the interests of Scheduled Castes and Scheduled Tribes. In such cases, the Government have amended the Constitution to restore the

benefits available to the Scheduled Castes and Scheduled Tribes. The action taken includes:-

- (a) The Supreme Court in its judgment in the Indra Sawhney's case had held that promotions for SCs/STs could continue only upto 15.11.1997. In order to continue reservation in promotion beyond 15.11.1997, the Seventy-seventh Amendment incorporated Clause (4A) in Article 16 of the Constitution. Thereafter an OM dated 13.8.1997 was issued. Withdrawal of this OM would be against the interests of SCs/STs;
- (b) The 81st Amendment to the Constitution was enacted to enable the administration to treat backlog/carried forward reserved vacancies for SCs/STs as a separate and distinct group which would not be subject to the overall ceiling of 50% imposed by the Supreme Court in Indra Sawhney's case. Pursuant to this amendment, the OM dated 29.8.1997 was withdrawn and replaced by a fresh OM dated 20.7.2000;
- (c) The Government brought about the 82nd Amendment to the Constitution restoring concessions/relaxations earlier available to the SC/ST candidates in matters of promotion. Following this amendment the OM dated 22.7.1997 was withdrawn by the OM dated 3.10.2000 and *status quo ante* was restored;

- (d) The 85th Amendment to the Constitution was enacted to negate the DOPT's OM dated 30.1.1997. Consequently, DOP&T issued OM dated 21.1.2002.

1.8 The Government have also stated that the issue of enacting a law on reservation has been examined and the Government are not in favour of such a law for the following reasons:-

- (a) Executive Instructions on reservation issued by DOP&T derive authority from Article 16(4) of the Constitution and come within the meaning of 'Law';
- (b) The legal validity of these instructions has specifically been upheld by the Supreme Court of India in Indra Sawhney's case;
- (c) No legal deficiency has been encountered in the implementation or enforcement of the policy. Non-compliance of the policy is tantamount to misconduct and makes the delinquent officers liable to disciplinary action under the Conduct Rules;
- (d) Executive instructions have the advantage of flexibility to meet the emerging needs and such flexibility cannot always be provided by legislative enactment;
- (e) Inclusion of an Act in the Ninth Schedule of the Constitution does not save it from challenge in the Supreme Court. Any

such enactment would also be liable to challenge on the grounds of violation of the basic structure of the Constitution.

1.9 It has been added that the Attorney-General of India has advised that comprehensive legislation on Reservation will be complex and cumbersome and that if the Court strikes down any of its provisions, questions about severability of the remaining will arise. He is also of the view that inclusion of such an Act in the Ninth Schedule does not protect it from a challenge on grounds that it violates the basic structure of the Constitution.

Comments of the Committee

1.10 The Committee are distressed to note that the relaxations and concessions provided to Scheduled Castes and Scheduled Tribes did not make much impact as the shortfall in various posts reserved for them still exists. Even after 57 years of Independence, the Group A & B posts meant for Scheduled Castes and all the posts meant for Scheduled Tribes have not been filled up despite the Government claiming to have provided relaxations and concessions to these communities. Surely, the Government have failed not because the relaxations and concessions were inadequate but because of the absence of zeal to implement these relaxations and concessions in letter and spirit. There is a need for a serious exercise to find out as to how the relaxations and concessions could be implemented in the most effective manner so as to help these communities to occupy the posts reserved for them in Government

Departments and Public Undertakings.

1.11 The Committee are happy that the Government at least withdrew three Office Memoranda issued on 30th January 1997, 22nd July 1997 and 29th August 1997 which were adversely affecting the interests of SC and ST employees. The Committee note that the Ministry of Personnel, Public Grievances and Pensions, however, have not reported as to the action taken by them in regard to OM dated 2nd July 1997 dealing with post-based reservation roster. The Committee strongly urge the Government to withdraw it too as the Government themselves admit that the prescribed percentage in different cadres and posts has not been reached. As regards the Office Memorandum issued on 13th August, 1997, the Government have stated that withdrawal of the same would be against the interests of SCs/STs. The Committee, however, are surprised to find that the Government have only decided to continue the reservation in promotion as at present and have conveniently ignored the provision of Article 16(4A) which states "Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State." The Committee, therefore, would like the Government to examine the provisions of Article 16(4A) of the Constitution afresh and amend the said O.M. to extend reservation to the SCs/STs to any class or classes of posts

including those above the lowest rung of Group 'A'.

1.12 The Committee are also not inclined to accept the reasons given by the Government for not enacting a comprehensive legislation on reservation in spite of repeated recommendation of the Committee in their earlier reports. The Committee reiterate that the Government should bring a comprehensive legislation on reservation for SCs and STs and to include it in the Ninth Schedule of the Constitution.

Recommendations (Sl. Nos. 10, 11, 12, 13 and 13A,

Para Nos. 2.59, 2.62, 2.67, 2.69 and 2.70)

1.13 The Committee had noted that Secretary, Legal Affairs had clearly brought out the scope of Virpal Singh Chauhan judgment and established that the court had made a distinction between the selection and non-selection posts but Secretary, DOP&T ignored this distinction to benefit general category people.

1.14 The Committee had also noted that there was a difference of opinion between the Ministry of Railways and DOP&T about the implementation of the Hon'ble Supreme Court's above judgment as the understanding of the two Ministries differed from each other. The Committee had felt that Secretary, DOP&T was adamant on the non implementation of the portions of the judgment which were in favour of SCs & STs.

1.15 The Committee were constrained to note that DOP&T had adopted duality in the matter of consultation. On the one hand, they are of the view that consultation was not required with the National Commission for SCs and STs because it is the duty of all the Organisations and Departments to comply with the Supreme Court's judgment, whereas on the other hand they insist that the Ministry of Railways should have consulted the DOP&T while making distinction between selection and non selection posts. This duality was maintained by the DOP&T so that nobody would detect the patent illegality of their action.

1.16 The Committee had observed that the deliberations that took place in the Lok Sabha on 4.8.1998 throw light on the working of the DOP&T bureaucrats. Shri Ram Vilas Paswan while speaking in Lok Sabha had mentioned that he knew how the permanent bureaucracy dilutes the things and when the Government becomes weak, bureaucracy becomes stronger and as a result, any step proposed by the Government remains undecided.

1.17 The Committee had, therefore, recommended that the then Secretary, DOP&T should be prosecuted under section 4 of Chapter II of the SCs & STs (Prevention of Atrocities) Act, 1989 apart from taking appropriate departmental penal action against him.

