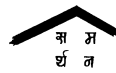

**A STUDY TO REVIEW AND STRENGTHEN NYAYA
PANCHAYATS IN INDIA**

*Including Aspects of Constitutionality of Nyaya Panchayats with Reference to
the Nyaya Panchayat Bill, 2009*

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DRAFT FINAL REPORT
October 2010

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VIDEH UPADHYAY¹

Background:

1. The Ministry of Panchayati Raj, Government of India have prepared the Draft Nyaya Panchayat Bill, 2009 that aims to revitalize the concept of participatory grass roots level dispute resolution by mediation, conciliation and compromise outside the formal judicial system. The Bill provides for the establishment of Nyaya Panchayats at the level of each village Panchayat or cluster of Village Panchayats. Under it the Nyaya Panchayats will be constituted through the election of Nyaya Panchas by people residing in the area to which the jurisdiction of the Panchayat extends. The Ministry of Panchayati Raj has prepared the Bill in exercise of the legislative powers of the Union Government under the Constitution of India. The present study is aimed at strengthening the constitutional and legal validity as well as the mechanisms mooted in the Draft Nyaya Panchayat Bill, 2009.² The entire study is carried out in seven sections as below.

I

NYAYA PANCHAYATS AND THE CONSTITUTIONAL IDEAL OF JUSTICE

2. Improving access and administration of justice to all citizens of the country is a constitutional ideal and mandate with the Government of India. The Draft Nyaya Panchayat Bill, 2009 responds to this constitutional mandate. This aspect is fully explained in the paragraphs below.

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² The study builds on a Report sent earlier this year to the Ministry titled as 'Issues and Aspects of Constitutionality of Nyaya Panchayats' as part of the progress of the present work.

3. The Constitution of India has given a place of pride to the attainment of the ideal of securing justice to all citizens. The Preamble speaks of the resolve to secure to all the citizens of India Justice which is defined or elaborated as social, economic and political. More significantly, the Preamble places justice higher than the other principle of liberty, equality and fraternity. The concept of Justice in the Preamble is indeed very wide. It is not confined to the narrow legal justice as administered by the Courts.³ Again the juxtaposition of words is important in as much as it gives precedence to social and economic over political justice. Article 38 especially embodies the preambular concept of justice where it speaks of social order in which “justice, social and economic and political shall inform of national life.” The Supreme Court of India has made clear that the constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of society by providing facilities and opportunity to remove handicaps and disabilities with which the poor are languishing, and to secure dignity of their person.⁴ Justice –social and economic–ought to be made available with utmost expedition so that that the socialistic pattern of society as dreamt of by the founding fathers can thrive and have its foundation and so that the future generation do not live under the dark and cry for social and economic justice.⁵

Panchayats need to be seen *afresh in the light of the mandate to promote Justice ‘in all possible ways’ under Article 39A*

4. Article 39 A of the Constitution postulates that the operation of legal system shall be such as to promote justice. It lays down that “*The State shall secure that the operation of legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by the reason of economic and other disabilities.*” The language of the Article is cast in mandatory terms as is clear by the use of the word ‘shall’ twice therein.⁶ Besides, the crucial words are (the obligation of the State) to provide free legal aid 'by suitable legislation or by schemes' or 'in any other way', so that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The above words occurring in Article 39A are of very wide import.⁷ The following observation of the Law Commission of India in its 114th Report in 1986 is noteworthy in this context:

“Article 39A of the Constitution of India directs the State to secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by economic or other disabilities. This is the constitutional imperative. Denial of justice on the grounds of economic and

³ Subhash Kashyap, *Constitutional Law of India*, Volume 1, Universal Law Publishing Co, 2008 at p.309

⁴ *Consumer Education and Research Centre v. Union of India* AIR 1995 SC 922

⁵ *G.B. Pant University v. State of Uttar Pradesh*, AIR 2000 SC 2695

⁶ M P Jain, *Indian Constitutional Law*, Sixth Edition, Lexis Nexis Butterworths Wadhwa, 2010

⁷ *State of Maharashtra v. Manubhai Pragaji Vashi and Ors.*, (1995) 5 SCC 730.

other disabilities is in nutshell referred to what has been known as problematic access to law. The Constitution now commands us to remove impediments to access to justice in a systematic manner. All agencies of the Government are now under a fundamental obligation to enhance access to justice. Article 40 which directs the State to take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government, has to be appreciated afresh in the light of the mandate of the new article 39A.”⁸

5. It is clear from the foregoing that Panchayats need to be seen *afresh in the light of the mandate to promote Justice ‘in all possible ways’* under Article 39A of the Constitution of India. As noted above Article 39 A of the Constitution of India obliges the State to provide free legal aid 'by suitable legislation or by schemes' or 'in any other way', so that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.⁹The proposal for constitution of Nyaya Panchayats throughout the country as contained in the Draft Nyaya Panchayat Bill, 2009 deserves to be seen as a dynamic and strategic mechanism for redressal of legal disputes, and for delivery of justice to the village people, taking into account the socio-economic conditions prevailing in the country. It responds to *the mandate to promote Justice ‘in all possible ways’* under Article 39A of the Constitution of India.