1.18 In their reply, the Government have stated that the OM dated 30.1.1997 was issued in pursuance of the law laid down by the Supreme Court and after placing the matter before the Cabinet. It was the decision

of the Government to issue the O.M. dated 30.1.1997. Thus no officer in the DOP&T violated any provision of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

Comments of the Committee

1.19 The Committee express their displeasure over the reply given by the Government because they have neither given serious thought to the observation of the Committee nor submitted a satisfactory explanation. The Committee are not satisfied with the common place reply furnished by the Government and desire to know the details of facts as to how the Ministry of Railways and Department of Personnel and Training(DOP&T) interpreted differently the Supreme Court judgment in the Virpal Singh Chauhan case. The Committee may be apprised as to why the opinion of the Secretary, Legal Affairs, had been by-passed by DOP&T with which the Ministry of Railways had not differed. The Committee strongly feel that DOP&T did not properly apprise the Cabinet about the interpretation made by the Ministry of Law and the Ministry of Railways. Apparently, DOP&T, as the nodal Ministry feel that it is their prerogative to interpret the judgment themselves despite the fact that the Ministry of Law had opined otherwise. The Committee reiterate their earlier recommendation for prosecution of the then Secretary, DOP&T under section 4 of Chapter II of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

Recommendation (Sl. No 19, Para No. 2.99)

1.20 The Committee had desired to have copies of the note which Secretary (DOP&T) had referred to the Ministry of Law and their comments but DOP&T had not sent the note(s) and comments of Ministry of Law because they wanted to conceal the facts from the Committee. The Committee are fully competent to call for any records but the records as promised were not furnished which shows that the DOP&T officials had not co-operated and helped the Committee in understanding the truth and appreciating the magnitude of the problem. For this non-cooperation and unhelpful attitude displayed by the Secretary, DOP&T towards the Committee, the Committee had recommended that he should be prosecuted under Section 4 of Chapter II of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 apart from taking appropriate departmental penal action against him.

1.21 In their reply, the Government have stated that as desired by the Committee, along with other information/documents, a copy of the advice of Ministry of Law, Department of Legal Affairs dated 7.11.1997 regarding the judgment of Supreme Court in Jagdish Lal's case vis-à-vis Chauhan's case and Januja's case was also sent to the Lok Sabha Secretariat vide that Department O.M. No. 41013/3/98-Estt.(Res.)-Pt.II dated 18.1.1999. As such all the information/documents desired by the Committee were furnished to them. Thus, full cooperation was extended to the Committee by the then Secretary, (DOP&T). The then Secretary, (DOP&T) did not display non-cooperation and unhelpful attitude towards the Committee.

Therefore, there is no case for taking any action against the then Secretary, (DOP&T) for prosecution or for departmental action as recommended by the Committee.

Comments of the Committee

1.22 The Committee are not satisfied with the reply of the Government. The Committee had desired to have copies of the note which the Secretary, (DOP&T) had referred to the Ministry of Law and their comments thereon. The reply of the Government nowhere mentions about sending copies of the specific notes desired by the Committee, though it has been stated by the Government that alongwith other information/documents, a copy of the advice of Ministry of Law, Department of Legal Affairs regarding the judgment of Supreme Court in Jagdish Lal's case vis-à-vis Chauhan's case and Januja's case was sent to the Lok Sabha Secretariat. Since the reply of the Government is not in conformity with the recommendation of the Committee, the Committee would like the Government to furnish copies of the note sent by Secretary (DOP&T) along with the comments of the Ministry of Law thereon.

Recommendations (Sl. Nos. 20,21 and 22,

Para Nos. 2.121, 2.122 and 2.123)

1.23 The Committee had found that on behalf of the DOP&T as well as for Railways Shri C.S. Vaidyanathan the then Additional Solicitor-General defended the position for both the Departments in which the two I.A.'s

were running in a different directions. Whereas the Ministry of Railways wanted correction of the factual mistake and re-opening of the issue decided in Virpal Singh Chauhan's case, the DOP&T wanted a confirmation of the principle laid down by the Virpal Singh Chauhan's case. Thus, nobody was defending the position as brought out in Railways IA Nos. 10 to 12. The Committee had opined that it should have been the duty of all the officers concerned to prepare a brief for the Attorney-General, Solicitor-General, etc. for appearing before courts to plead for retention of existing benefits enjoyed by the SCs and STs and not for taking away those benefits.

1.24 It was also brought to the notice of the Committee that the then Railway Minister (Shri Nitish Kumar) had approved engagement of Shri V.R. Reddy, Senior Advocate and ex-Additional Solicitor-General of India for appearing before the Supreme Court on behalf of the Railways. But he was not allowed to appear because the Secretary, DOP&T spoke to the Chairman, Railway Board in this regard and questioned the Railway's right to file the Intervener Application. He also objected to the engagement of Shri Reddy and as a result of which the appearance of Shri Reddy was dropped on the basis of a telephonic request made by Member Staff, Railway Board without bringing it on record. The Committee, thus found that reservation policies were defended carelessly in the court of law.

1.25 The Committee had also observed that the people are encouraged by top bureaucracy to file cases before court to challenge the reservation policies. Thereafter, the counter affidavit of the replies are filed in a perfunctory manner and the appearance of all those Advocates is made who are either not fully conversant with the case or having no expertise in the reservation rules. They take little care to defend the cases due to lack of interest as well as lack of financial incentives to them and as and when these cases are lost, the judgment is implemented by partisan bureaucracy saying that if judgment is not implemented, there may be contempt case against them. The SCs/STs as individual and their Organisations are not in a better financial position to undertake these litigation and afford fees of well renowned Advocates. Thus, in the absence of the best available legal talents the Dalits cannot get justice. The Committee had, therefore, strongly recommended that only Attorney-General / Advocate-General or a Private Lawyer of eminence should be engaged at all stages of hearing to defend cases in Supreme Court / High Courts whenever reservation principles beneficial to the Scheduled Castes / Scheduled Tribes are challenged.

1.26 In reply, the Ministry in their action taken reply have stated that this point is primarily the concern of the Ministry of Law, Department of Legal Affairs, as they engage Advocates to defend the cases on behalf of Union of India before the Supreme Court / High Court. Further, keeping in view the importance of the case and the possible repercussions of the

outcome, a suitable Lawyer of appropriate eminence is engaged to defend the case on behalf of Union of India. This is equally applicable in matters relating to reservation rules as it is to challenge of any other rules / policy of the Government.

1.27 They have further stated that the Committee on the Welfare of Scheduled Castes and Scheduled Tribes in para 2.45 of their 2nd Report (13th Lok Sabha) made following observations:

“The Committee..... would urge the Government to see that in future, cases involving reservation aspects are defended with keen interest by well qualified and experienced advocates, preferably from Scheduled Castes and Scheduled Tribes Communities; which alone will boost the faith of these Communities in the Government..... National Commission for Scheduled Castes and Scheduled Tribes should invariably be made a party in such matters.”

1.28 The Ministry of Law, Justice & Company Affairs issued instructions vide their OM No. 44(11)/2000-Judl. dated 26.6.2000 to all Ministries/Departments, all Senior Government Standing Counsels of High Court and CAT, Central Agency Section, Branch Secretariats at Mumbai, Kolkata, Chennai and Bangalore and Litigation (HC) Section to comply with the observation of the Committee while conducting the Court cases involving reservation question. That Ministry also issued instructions to Central Agency Section, Branch Secretariats at Mumbai, Kolkata,

Chennai and Bangalore and Litigation (HC) Section to engage Senior Law Officers in such cases, where considered necessary. The in-charge, Central Agency Section etc. have also been requested to comply with the following observations of the Committee while defending the court cases involving reservation question and to bring such court cases to the notice of Law Secretary immediately:-

“that the SCs/STs as individuals and their Organisations are not in a better financial position to undertake these litigation and afford fees of well renowned Advocates whose fees are very exorbitant beyond their reach which run into Rs. 10,000/- to Rs. 1,00,000/- per appearance per day. In the absence of the best available legal talents the Dalits cannot get justice. The Committee strongly recommend that only Attorney General/Advocate General or a Private Lawyer of eminence should be engaged at all stages of hearing to defend cases in Supreme Court/High Courts whenever reservation rules beneficial to the Scheduled Castes/Scheduled Tribes are challenged”.

Comments of the Committee

1.29 The Committee had observed that the then Railway Minister (Shri Nitish Kumar) had approved engagement of a Senior Advocate and Ex-Additional Solicitor-General of India for appearing before the Supreme Court on behalf of the Ministry of Railways. The Committee were surprised to find how the Secretary, DOP&T had interfered in the matter by not allowing the Ministry of Railways to engage an Advocate of eminence to appear before the court. In their reply the DOP&T have stated that the point of engaging Advocates is primarily the concern of Ministry of Law, Department of Legal Affairs. The Committee would like to know the circumstances under which the Secretary, DOP&T encroached upon the jurisdiction of the Law Ministry to engage advocates. The Committee also deplore such action of the then Secretary, DOP&T and strongly urge the Government to take remedial steps to avoid such situations in future.

1.30 The Committee are happy to note that Ministry of Law, Justice and Company Affairs acting on their 2nd Report (13th Lok Sabha) of the Committee have issued instructions on 26-6-2000 to all Ministries/ Departments, all senior Central Government Standing Counsels of High Courts and CAT, Central Agency Section, Branch Secretariats at Mumbai, Kolkata, Chennai, Bangalore and Litigation(HC) Section, to comply with the observation of the Committee while conducting court cases involving reservation issue. However, mere issue of instructions would not ensure

justice for SC/ST people. The instructions need to be implemented in letter and spirit. The Committee are of the opinion that although there are a number of instructions/orders pertaining to the welfare of SC/ST people, yet they are deprived of the benefits enshrined in the Constitution. The Committee, therefore, would like the Government to vigorously mobilise their efforts towards effective implementation of all such instructions/orders.

Recommendation (Sl. No. 23, Para No. 2.124)

1.31 The Committee had recommended that whenever due to any judgement of the Hon'ble Supreme Court any change in the existing rules of reservation for Scheduled Castes and Scheduled Tribes is required to be made which will result in taking away some benefits enjoyed by them, it should be the duty of the officers concerned:-

- (i) to consult the National Commission for SCs and STs to ascertain their opinion on the judgement;
- (ii) to clearly point out to the Minister/Cabinet that the judgement takes away some service benefits enjoyed by the Scheduled Castes and Scheduled Tribes; and
- (iii) to suggest to the cabinet if the effect of the judgement could be nullified by an amendment of the Constitution.

1.32 It has been stated by the Ministry in their reply that recommendation of the Committee given in para (i) and (ii) *supra* are

noted for compliance. In so far as recommendation (iii) is concerned, it is accepted by them to the extent that in general such an attempt can be made. It has been mentioned that amendments to the Constitution are complex decisions requiring detailed legal and other consultations and sometimes involve thorough discussions and thus to impose such a duty may not be feasible.

Comments of the Committee

1.33 The Committee are satisfied to know that the Government have noted points (i) and (ii) of the recommendation of the Committee for compliance. The Committee would like the Government to abide by their commitment to implement the recommendation. As regards the third point of the recommendation, the Committee are of the opinion that its implementation depends on the intention of the implementing authority. The Committee, therefore, reiterate that whenever due to judgment of the Hon'ble Supreme Court any change in the existing rules of reservation for Scheduled Castes and Scheduled Tribes is required to be made, which will take away some benefits enjoyed by them, the concerned officers should suggest to the Cabinet if the effect of the judgment could be nullified by an amendment to the Constitution or by any other alternative legal remedial measure.

Recommendation (Sl. No. 24, Para No. 3.9)

1.34 The Committee had noted that the scheme of reservation as conceived by the Government of India and notified vide OM dated 13 August, 1990 was also upheld by the Supreme Court in the Mandal Case. This scheme has not been amended/modified by the Constitution Bench in Sabharwal's case. The Committee had further noted that vacancy-based reservation system as approved by Hon'ble Supreme Court cannot be given up till prescribed percentage is achieved otherwise it will tantamount to violation of law as laid down in Mandal's as well as Sabharwal's judgments.

1.35 The Government in their action taken notes furnished to the Committee have stated that the matter regarding introduction of the post-based rosters was referred to the Attorney General of India. He opined as under:

“..... Government had no option but to switch over to the post-based rosters. The two fold limits of 50% reservation, the first taking the year as a unit, as laid down by the Supreme Court in Indra Sawhney case and the second of 50% of the posts as laid down in Sabharwal's case have both to be complied with, by the Government.”

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“..... the limit of 50% in reservation on the total number of posts which forms the cadre strength cannot be achieved by following the vacancy-based rosters..... Government could not have

continued the old vacancy-based rosters and had to bring it in line with the judgment of the Supreme Court in Sabharwal's case."

1.36 It has also been added that the Government by introducing post-based rosters has rightly implemented the Supreme Court judgment in R.K. Sabharwal's case. Introduction of post-based rosters does not violate the decision of the Supreme Court in Mandal's case in any way.