‘Substantial Justice’ and Nyaya Panchayats

6. One definitive way of conceiving Nyaya Panchayats is that they are local institutions, staffed by local community members, and answerable to local attitudes and locally defined needs. It has been authoritatively commented in the one of the well known texts on ‘village courts’ in another country that “*Substantial Justice* may be an imprecise notion in jurisprudence, but it is an appropriate description of what is sought by hundreds of societies” in the villages across the country.¹⁰ Substantial justice has been variously defined by different Judges. A few instances and phrases used judicially include ‘the natural sense of what is right and wrong’; ‘universal justice’, ‘the substantial requirement of justice’, ‘fundamental justice’, ‘fair-play in action’,

⁸ See Chapter V, Para. 5.3 114th Report of the Law Commission of India, August 1986

⁹ The Supreme Court of India amplified the full import of the mandate under Article 39A by adding further as follows: “It is now acknowledged throughout the country that the legal aid programme which is needed for the purpose of reaching social justice to the people cannot afford to remain confined to the traditional or litigation oriented legal aid programme but it must, taking into account the socio-economic conditions prevailing in the country, adopt a more dynamic posture and take within its sweep what we may call strategic legal aid programme consisting of promotion of legal literacy, organization of legal aid camps, encouragement of public interest litigation and holding of lok adalats or niti melas for bringing about settlements of disputes whether pending in courts or outside.”Centre for Legal Research and Another v. State of Kerela, AIR 1986 SC 1322

¹⁰ Goddard, Michael. (2009) *Substantial Justice: An Anthropology of Village Courts in Papua New Guinea*, Berghahan Books at P.13 In an insightful comment the author adds that “Their (village people’s) concepts of justice are conditioned by complex moral understandings derived historically from the imperatives of kin-ordered subsistence production, as well as by their observation and experience of the colonially introduced laws, rules and punitive procedures. An anthropology of village courts requires an understanding of their sociality, and thus returns us to the traditional themes in the anthropology of law.”

'common fairness' etc.¹¹ In a country like India where more than a quarter of population is steeped in poverty and a third of the citizens lacking basic reading and writing skills, it will be reasonable to expect that substantial justice to them could be mere slight improvement in their lives. What exactly does law and justice mean to the poor and the disadvantaged village people? What obstacles they face in living a dignified life and do law have a role in mitigating some of them? What are the strategies they have adopted to fight injustices in their lives and for sheer survival in many cases?¹² The strategies for seeking justice - and the means to redress conflicts in local village societies - rest with the leaders and enlightened people of the same local village society. This is one of the essential premises of the Draft Nyaya Panchayat Bill, 2009.

7. Committees of the Government of India in the past have also emphasized that if distributive justice is to become a reality for those in deprivation and poverty, "Nyaya Panchayats at the village level is the only answer." The following observations extracted from the Justice PN Bhagwati Committee on Judicare, constituted by the Government of India, which submitted its report in 1977 deserves notice in this regard:

"If we want distributive justice to become a reality for those who now share stark deprivation and poverty, one of the basics should be easy access to institutions of justice through village level delivery of justice. Having regard to the smallness of the subject matter of village litigation and the considerable bad blood that may be generated by cantankerous and unproductive legal battles and remembering that petty cases are mostly those, where at-least one party is a small man, we must create mini courts which save the poor from litigiousness....It is common knowledge that a litigation, civil or criminal, whichever party wins or loses leaves a trail of bitterness and bad blood and tremendous financial loss for both apart from protracted trials and resulting frustration. In Indian conditions law and justice at the Panchayat level with a conciliatory methodology is an imperative necessity. This can only be achieved by having a suitable forum for conciliation and adjudication involving little cost and no delay with an informal procedure conforming only to the requirements of natural justice where the key word would be justice rather than law. Nyaya Panchayats at the village level is the only answer."¹³

¹¹ For a useful discussion of some of these terms in a recent case see *Narayan S/o Gujabrao Bhojar V. Yeotmal Zilla Parishad Karmachari and Rajudas S/o Laxmanrao Jadhav*, 2009(6)MhLj500. In this context the Supreme Court had observed that "The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence, processual, as much as substantive." See *Sushil Kumar Sen v. State of Bihar*, [1975]3SCR942.

¹² The present author feels that far from getting the answers, these are all questions that have never been closely understood by the best of legal luminaries and generally, the intellectual fraternity. For more comments on these aspects by the present author see *Videh Upadhyay. (2007) Justice and the Poor: Does the Poverty of Law Explain Elusive Justice to the Poor?* in Bibek Debroy (ed.) *Judicial Reforms in India*, Academic Foundation, New Delhi

¹³ Report of the Justice PN Bhagwati Committee on Judicare, Government of India, 1977, as extracted in Mathur, S.N. (1997) *Nyaya Panchayats as Instruments of Justice*, Institute of Social Science, New Delhi.