Comments of the Committee

1.37 The Committee note that the Government had referred the matter regarding introduction of the post-based rosters to the Attorney-General for his opinion. The opinion of the Attorney-General, however, has not been fully quoted by the Government in their action taken reply furnished to the Committee. From the fragmented quotation it appears that the Attorney-General has based his opinion taking shelter under the limit of 50% in reservation for switching over to post-based reservation. The Committee strongly feel that unless the representation of SCs and STs in different grades and cadres reaches the prescribed percentage under the earlier arrangement, the action of switching over to post-based roster is not justified. The Committee are deeply constrained to observe that the vacancy-based reservation system as approved by the 6 judges of Supreme Court in the Mandal Case has been conveniently ignored by the Government. They had held that the vacancy-based reservation system can operate till such time the representation of persons belonging to reserved categories in a cadre reaches the prescribed percentage of

reservation. It is a matter of great concern to the Committee as to how the Government would achieve the prescribed percentage of reservation by switching over to new post-based reservation. The Government cannot wash their hands off saying that the old account is closed and that they have to open a new account for reservation purposes. The Committee feel that the Government have consciously or unconsciously usurped the right of Scheduled Caste and Scheduled Tribe employees guaranteed under the Constitution by blatantly ignoring the approval of the 6 Judges of Supreme Court in Mandal's Case. The Committee, therefore, strongly reiterate their earlier recommendation that the scheme of reservation as conceived by the Government of India and notified vide OM dated 13th August 1990 should not be given up till the prescribed percentage is achieved.

Recommendation (Sl.No.25, Para No. 3.10)

1.38 The Committee had noted that officials of DOP&T had conceived a scheme in the shape of the O.M. dated 2.7.1997 which runs contrary to the Hon'ble Supreme Court's judgment in Mandal as well as Sabharwal's cases and thereby they misled the Cabinet as well as the Prime Minister. The Committee had, therefore, recommended that officials of DOP&T may be prosecuted under section 4 of Chapter II of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

1.39 The Government in their reply have stated that R.K. Sabharwal's case judgment had been implemented after thorough examination, and consultation with the Ministry of Law, the Ministry of Social Justice and Empowerment and the National Commission for Scheduled Castes and Scheduled Tribes as also after holding detailed discussions with major employing Ministries/Departments and the National Commission for Backward Classes. The OM dated 2.7.1997 was issued after apprising the Cabinet. The Government had no option but to introduce post-based rosters in place of vacancy-based rosters as done vide DOP&T OM dated 2.7.1997. The OM is in no way contrary to the Supreme Court's judgment in Mandal's case and has rightly implemented the judgment in R.K. Sabharwal's case. The concerned officials did not do anything for which they may be charged or prosecuted.

Comments of the Committee

1.40 The Committee are of the strong belief that the Government are not ready to accept the fact that SC/ST people are still deprived of many benefits enshrined in the Constitution. The Committee are not at all satisfied with the reply given by the Government that the OM issued on 2nd July 1997 was in no way contrary to the Supreme Court judgement in Mandal's case and that it has rightly implemented the judgement in R. K. Sabharwal's case. If that is so, how the Government have completely ignored the OM dated 13th August 1990 wherein it was specifically mentioned about the ruling given by the 6 Judges of Supreme Court in

connection with continuance of vacancy- based reservation system till the percentage as prescribed has been reached. The Government have not taken into consideration this aspect while drafting OM dated 2nd July 1997. The Committee, therefore, feel that the Government have knowingly overlooked the ruling given by the 6 Judges of Supreme Court. The Committee, therefore, reiterate their earlier recommendation to prosecute the officers of the DOP& T under Section 4 of Chapter II of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

Recommendation (Sl. No. 26, Para No. 3.23)

1.41 The Committee were of the view that old rosters which were serving the object for which they were devised and the lower echelon of the Government machinery who were fully acquainted and conversant with their operation were discarded creating upheaval in the operation of roster system. By giving up the old system and introducing new system / new roster stated to be post-based rosters in such a complicated manner which even today, after three years, are not understood, not only by lower echelon of the Government functionaries but even by the middle and higher management group of the Government servants because they are so complicated that immense difficulties have been created in the operation of roster harming the interest of Scheduled Castes and Scheduled Tribes only. The Committee had, therefore, recommended that the rosters existing prior to 2nd July, 1997 should be allowed to be

operated till the period the prescribed percentage of reservation is achieved.

1.42 In their reply the Government have stated that the continuation of the old vacancy-based rosters is no longer possible as explained in para 3.9 & 3.10 which is reproduced below:-

“The matter regarding introduction of the post-based rosters was referred to the Attorney-General of India. He opined as under: -

“... Government had not option but to switch over to the post-based rosters. The two fold limits of 50% reservation, the first taking the year as a unit, as laid down by the Supreme Court in Indra Sawhney case and the second of 50% of the posts as laid down in Sabharwal’s case have both to be complied with, by the Government.”

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“... the limit of 50% in reservation on the total number of posts which forms the cadre strength cannot be achieved by following the vacancy-based rosters.... Government could not have continued the old vacancy-based rosters and had to bring it in line with the judgment of the Supreme Court in Sabharwal’s case.”

1.43 They further added that the Government by introducing post-based rosters has rightly implemented the Supreme Court judgment in R.K. Sabharwal’s case. Introduction of post-based rosters does not violate the decision of the Supreme Court in Mandal’s case in any way. R.K.

Sabharwal's judgment has been implemented after thorough examination after consultation with the Ministry of Law, the Ministry of Social Justice and Empowerment and the National Commission for Scheduled Castes and Scheduled Tribes and after holding detailed discussions with major employing Ministries / Departments as well as National Commission for Backward Classes. The OM dated 2.7.1997 was issued after apprising the Cabinet. The Government had no option but to introduce post-based rosters in place of vacancy-based rosters as done vide DOP&T OM dated 2.7.1997. The OM is in no way contrary to Supreme Court's judgment in Mandal's case and has rightly implemented the judgment in R.K. Sabharwal's case. The concerned officials did not do anything for which they may be charged or prosecuted.

Comments of the Committee

1.44 The Committee are not impressed by the reply of the Government that continuation of the old vacancy-based rosters is no longer possible in view of their explanation given earlier. There was a misinterpretation of the judgment by the Government while they replaced the vacancy-based roster with the post-based roster. In doing so, they totally ignored the condition laid down by the Supreme Court in R. K. Sabharwal's case. Switching over to post-based roster becomes valid only when the representation of persons belonging to the reserved categories in a cadre reaches the prescribed percentage of representation. The Government themselves admit that shortfall exists in different cadres and posts

reserved for Scheduled Castes and Scheduled Tribes. Under such circumstances, the Committee find it difficult to understand the logic of the Government in not persisting with the roster operating prior to 2 July 1997 till the prescribed percentage of reservation is achieved. The Committee, therefore, strongly reiterate their earlier recommendation to allow operation of the roster existing prior to 2nd July 1997 till the period the prescribed percentage of reservation is achieved.

Recommendations (Sl.Nos.31 and 32, Para Nos. 3.46 and 3.47)

1.45 The Committee had noted that at the end of the roster “squeezing” has been done for the reserved categories to reach the number of posts to be reserved for them without violating the 50% limit laid down by the courts. The Committee further noted that while drawing up rosters, the cadre controlling authorities should similarly `squeeze’ the last points of the roster and such squeezing may not be done when it would violate the rule of 50%.

1.46 Therefore, the Committee were of the view that the instructions about squeezing are not clear and cannot be understood by a layman. The dictionary meaning of squeezing is “pressing” “subjecting to extortion”, “forcing” which means “twisting”. From the above dictionary meaning of “squeezing” the Committee were unable to understand the meaning of these instructions relating to rosters.

1.47 The Government in their action taken replies furnished to the Committee have stated that the concept of “squeezing” in the context of OM dated 2.7.1997 has been explained in para 8 of the explanatory note annexed to the OM as well as by way of illustration given in the model rosters annexed thereto. It provides that at the end of the roster, points are marked for SC, ST, OBC or as unreserved in such a way that the number of posts to be reserved reaches the percentage prescribed for each category as far as possible. While doing so it is ensured that reservation does not exceed the limit of 50% and number of posts reserved for each category does not exceed the percentage of reservation prescribed for these categories. They have further added that instructions regarding squeezing may need greater clarity. The revision of the instructions to bring in clarity is under examination.

Comments of the Committee

1.48 The Committee appreciate that the Government have noted that the instructions regarding squeezing need greater clarity and that they are examining the instructions for bringing in more clarity. The Committee, however, are concerned with the fact that the Government are taking a long time in issuing the clarifications. The Committee, therefore, urge the Government to issue revised instructions at the earliest so that the existing confusion in the matter is cleared for good. The Committee may be apprised of the progress made in this regard.

Recommendation (Sl. No. 33, Para No. 3.57)

1.49 The Committee noted with concern that reservation has been reduced for SCs from 15% to 7.5% by keeping only one post in the newly devised roster. In the same way reservation for OBCs has been reduced from 27% to 23.76% thereby ensuring two more posts for non-reserved categories. For Scheduled Castes the reservation on 14 rotation is worked out to full number i.e.2. Thus this reduction cannot be understood due to the application of reservation rules. The Committee had, therefore, suggested that 14 points rotational roster could have been prepared in the manner in which reserve and non-reserve points could have been arranged without violating the rule of 50% upper limit of reservation as under:-

1. OC (Other Community)
2. SC
3. OC
4. OBC
5. OC
6. OBC
7. OC
8. ST
9. OC
10. OBC
11. OC
12. SC
13. OC
14. OBC

1.50 The Committee had felt that this rotation is more logical and balancing between the reserve and non-reserve points. The Committee, had therefore, recommended that Government should immediately revise the rotational roster and restore the prescribed reservation particularly for Scheduled Castes and make system simple and user friendly.

1.51 In reply, the Government have stated that method of preparing rosters as provided in the OM dated 2.7.1997 is based on sound mathematical principles. Rosters are in line with principles laid down by the Supreme Court. They have further stated that the views of DOPT have been given while replying to the recommendation of the Committee contained in Paragraph 3.24 and 3.25 of the report which is as under :-

“In order to ensure that SCs,STs and OBCs in services get quota of posts as per percentage of reservation prescribed for them and also to ensure that while implementing reservation, orders of the Supreme Court are complied with, post based reservation rosters have been introduced vide DOP&T's OM dated 2.7.1997. While prescribing rosters, all efforts have been made to see that posts reserved for SCs and STs are as per the percentage of posts reserved for them respectively.”

1.52 Similarly, they have also added that the rotational 14 point roster suggested by the Committee provides point number 2 as reserved for SCs. If in a cadre of upto 6 posts, second point is given to SCs, reservation for SCs at the point of time would exceed the percentage prescribed for them. In view of the judgment in R.K. Sabharwal's case, the percentage of reservation for SCs should be 15% and for STs it should be 7.5%. Operating the roster as suggested by the Committee would result into excess reservation at certain points of time and would be against the Supreme Court judgment in R.K. Sabharwal's case. The post-

based rosters now in vogue have been understood and operated at all levels.

Comments of the Committee

1.53 The Committee express their displeasure over the Government taking lightly the recommendation of the Committee. The Committee are not satisfied with the reply furnished by the Government. The rotational roster suggested by the Committee would not, in any way, result in excess reservation. The Government in their reply have stated that if in a cadre of upto 6 posts second point is given to SC, reservation for SCs at that point of time would exceed the percentage. The Committee are surprised by the contradictory view adopted by the Government as on the one hand it has been stated that in a small cadre of upto 13 posts, roster does not permit reservation to be made for all the three categories (SCs, STs and OBCs) which has also been reiterated in para 4 (e) of O.M. dated 2nd July, 1997 and on the other, the Government are citing an example of a cadre having upto 6 posts only. It seems that without examining seriously the pros and cons of the roster suggested by the Committee, the Government are determined not to accept it as a matter of principle. The Committee, therefore, reiterate their earlier recommendation that Government should revise the rotational roster and restore the prescribed reservation as recommended by the Committee earlier.

Recommendation (Sl. No. 34, Para No. 3.63)

1.54 The Committee felt that the OM dated 2.7.1997 had been issued by taking adverse points of the Supreme Court judgment in R.K. Sabharwal Vs State of Punjab and J.C. Malik Vs Ministry of Railways. As per the judgment of the Supreme Court the vacancy-based roster is to continue until the representation of SCs/STs in the cadre reaches the prescribed percentage of reservation. Once the prescribed percentage of reservation is reached, then the vacancies released thereafter are to be filled by appointment of persons from respective category (general or reserved) following post-based roster. The Committee had noted that the Supreme Court did not direct the Government to make modifications to the existing roster. The Committee also noted that the Sabharwal's judgment has neither prescribed for implementation of 200 point roster nor it has prescribed for immediate implementation of the new roster. The Committee were constrained to note that DOP&T without proper understanding of the Supreme Court judgment has changed the vacancy-based roster into post-based roster by issuing the OM dated 2.7.1997. The Committee had, therefore, recommended that the vacancy-based roster be continued until the required percentage of reservation for SCs and STs is reached in all grades of posts and O.M. dated 2.7.1997 be withdrawn.