Disputes in Nyaya Panchayats as more than ‘mere legal cases’

8. In village societies “disputes” are also more than mere legal cases. Ethnographers have historically contextualized disputes in the wider issues of politics, kinship and religion in society, revealing layers of meaning beyond what immediately impressed observers as disputes between two parties. It is thus rightly argued that “an adequate account of a dispute requires a description of its total social context - its genesis, successive efforts to manage it, and the subsequent relationship between the parties...This relatively wider definition of scope also involves a shift in focus away from judge –(and judgment)- oriented accounts of the character and function of dispute settlement”¹⁴ Law Commission of India in its Fourteenth Report also made the point that an amicable settlement of disputes before Nyaya Panchayats “becomes easier to secure when the person clothed with the authority of deciding them have the advantage of knowing the disputants, the subject-matter of the dispute, the way in which the dispute arose and other facts relating to them.”¹⁵ This understanding helps explain that in settling disputes in villages lay – persons, and not necessarily law persons have a vital and decisive role to play. This role is recognized and is integral to the scheme of the proposed Nyaya Panchayat Bill, 2009.

9. A Report of the Committee set up by the Congress Working Committee in 1954 gives an account of how Nyaya Panchayats have historically went about addressing disputes before it and in doing so what inherent advantages the Nyaya Panchas used to have. The Report noted as follows:

“Nyaya Panchayat played an important role in solving disputes of the village. “Sitting on the Panchayat, the elders of village use to solve disputes arising between members of the village community. These elders use to live in the villages themselves and were by virtue of their residence well acquainted with local conditions and knew the habit, customs and practices of the people. Almost all individuals of the village were known to them. In view of all these factors they easily came to know reasons behind the dispute that arose. They heard the parties in the presence of the entire village and solved the disputes. Public opinion of the village used to act as a powerful influence on the parties to the dispute and because justice was meted out at every place where the dispute took place, it used to be inexpensive and immediate. One direct advantage of this was that normally no attempt was made to fabricate false evidence and even if an attempt was made the same could be easily demolished. When the village elders took over on themselves the duty of solving problems it used to have a salutary effect on both sides and disputes

¹⁴ Comaroff, John. and Simon Roberts. (1986). *Rules and Processes: The Cultural Logic of Dispute in an African Context*, University of Chicago Press, at p.13-14. The Book is regarded as a path breaking ethnography of dispute in an African society. On the basis of a sensitive study of the Tswana of southern Africa, the authors argue that the social world, and the dispute processes that occur within it, are given form and meaning by a dialectical relationship between socio-cultural structures and individual experience. They develop a model that lays bare the form and content of "legal" and "political" discourse in all its variations—a model that accounts for the outcome of conflict processes and explains why the Tswana, like people in other cultures, conceive of their world in an apparently contradictory manner—as rule-governed yet inherently open to pragmatic individualism; orderly yet inherently fluid and shifting.

¹⁵ Fourteenth Report of Law Commission of India, 1958 at p.914.

and quarrels arising out of groupism used to come an end and not drag on. In fact, all used to have faith and trust in village elders which gave them the strength to solve disputes objectively and impartially.”¹⁶

Nyaya Panchayats Give Operative Effect to ‘Law from Below’ Tradition

- 10.** The abovementioned processual view of dispute and notions of justice in village societies are vital to understanding Nyaya Panchayats in India. If these paradigms are appreciated it will follow that the village people do not see laws as rules that straightforwardly determine dispute outcomes. It is recognized, rather, that ‘the rules themselves may be the object of negotiation and may sometimes be a resource to be managed strategically’¹⁷ This aspect deserves a little further explanation. There are really two ways to understand the legal system. The first one is from the *above* with a clear focus on formal law sources including codified legislation and judicial opinions. The other way is from *below* when the focus is on ‘the lived experience of the ordinary people’. While the *law from the above* genre is dominant, indeed all pervasive and the obvious favourite of the Bar and the Bench, the need to develop and understand law from below is non-existent.¹⁸ It is easy to see that Nyaya Panchyats being a dispute redressal system and being local institutions, staffed by local community members, and answerable to local attitudes and locally defined needs can provide operative effect to the usage and practice of *law from below*.
- 11.** *All of the above points in this section show that Nyaya Panchyats as an institution has the potential to reshape our legal culture by making it more ‘people-oriented’ while augmenting the capacity of the legal system to deliver substantive justice across the country. It is also clear that the Draft Nyaya Panchayat Bill 2009 squarely responds to the constitutional ideal of justice that, as said above, is ‘not confined to the narrow legal justice’ is ‘an elastic continuous process’ and that “ought to be made available with utmost expedition”.*

¹⁶ Report of the Committee set up by the Congress Working Committee in 1954 as extracted in Mathur, S.N. (1997) *Nyaya Panchayats as Instruments of Justice*, Institute of Social Science, New Delhi.

¹⁷ Comaroff, John. and Simon Roberts at p.14

¹⁸ To the author this explains the scarce socio-legal research around the lives of the poor and the disadvantaged in India.

II

KEY POINTS, SCHEME AND SAFEGUARDS BUILT IN THE NYAYA PANCHAYAT BILL, 2009

12. The Draft Nyaya Panchayat Bill 2009 seeks to bring justice to the door of the people by establishing Nyaya Panchayats at the Village Panchayat level i.e. at the level of small group of villages. It is driven by the belief that Nyaya Panchayats alone can solve the problem of bringing justice nearer to the village people. Accordingly, the Draft Nyaya Panchayats Bill, 2009 opens with its objective defined as “*a Bill to provide for establishment of Nyaya Panchayats, at the level of every Village panchayats or a group of Village Panchayats as the case may be, depending on population and area, as a forum for resolution of disputes with peoples participation directed to providing a system of fair and speedy resolution of disputes arising in rural areas, access to justice, both civil and criminal, to the citizens at the gross root level, and for matters connected therewith or incidental thereto*”.

Nyaya Panchayats as ‘Decentralized Dispute Redressal System’

13. The preambular emphasis of the Nyaya Panchayat Bill 2009 points out the Nyaya Panchayats represent ‘a decentralized dispute redressal system’ and it needs to be defined and seen as such. Equating them with regular courts has caused confusion in the past that needs to be done away with. The preamble to the Bill makes the objective further clear by stating that “*establishment of a decentralized dispute redressal system through mediation, conciliation and compromise at the grass-root level requires to be institutionalized with the involvement of the people living in that particular area*”.

14. The Nyaya Panchayat Bill 2009 emphasizes the pre-eminent role of conciliation and mediation in handling village level disputes as would be expected of any decentralized dispute redressal system.¹⁹ However the formulation that “*mediation, conciliation and compromise at the grass-root level require to be institutionalized with the involvement of the people living in that particular area*” needs a close appreciation. Law Commission of India in its Fourteenth Report while highlighting the fact it is “erroneous” to regard Nyaya Panchayats in the same manner as ordinary Courts as they are “essentially different” went on to add that the Nyaya Panchayat’s “main function is to bring about as far as possible, a compromise of small disputes arising in the village. An amicable settlement of such disputes becomes easier to secure when the person clothed with the authority of deciding them have the advantage of knowing the disputants, the subject-matter of the dispute, the way in which the dispute arose and other facts relating to them. The personal knowledge of panchas in these matters

¹⁹ As the Report of the Committee on Nyaya Panchayats submitted to the Union Ministry of Panchayati Raj in October 2007 points out “This (conciliation and mediation) has been an integral aspect of local level dispensation of justice across millennia. It also remains fully consistent with the emergent national policy favouring ADR (Alternate Dispute Resolution) in wider public spheres.”

which they are entitled to use in inducing a settlement wherever possible and ultimately, if necessary, deciding those disputes is valuable for efficient and smooth working of these tribunals, whether as conciliators or as adjudicators.”²⁰

Elected Nyaya *Panchas* and the Institutional Safeguards built in the Nyaya Panchayats Bill, 2009

15. If the dispute redressal system with a clear focus on mediation, conciliation and compromise needs to be institutionalized with the involvement of the people living in the local panchayat area the next question is as to who are the best local village people to form this body. The Nyaya Panchayat Bill, 2009 lays down that “*Every Nyaya Panchayat shall consist of five panchas who shall be elected by the voters enrolled in the voters list of that village panchayat or group of village panchayat in the manner to be prescribed by the state government*”²¹ While modes of selection and appointment and of nomination can be conceived as possible ways of constituting a Nyaya Panchayat, as the above clause shows the Bill has chosen election as the mode for constituting these Panchayats.
16. It is pertinent to note here that the Law Commission, in its Fourteenth Report, expressed itself against the principle of government nomination of Nyaya *Panchas*. It felt that nominated *panchas* may not ‘command the complete confidence of villagers’; nominated *panchas* may be impartial but the nominating officers may lack ‘first hand knowledge of local conditions’; in that event ‘the freely expressed will of the villagers, in substance, (would) be replaced by the untrustworthy recommendations of the subordinate officials’. The nominees would ‘tend to act in a manner which will command the approval of the appointing authority rather than discharge their functions in a true spirit of service to the village community’. Although the Commission did not in principle, support an elected judiciary, it did not regard Nyaya Panchayat as judiciary in the proper sense of the term but rather as ‘tribunals’ who have to ‘inspire the confidence of villagers’. The Study Team on Nyaya Panchayats in 1962 endorsing those views had also concluded that “The system of nomination in any form has to be ruled out. Villagers must be given a free hand and the choice lies between the system of direct elections and indirect elections.”²²
17. The mode of election in constituting Nyaya *Panchas* has been criticized as possibly fomenting party politics, patronage, factionalism etc.. However, while appreciating that this is the only mode which goes with the objectives of democratization of justice delivery mechanism adequate safeguards has been built in the Bill. The clauses such as the ones providing for reservation to Scheduled Caste and Scheduled Tribes in every Nyaya Panchayat proportional to their population; for 50% of total seats reserved for S.C. and S.T. to be reserved for women belonging to such category; for 50% of the total number of seats of Nyaya Panchayat to be reserved for women; empowering state to make provision for reservation in favour of O.B.C., and the

²⁰ Fourteenth Report of Law Commission of India, 1958 at p.914.