1.55 The Government in their reply have stated that the Supreme Court in R.K. Sabharwal's case directed to relate reservation to the number of

posts in a cadre and not to vacancies. Relevant parts of the Supreme Court judgment in R.K. Sabharwal's case are reproduced below:-

“The roster is implemented in the form of running account from year to year. The purpose of “running account” is to make sure that the Scheduled Castes, Scheduled Tribes and Backward Classes get their percentage of reserved posts. The concept of “running account” in the impugned instructions has to be so interpreted that it does not result in excessive reservation.”

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“When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. In other words, in cadre of 100 posts when the posts earmarked in the roster for the Scheduled Castes and Backward Classes are filled the percentage of reservation provided for the reserved categories is achieved. We see no justification to operate the roster thereafter. The “running account” is to operate only till the quota provided under the impugned instructions is reached and not thereafter. Once the prescribed percentage of posts is filled the numerical test of adequacy is satisfied and thereafter the roster does not survive.”

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“.....the only way to assure equality of opportunity to the Backward Classes and the General Category is to permit the roster

to operate till the time the respective appointees/promotees occupy the posts meant for them in the roster. The operation of the roster and the “running account” must come to an end thereafter. The vacancies arising in the cadre, after the initial posts are filled, will pose no difficulty. As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster.”

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“The cadre strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts which form the cadre strength. The concept of ‘vacancy’ has no relevance in operating the percentage of reservation.”

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“When all the roster-points in a cadre are filled the required percentage of reservation is achieved. Once the total cadre has full representation of the Scheduled Castes, Scheduled Tribes and Backward Classes in accordance with the reservation policy then the vacancies arising thereafter in the cadre are to be filled from

amongst the category of persons to whom the respective vacancies belong.”

1.56 Clarifying further, it has been added by the Ministry that reading of the Supreme Court judgment in R.K. Sabharwal’s case makes it clear that Government had no other option but to replace vacancy-based rosters with post-based rosters. The matter regarding introduction of the post-based rosters was referred to the Attorney General of India. He opined as under:-

“..... Govt. had no option but to switch over to the post-based rosters. The two fold limits of 50% reservation, the first taking the year as a unit, as laid down by the Supreme Court in the Indra Sawhney and the second of 50% of the posts as laid down in Sabharwal’s case have both to be complied with, by the Government.”

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“..... the limit of 50% in reservation on the total number of posts which forms the cadre strength cannot be achieved by following the vacancy-based rosters..... Government could not have continued the old vacancy-based rosters and had to bring it in line with the judgment of the Supreme Court in Sabharwal’s case.”

1.57 It has also been stated that the Government by introducing post-based rosters have rightly implemented the Supreme Court judgment in R.K. Sabharwal’s case. Result of continuation of vacancy-based rosters till

the period the prescribed percentage of reservation is achieved would be the same as following the post-based rosters. In some cases, change over to post-based rosters would be more beneficial to SC/ST/OBC candidates. To illustrate the above point, the case of a service, which has 200 sanctioned posts has been considered where 50% posts are to be filled by promotion and 50% by direct recruitment. In the post-based roster for promotion, there would be 100 points. In normal course at any point of time all the 100 posts would be filled and there would be 15 posts reserved for SCs. If vacancy-based roster is followed in this case till reservation is complete, SCs would get reservation in subsequent recruitment only if there are less than 15 SC candidates promoted by reservation in the grade. The same would be the case if the post-based roster is used. To see how post-based rosters are more beneficial to SCs and STs, suppose in the said service at any point of time there are 13 SC candidates promoted by reservation. In subsequent recruitment year, suppose six posts are to be filled by promotion which fall on points number 9, 10, 11, 12, 13, 14 of the 40 point vacancy-based roster which existed prior to 2.7.1997. In that case only point no. 14 is reserved for SC candidates and thus only one SC candidate can be promoted by reservation. Filling up of the remaining one vacancy reserved for SC would have to wait till subsequent recruitment year(s), when a vacancy falls on point reserved for SCs. However, if post-based roster is followed, two SC candidates can be promoted in the very first year of recruitment.

All permutations and combinations would show that continuation of vacancy-based rosters till reservation is complete, would not be benefiting SC/ST candidates.

Comments of the Committee

1.58 The Committee note that the Supreme Court had observed that the roster is implemented in the form of running account from year to year and that the purpose of running account is to make sure that the Scheduled Castes/Scheduled Tribes and Backward Classes get their percentage of reserved posts. The Supreme Court had also observed that the running account is to operate only till the quota provided under the impugned instructions is reached and not thereafter. The Committee, however, note that the Government have abruptly stopped the running account related to vacancy-based roster without caring first to fill up the shortfall of percentage in different categories of posts/cadres as existed at that point of time. Had they filled up the existing shortfall of posts first and then switched over to post-based roster, there would not have arisen the controversy. By invoking the interpretation given by the Attorney- General, the Government have stressed the need to switch over to post-based roster. But with the enactment of the 81st Amendment to the Constitution, the subject of ceiling of 50% imposed by the Supreme Court in Indra Sawney's case stands clarified as the backlog /carried forward reserved vacancies for SCs/STs has to be treated as a separate and distinct Group

and not to be clubbed together with the vacancies of the year in which they are being filled up for determining the ceiling of 50% reservation on total number of vacancies of that year. The Committee, therefore, are unable to accept the argument given by the Government that they had no other option but to switch over to post-based rosters. The Committee have already pointed out that judgment in the Sabharwal's case has neither prescribed implementation of the 200 point roster nor it had prescribed for immediate implementation of the post-based roster. The Committee feel that the Government by issuing OM dated 2nd July, 1997 have not only deviated from their path but also hurt the feelings of Scheduled Caste/Scheduled Tribe people who have borne the brunt of neglect and injustice over the ages. The Committee, therefore, reiterate their earlier recommendation that the roster points as were being maintained in the old vacancy-based roster be continued until the required percentage of reservation for Scheduled Castes/Scheduled Tribes is reached in all grades of posts and OM dated 2nd July, 1997 which has no relevance in view of the 81st Amendment to the Constitution, be withdrawn immediately.

Recommendation (Sl. No. 35, Para No. 3.65)

1.59 The Committee had noted that the principle of exclusion of appointment made by deputation or by transfer from reservation policy was contrary to the fact that reservation has to be provided on vacancies

and is not to be measured with reference to posts in a cadre. The application of new principles of law as laid down by Hon'ble Supreme Court will have serious repercussion on representation of SCs/STs in a cadre at this prescribed percentage. Therefore, the Committee had recommended that these instructions should be immediately withdrawn so that adequate representation of SCs/STs is ensured as per prescribed percentage.