²¹ Section 3 of the Nyaya Panchayat Bill, 2009

²² Report of Study Team on Nyaya Panchayats, 1962 at p.125

provision that a dispute before Nyaya Panchayat shall be heard and determined by a bench consisting of Panchayat Pramukh, two panchas selected amongst the panchayats and two other persons not otherwise disqualified from amongst a panel of names suggested by the parties to the dispute etc. are all such provisions that enables mandatory representation of the marginalized clauses in the Nyaya Panchayats and builds in safeguards that can help Nyaya Panchayats be free from the vice of elite capture.²³

18. There are further safeguards in the Draft Bill. There is a provision that that no panch shall participate in any meetings or proceedings of a panchayat (Gram Panchayat) at the village, intermediate or district level;²⁴ that office of Nyaya Panchayat *Pramukh* shall be held by each panch for a period of one year by rotation;²⁵ and that offences against women and dispute relating to custody and maintenance of children and dependents including divorced spouses shall be heard by a bench consisting of Nyaya Panchayat Pramukh and two elected women panchas and two other persons not otherwise disqualified from being elected as a panch from amongst a panel of names suggested by the parties to the dispute²⁶. These are all provisions that infuse fairness and equity in the Nyaya Panchayat dispute redressal system. Other useful provisions that are central to the legislative scheme proposed by the Nyaya Panchayat Bill, 2009 include:

- No panch shall be nominated to or participate in the proceedings of Nyaya Panchayat bench or be involved in any manner with any proceedings before the Nyaya Panchayat where any party is either a near relation or a business partner;²⁷
- First appeal from the decision of the Nyaya Panchayat shall lie to full bench of Nyaya Panchayat which consist of all the 5 Nyaya Panchas alongwith two other persons not otherwise disqualified from being elected as a panch and from amongst a panel of names suggested by the parties to the dispute;²⁸ further, an appeal (Second Appeal) against decisions of full bench of Nyaya Panchayat before District Nyaya Panchayat Appellate Authority especially established for this purpose;²⁹
- Establishment of District Nyaya Panchayat Appellate Authority and an Authority known as Ombudsman by the state government on the recommendation of selection committee in each district of the state and such selection committee to consist of following - (a) Judge of the High Court of the State nominated by the Chief Justice of the High Court to act as Chairperson, (b) Secretary, State Department of Personal, (c) Secretary, State Department of Law, (d) Secretary, State Department of Tribal Affairs or Social Welfare to act

²³ See Section 3 of the Nyaya Panchayat Bill, 2009 for all the cited provisions.

²⁴ Section 3(4) of the Nyaya Panchayat Bill, 2009

²⁵ Section 3(5) of the Nyaya Panchayat Bill, 2009

²⁶ Section 3(7) of the Nyaya Panchayat Bill, 2009

²⁷ Section 6(1) and 6(2) of the Nyaya Panchayat Bill, 2009

²⁸ Section 36 (1) and 36(2) of the Nyaya Panchayat Bill, 2009

²⁹ Section 36 (3) of the Nyaya Panchayat Bill, 2009

as members and (e) Secretary, State Department of Panchayat Raj to act as member-convener;³⁰

- The District Nyaya Panchayat Appellate Authority shall consist of three members – (a) a person who is, or has been, or is qualified to be a District Judge, who shall be its President, (b) two other members one of whom shall be a woman, who shall have the following qualifications namely (i) be not less than 35 years of age, (ii) possess a bachelors degree from recognized university, (iii) be persons of ability, integrity and standing and have adequate knowledge and experience of at least ten years in dealing with problems relating to law, public affair or in administering local self government;³¹ and
- Appointment of ombudsman for amongst persons of eminent standing and impeccable integrity with at least 20 years of experience in public administration who shall investigate and dispose of any complaint filed before the Nyaya Panchayat on the basis of findings received from Nyaya Panchayat regarding misuse of any public office or misappropriation of funds or any deficiency in implementation of central or state government scheme or corruption or maladministration by any public servant or panchayat or panchayats within the Nyaya panchayat area.³²

³⁰ Section 37 of the Nyaya Panchayat Bill, 2009

³¹ Section 38 of the Nyaya Panchayat Bill, 2009

³² Section 39 of the Nyaya Panchayat Bill, 2009

III

ASPECTS OF CONSTITUTIONALITY OF NYAYA PANCHAYATS

Seventy-Third Amendment, Social Justice and Nyaya Panchayats

19. The Constitution (Seventy-Third Amendment) Act that came into force with effect from 24th April 1993 gave a constitutional status to the *Gram Sabha* and the *Gram Panchayats* while seeking to vest with them substantial powers to enable them to become effective institutions of local self governance at the village and panchayat levels. However, a pertinent point to note is that states of Andhra Pradesh, Gujarat, Haryana and Karnataka made no provisions for Nyaya Panchayats in their post -73rd Amendment law, though they had the provisions in their earlier laws. This has been seen as “a retrograde step taken by these states to disempower the constitutionally mandated panchayats.”³³ One argument that is often made in this context is that since the subject of “administration of justice” was not one of the listed items in the 11th Schedule to the Constitution that provided subjects with respect to which the powers and functions could be vested in the panchayats, it is clear that panchayats can have no role to play in this field. This argument is flawed for two reasons. One, list of items provided in the 11th Schedule is only illustrative and not exhaustive. Hence, non-listing of “administration of justice” would not debar *Panchayats* from dealing with that subject.³⁴ Secondly, and more importantly, under the Constitution the primary function of panchayats at each tier is “the preparation of plans for economic development and social justice”³⁵ The inclusion of ‘social justice’ here makes it clear that administration and dispensation justice in local village societies is a constitutional mandate that rests with the *Panchayats*. On the full meaning and import of the “social justice” when seen with the *Panchayats* mandate for “the preparation of plans for economic development and social justice” it has been rightly observed as follows:

“The term “social justice” in Article 243 G(a) has to be read and understood both conjunctively and disjunctively depending on the context in which it is being interpreted. While preparing for plans for economic development, one could not do something, which would enhance social injustice. Here it has to be read conjunctively. But when a dalit is oppressed or denied access to a place of worship or discriminated against socially as an “untouchable”, the term has to be interpreted as a stand-alone category to render justice to the victim. Thus

³³ Mahipal, *Village Level Decentralisation of Judicial System*, IIPA, New Delhi, 1999, pp 8-9

³⁴ It has been pointed out that the former Prime Minister of India “Rajiv Gandhi made the issue quite clear. In his reply to the debate on 64th and 65th Constitution Amendment Bills at Rajya Sabha on October 13, 1989, he said ‘All that is indicated in the Eleventh and Twelfth Schedules is the path along which effective devolution might be pursued to render panchayats and nagar palikas into vibrant, dynamic, meaningful institutions of local self-government.’...” See Bandopadhyay, D. *Nyaya Panchayats: The Unfinished Task*, Economic and Political Weekly, December 17, 2005.

³⁵ Article 243G(a) of the Constitution of India.

social justice would not only mean a package of affirmative actions in economic, social and political arena, but an enforcement of civil rights including providing relief to the victim and initiating appropriate action against the violators of those civil rights. Thus, the concept of dispensation of justice is inherently embedded in the primary function of panchayats under the Article 243G(a).”³⁶

Legislative Competence of the Centre under the Constitution

- 20.** The legislative competence of the Centre to frame and enact a law on Nyaya Panchayats can be sourced to Entry 11 A of the Concurrent List under the Seventh Schedule of the Constitution that is as follows:

“Administration of Justice; constitution and organization of all courts except the Supreme Court and the High Courts’

The Nyaya Panchayat Bill 2009 needs to be sourced to the entry of ‘Administration of Justice’ under Entry 11 A, Concurrent List. Confusion is often caused by also citing Entry 95, Union List that relates to “Jurisdiction and power of all courts...” for sourcing the Nyaya Panchayat Bill. This has contributed to giving an impression that Nyaya Panchayats can be equated with regular courts. That this is just not the case shall be explained in detail below.

- 21.** An appreciation of the legislative scheme proposed under the Nyaya Panchayat Bill, 2009 require some key constitutional questions and concerns to be considered including whether legislative scheme is reasonable and meets the objective that the Bill seeks to achieve; whether constitution of Nyaya Panchayats violates the principles underlying Article 50 of the Constitution of India, providing for separation of judiciary, legislature and executive inter-se; Whether conferring of judicial power on elected *panchas* is unconstitutional and is contrary to the spirit of judicial independence; and whether the objectives of imparting justice can be achieved by elected persons, who have no legal background or training. All these questions and concerns on the constitutionality of Nyaya Panchayat are examined with reference to judicial principles and case laws below.

Creation of Nyaya Panchayats in response to Article 50 of the Constitution

- 22.** Article 50 of the Directive Principles of Policy under the Constitution of India lays down that “the State shall take steps to separate the judiciary from the executive in the public services of the States.” The Supreme Court interpreting this Article has laid down that “Simply stated, it means that there shall be a separate judicial service free from the executive control.”³⁷

³⁶ See Bandopadhyay, D. *Nyaya Panchayats: The Unfinished Task*, Economic and Political Weekly, December 17, 2005.

³⁷ *Chandra Mohan v. State of Uttar Pradesh*, AIR 1966 SC 1987; providing a useful historical context of Article 50 the Supreme Court said: “But at the time the Constitution was made, in most of the States the magistracy was under the direct control of the executive. Indeed it is common knowledge that in pre-independent India there was

23. At the outset one aspect that has led to a totally unfounded criticism of the Nyaya Panchayats needs to be made clear. Nyaya Panchayats are different from Gram Panchayats i.e. Village Council established at the level of the Panchayat. Gram Panchayat are different from Nyaya Panchayat in as much as the former is an executive body and part of local self governance at the village level, whereas the latter is a judicial body, members whereof have no affinity to Gram Panchayat.
24. It is relevant to note that apart from the States which already had a system of Nyaya Panchayats at the time of adoption of the Constitution (Madras, Mysore, Kerela), only a few States (Madhya Pradesh, Uttar Pradesh) implemented Article 50 upon the adoption of the Constitution by creating separate Nyaya Panchayats. As a leading legal scholar points out “In the period following the adoption of the *Balwant Rai Mehta Committee Report* (1959) and the reorganization of the village institutions both as local government and departmental agencies, many more States established Nyaya Panchayats as separate judicial bodies, thus fulfilling the Directive Principles of separation of judiciary from the executive. The ideology of separation of judicial from the executive power embodied in Article 50 was clearly one impulse that led to the creation of Nyaya Panchayat in states which did not have such separate bodies.”³⁸ Thus it clear that far from Nyaya Panchayats violating Article 50 of the Constitution these Panchayats were in fact constituted in response to it.