1.60 The Government in their reply have stated that the posts filled by deputation or by transfer on deputation are outside the purview of reservation. Therefore, reservation – whether vacancy-based or post based – has no bearing on posts filled by deputation or transfer on deputation.

Comments of the Committee

1.61 The Committee do not agree with the stand of the Government that posts filled by deputation or by transfer on deputation are outside the purview of reservation. The Committee are of the considered view that in a department where ten or more posts are filled by deputation or transfer on deputation, the rule of reservation could be made applicable. The Committee, therefore, reiterate that the instruction on the subject may be reviewed and revised to give adequate representation to SCs/STs while filling up posts on deputation or by transfer on deputation basis.

Recommendation (Sl. No. 41, Para No. 3.92)

1.62 The Committee were aware of the prevailing situation in which continuous litigations in the reservation matter has become almost a daily affair. Apprehending that any constitutional amendment regarding reservation might be challenged in the Hon'ble Supreme Court, the Committee considered it necessary that these amendments after enactment may be kept in the Ninth Schedule so that the Court may not have any jurisdiction to interfere in the process of equalization and social justice which suffers because of such litigations.

1.63 The Government, in their reply, have stated that the issue of enacting a law on reservation for SCs and STs and inclusion of such a law in the Ninth Schedule to the Constitution was examined. The Government does not favour enactment of such a law for the following reasons:

- (a) The executive instructions on reservation issued by DOP&T derive authority from Article 16(4) of the Constitution and come within the meaning of "law".
- (b) The legal validity of these instructions has specifically been upheld by the Supreme Court in the Indra Sawhney case.
- (c) No legal deficiency has been apprehended in implementation or enforcement of the policy. Non compliance with the policy tantamounts to misconduct which makes delinquent officials liable to disciplinary action under the Conduct Rules.

(d) Executive instructions have the advantage of flexibility to meet the emerging needs and such flexibility cannot always be provided by legislative enactment.

1.64 It has been stated that views of the Attorney-General were also obtained regarding legislation on reservation. He advised that comprehensive legislation on reservation will be complex and cumbersome and that if the Court strikes down any of its provision, questions about the severability of the remaining legislation will arise.

1.65 They have further added that inclusion of an Act in the Ninth Schedule would not save it from challenge in the Supreme Court. The Attorney General in this regard also opined that a Constitutional amendment inserting the legislation on reservation, if any, in the Ninth Schedule would be liable to challenge on the ground of violation of the basic structure of the Constitution. The Attorney-General referred to the observation of the Supreme Court in the judgment in the case of M.G. Badappanavar Vs. State of Karnataka that equality is a basic feature of the Constitution of India and any treatment of equals unequally or unequals as equals will be violative of basic structure of the Constitution of India. Thus, according to the Supreme Court, if any of the provisions of the Act, if enacted, is found to be treating equals as unequals or unequals as equals, inclusion of the Act in the Ninth Schedule would not help.

1.66 The Government have also pointed out that an Act of the Tamil Nadu Government on reservation which has been included in the Ninth

Schedule of the Constitution vide the Constitution (Seventy-sixth Amendment) Act, 1994, is already under challenge before the Supreme Court.

Comments of the Committee

1.67 The Committee are not in favour of accepting the reasons put forth by the Government regarding non-enactment of a legislation on reservation for SCs and STs and to include it in the Ninth Schedule of the Constitution. The views of the Attorney-General in this regard should not be considered as final and exclusive. Article 46 of the Constitution enjoins upon the State to promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and to protect them from social injustice and all forms of exploitation, Therefore, the declared concern of every successive Governments in Independent India has been to bring SCs and STs on par with other sections of the society through various safeguards and provisions. The Government is also committed to ensure social, economic and political upliftment of these groups in every sphere of life. In the opinion of the Committee it would not, in any way, affect the equality aspect of the Constitution as referred to by Attorney-General with regard to the observation of the Supreme Court in the case of M.G. Badappanavar Vs State of Karnataka. The Committee, therefore, reiterate their earlier recommendation that Constitutional amendments on

reservation for SCs/STs after enactment should be included in the Ninth Schedule of the Constitution.

Recommendation (Sl. Nos. 44 and 45, Para Nos. 4.24 and 4.25)

1.68 The Committee were of the view that had the bureaucracy brought the effects of the Mandal judgment to the then Government or subsequent Government, they would not have ignored the need to make the Constitutional amendment to Article 335, because the concept of reservation without relaxation is meaningless.

1.69 The Committee had noted that due to the adverse effects of the Mandal judgment, the interest of the SCs and STs had been badly affected. It was stated that while putting the matter before the then Government, the DOP&T officials neither apprised the seriousness of effects of the Mandal Judgment and also of the S. Vinod Kumar's judgment on reservation policy nor suggested any alternative remedial action such as constitutional amendment, but only proposed for the implementation of the judgment. The Committee had, therefore, recommended that a separate regulatory authority is required to control the reservation policy and to regulate the same instead of allowing the same to DOP&T.

1.70 The Ministry in their reply have stated that OM dated 22.7.97 was issued after duly informing the Cabinet of the proposal which, *inter alia* highlighted the then existing policy and the directions of the Supreme

Court in the matter. The officers of DOP&T did not have any ill will towards SCs and STs and they had performed their duty. Non-implementation of the judgment of the Supreme Court would have amounted to contempt of court. Decision of the Supreme Court in Indra Sawhney's case and S. Vinod Kumar's case had become the law of the land.

1.71 Furthermore, they have added that even if there were a separate Regulatory Body to control and regulate the reservation policy of the Government, it would not have been possible for it to ignore the Supreme Court judgments. It is felt that no useful purpose would be served by such a body. It may, however, be pointed out that National Commission for SCs and STs, a constitutional body is already there to protect the interests of SCs and STs, which supplements the Government's efforts to monitor and evolve the reservation policy.

Comments of the Committee

1.72 The Committee on the basis of the reply of the Government have concluded that Government have not given serious thought to the recommendation of the Committee. The Committee feel that the aim of the Government should be to provide maximum benefits for the welfare of SCs and STs as guaranteed by the Constitution of India and, while providing benefits to them, intention of the implementing authority should be clear and unbiased.