Nyaya Panchayats answers the test of Article 14 of the Constitution

25. Any act of the repository of power, whether legislative or administrative or quasi judicial is open to challenge if it is in conflict with the Constitution or if it so arbitrary and unreasonable that no fair minded authority could have ever made it.³⁹ As the sections and paragraphs below shall show there is nothing under the Nyaya Panchayat Bill, 2009 that is prohibited by the Constitution of India or is in conflict with it. Besides, the legislative scheme proposed under the Nyaya Panchayat Bill 2009 and provisions explained above are based on reasonableness and none of its essential features are arbitrary as each one has a direct nexus with objective that the Bill seeks to achieve. It has been held by the Supreme Court that the test of reasonableness is not entirely subjective. The fundamental rights and the constitutional ideals of justice provide the test.⁴⁰ Nyaya Panchayats are founded squarely on the constitutional ideal of justice and its essential features i.e. the establishing of a decentralized dispute redressal system, focus on conciliation and mediation and having elected *nyaya panchas* inspiring confidence of the village people are all central to the objective that

a strong agitation that the judiciary should be separated from the executive and that the agitation was based upon the assumption that unless they were separated, the independence of the judiciary at the lower levels would be a mockery. So Article 50 of the Directive Principles of Policy states that the State shall take steps to separate the judiciary from the executive in the public services of the States. Simply stated, it means that there shall be a separate judicial service free from the executive control.”

³⁸ Marc Galanter, *Law and Society in Modern India*, OUP,1997 at p.67

³⁹ *GN Nayak v. Goa University*, AIR 2002 SC 790

⁴⁰ *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75; *Gursharan Singh v. New Delhi Municipal Committee* AIR 1996 SC 1175; Also see Subhash Kashyap, *Constitutional Law of India*, Volume 1, Universal Law Publishing Co, 2008 at p.486

the Bill seeks to achieve. The legal and constitutional policy adumbrated in the Nyaya Panchayat Bill 2009 answers the test of Article 14 of the Constitution of India.

26. It is also relevant to make note of the fact that while there has been a series of judgments, especially at the levels of the High Courts, where the proceedings and decision of the Nyaya Panchayat has invited legal scrutiny, none of these judgments have held the institution of Nyaya Panchayat itself as unconstitutional.⁴¹ The legal validity of some of the decisions in particular cases of the Nyaya Panchayats has been called into question by the High Courts but their constitutionality has never been doubted. On the other hand, as the paragraphs below shall show, both the Supreme Court and the High Courts in different cases have respectively held that “The Constitution does not prohibit the establishment of Nyaya panchayats. On the other hand, the organization of the Nyaya panchayats will be in promotion of the directive principles contained in Article 39-A of the Constitution...”⁴² and that there is no illegality in the appointments on Panchas in the Gram Kutchery/ Nyaya Panchayats by way of election.⁴³
27. The other aspect that deserves notice from a survey of appeals/cases against the decision of the Nyaya Panchayat to the High Courts is that they are just very few in numbers.⁴⁴ The Fourteenth Report of the Law Commission of India in one of the early comprehensive survey of the cases in Nyaya Panchayats concluded thus: “The figures show that only a very small percentage of decisions of these courts were taken to the superior courts and out of those so taken only, a small proportion were reversed” After surveying state-wise the nature and numbers of cases the Law Commission inferred: “Fully allowing for the restricted powers of revision conferred on the superior courts in respect of the decisions of these panchayat courts, it would be fair inference to draw from the above figures that the villagers in general are satisfied with the administration of justice obtaining in the village or panchayat courts and that the decisions of these courts on the whole do substantial justice.”⁴⁵ Four decades after this finding of the Law Commission a comprehensive study of Nyaya Panchayats in 1997 also found out that it is only in 10 percent of *panchayat* judgments that parties moved the regular courts and in most cases, these higher courts have upheld the judgments of *nyaya panchayats*.⁴⁶ The findings above also show that the existing Nyaya Panchayats are proving to be effective vehicles in securing the constitutional ideal of justice.

⁴¹ See for example *Marwa Maghani v. Sangram Sampat* AIR 1960 Punj. 35; *Baleshwar Singh Vs. District Magistrate and Collector, Banaras and Ors*, AIR1959All71; *Venkatchal Naicken v. Panachyat Board*, 1952, M.W.N, 912; *Ram Prakash v. Nyaya Panchayat*, AIR 1967 H.P 4; *Lahore v. Civil Judge*, AIR 1964 Raj.196; *Re S Rangaswamy*, AIR 1964Mad.435; amongst others. More such judgments are being surveyed as part of the present work and conclusions and inferences from these shall be finalized and presented in due course.