1.73 The Committee are, therefore, surprised at the reply of the Government that no useful purpose would be served by appointing a separate regulatory body for controlling reservation policy of the Government. In this context, it is not out of place to mention here that the Committee in their 22nd Report (13th Lok Sabha) had recommended that the Government should designate only one Ministry which should be the nodal Ministry to look after the proper implementation of reservation orders. It was also recommended that there should be a Central law to regulate the implementation of reservation policy for SCs and STs in all the State Governments, Ministries, Departments of the Government of India, Public Sector Undertakings and Private Sector. The Committee, therefore, reiterate their earlier recommendation that a separate regulatory authority is required to be constituted to control the reservation policy and to regulate the same instead of allowing it to be done by DOP&T.

Recommendation (Sl. No. 49, Para No. 5.6)

1.74 The Committee had noted that the Office Memorandum issued on 13-8-1997 was on the basis of the amendment of Article 16(4) of the Constitution of India which contains that the existing reservation in promotion shall continue till such time as the representation of SCs and STs reaches the prescribed percentage. The Committee had also noted that the Cabinet had considered the question of extending the reservation in promotion in higher grade of posts of Class-I with a view to comply with

the directives of the Constitution. The Committee had, therefore, recommended that reservation should be provided not only upto lowest rung of Class I posts but to all classes of posts (upto highest grade of posts) under the State.

1.75 In reply, the Government have stated that the Supreme Court in Indra Sawhney's case had held reservation in promotion as ultra vires. It, however, allowed reservation in promotion upto 15.11.1997. In order to continue reservation in promotion as it existed prior to the judgment of the Supreme Court beyond 15.11.1997, 77th amendment to the Constitution was made by which Article 16(4A) was incorporated in the Constitution. Statement of objects and reasons of the Constitution (Eighty-sixth Amendment) Bill which led to incorporation of Article 16(4A) stated that the object was to continue the then existing dispensation. It also stated that the Government had decided to continue the then existing policy of reservation in promotion for SCs and STs.

1.76 They have further clarified that the reservation in promotion at the time of judgment in Indra Sawhney case was available in all Groups of posts in case of promotion by non-selection method. In case of selection method reservation was available upto lowest rung of Group 'A' only. The same policy has been continued after the amendment, keeping in view the Statement of the objects and reasons of the Bill referred to above.

Comments of the Committee

1.77 The Committee are disappointed by the reply of the Government with regard to extension of reservation in promotion in higher grades of posts of Class I for which the Ministry had earlier replied in the affirmative. By drawing the attention of the Committee to the Statement of the objects and reasons of the Constitution (Eighty-sixth Amendment) Bill, the Government wanted to clarify that they were following the same policy as earlier.

1.78 The Committee feel that Article 16(4A) of the Constitution does not bar reservation in the entire cadre of Class I. The purpose of the amendment in the Constitution was to cover all group 'A' posts where the representation of SCs and STs has not reached prescribed percentage. The Committee, therefore, reiterate their earlier recommendation that the reservation should be provided not only upto lowest rung of group 'A' posts, but to all classes of posts (upto highest grade of posts) under the State.

Recommendation (Sl. No. 52, Para No. 6.11)

1.79 The Committee had observed that reservation for Scheduled Castes and Scheduled Tribes in services, though constitutionally guaranteed has become a farce due to the frequent and unwanted interference by the Supreme Court on that. The Committee had, therefore, recommended that necessary amendment may be made in the Constitution to enable a Reservation Act to be enacted and the same

should be placed in the Ninth Schedule of the Constitution so that the judicial interference can be avoided.

1.80 It has been stated by the Government in their reply that the issue of enacting a law on reservation and putting it in the Ninth Schedule of the Constitution has been examined. The Government are not in favour of a law on reservation for the reasons that executive instructions on reservation issued by DOP&T derive authority from Article 16(4) of the Constitution and come within the meaning of "Law"; the legal validity of these instructions has specifically been upheld by the Supreme Court in the Indra Sawhney case; no legal deficiency has been apprehended in implementation or enforcement of the policy; non compliance with the policy tantamount to misconduct which makes delinquent officials liable to disciplinary action under the Conduct Rules; and executive instructions have the advantage of flexibility to meet the emerging needs and such flexibility cannot always be provided by legislative enactment.

1.81 It has also been stated that the views of the Attorney General were also obtained in the matter. He advised that comprehensive legislation on reservation will be complex and cumbersome and that if any of its provisions is struck down by the Court, questions about the severability of the remaining legislation will arise. Regarding inclusion of the Act in the Ninth Schedule, he has opined that it would not save it from challenge in the Supreme Court. He stated that a Constitutional amendment inserting the legislation on reservation, if any, in the Ninth Schedule would be liable

to challenge on the ground of violation of the basic structure of the Constitution.

1.82 The reply further stated that an Act of the Tamil Nadu Government on reservation which has been included in the Ninth Schedule of the Constitution vide the Constitution (Seventy-sixth Amendment) Act, 1994, is already under challenge before the Supreme Court.

Comments of the Committee

1.83 The Committee express their displeasure over the reply of the Government stating that the Government are not in favour of a law on reservation for the reasons that the executive derive authority from Article 16(4) of the Constitution. The Committee are of the opinion that this Article should not be the sole criterion to derive such authority. It should also be drawn from the Preamble of the Constitution. Furthermore, Article 46 (Directive Principles of State Policy) of the Constitution also provides that educational and economic interests of SCs and STs be safeguarded. The Committee are of the view that besides implementing strictly the existing laws/instructions, the Government should not hesitate to evolve new laws / rules / ways to give maximum benefits to SC/ST people.

1.84 The Committee feel that there was hardly any need to seek views of the Attorney-General. The Government should have taken independent decision in the matter. As regards the challenging of a Tamil Nadu Government Act on reservation before the Supreme Court, the Committee would like to know when it was challenged and what action

has been taken by the Government to defend and for its speedy disposal as well as the present status of the case.

1.85 Keeping the above facts in view, the Committee reiterate their earlier recommendation that necessary amendment may be made in the Constitution to enable a Reservation Act to be enacted and the same should be placed in the Ninth Schedule of the Constitution.

1.86 The Committee are unhappy to note that the Government have not furnished replies to the recommendation Nos. 4,5,7,8,15,16 and 18 (Para nos. 2.24, 2.27, 2.51, 2.52, 2.73, 2.86 and 2.98) to the Committee. The Committee are of the view that recommendations of the Committee have not been taken seriously. The Committee hope that all care would be taken to furnish all replies by the Government in future.

NEW DELHI
August, 2005
Bhadrapada, 1927 (Saka)

DR. SATYANARAYAN JATIYA
Chairman
Committee on the Welfare
of Scheduled Castes and
Scheduled Tribes

A/Cte./Joginder/ATR DOPT (New)