⁴² *State of U.P. and others Vs. Pradhan Sangh Kshetra Samiti and others*, AIR 1995 S.C. 1512

⁴³ *Kishna Kumar Mishra Vs. State*, AIR 1996 Patna 112; *Gurdial Singh Vs. The State*, AIR 1957 Punjab 149

⁴⁴ On a review of over hundred cases relating to Nyaya Panchayats before the High Courts and the Supreme Court as a prt of the present study the conclusion above has a sound basis.

⁴⁵ Fourteenth Report of the Law Commission of India, 1958 at p. 905

⁴⁶ Mathur S.N., *Nyaya Panchayats As Instruments Of Justice*, 1st ed. (1997), p. 44

Nyaya Panchayats promotes Article 39 A of the Constitution

28. The Preambular emphasis of the Nyaya Panchayat Bill, 2009 that “Article 39A of the Constitution mandates that the opportunities for securing justice are not denied to any citizen by reason of social, economic or other disabilities in the administration of justice” is well placed. While examining the legal and constitutional validity of the UP Panchayat Raj Act, 1947 that provides for the constitution of Nyaya Panchayats in the State the following observations of the Supreme Court merits attention:

“The last contention of the respondents was that the Act makes provision for the Nyaya panchayats whereas the amended provisions of the Constitution do not direct the organization of such panchayats and, therefore, the Act is ultra vires the Constitution. The contention is only to be stated to be rejected. Admittedly the basis of the organization of the Nyaya panchayats under the Act is different from the basis of the organization of the gram panchayats, and the functions of the two also differ. The Nyaya panchayats are in addition to the gram panchayats. The Constitution does not prohibit the establishment of Nyaya panchayats. On the other hand, the organization of the Nyaya panchayats will be in promotion of the directive principles contained in Article 39-A of the Constitution.”⁴⁷.

The above decision of the Supreme Court affirms what has been stated at the outset in this work. In paragraphs 4 and 5 of the present study it has been shown that Panchayats need to be seen afresh in the light of the mandate to promote Justice ‘in all possible ways’ under Article 39A of the Constitution of India. As pointed out above, Law Commission of India in its 114th Report in 1986 had remarked that “*The Constitution now commands us to remove impediments to access to justice in a systematic manner. All agencies of the Government are now under a fundamental obligation to enhance access to justice. Article 40 which directs the State to take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government, has to be appreciated afresh in the light of the mandate of the new article 39A.*”⁴⁸ The Nyaya Panchayat Bill 2009 responds to this constitutional mandate while seeking to bring justice to the door of the rural folks by establishing Nyaya Panchayats at the Village Panchayat level.

Elected Nyaya Panchayats are Constitutional

29. As a participatory forum for resolution of dispute at the grassroots level the success of Nyaya Panchayat critically hinges on the fact that the Nyaya Panchas constituting the Panchayat inspires the confidence of the village people. The direct election of the Nyaya Panchayats is nothing but a vote of confidence in their favour. Given the nature of conciliation, mediation and settlement such people with the vote of confidence in their favour are likely to be most effective. In that sense the mode of election for

⁴⁷ *State of U.P. and others Vs. Pradhan Sangh Kshettra Samiti and others*, AIR 1995 S.C. 1512 at p. 1531

⁴⁸ See Chapter V, Para. 5.3 114th Report of the Law Commission of India, August 1986

constitution of Nyaya Panchayats is an integral part of the legislative scheme laid out in the Nyaya Panchayat Bill, 2009.

- 30.** The question as to whether conferring of judicial power on elected *panchas* is constitutional has also been judicially answered in the affirmative. The Patna High Court while deciding the question relating to validity of Constitution of Gram Kutchery (Village Court) by way of election thus held-“So far as appointment of members of Gram Kutchery by way of election is concerned, I find no illegality in the same. It is for the Legislature to decide as to what will be the mode of appointment. If the election is made one of the mode of appointment, that will not render the provision as unconstitutional”⁴⁹ Likewise, the Punjab and Haryana High Court, posed with exactly the same questions as to decide the validity and constitutionality of the provision of elective judiciary as contained in Punjab Gram Panchayat Act, 1952 as also to decide on the contention raised with respect to separation of executive from judiciary as enshrined in Article 50 of the Constitution of India, held that “The validity of the Punjab Gram Panchayat Act cannot be challenged on the ground that it has sanctioned the appointment of an elective judiciary and has thereby contravened the provisions of the Constitution. It is true that the method of the recruitment of judicial officers like judges of the Supreme Court, Judges of High Courts & District & Subordinate Judges has been set out in the appropriate Articles of the Constitution, but items 3 and 5 of the List II (State Legislative List) confers ample power on the State Legislature to provide for administration of justice, constitution and organization of Courts and the constitution of local authorities for purposes of local self Government or village administration.”⁵⁰
- 31.** The above judgments uphold the constitutionality of the elected Nyaya Panchas. It is thus no surprise that out of five States, providing for Nyaya Panchayats or its equivalent judicial system at grass-root level post the 73rd Amendment to the Constitution of India in 1992, three States have adopted direct election as a mode of constituting Nyaya Panchayats even while rest of them have adopted nomination or a combination of nomination and elective modes for constituting Nyaya Panchayats.⁵¹

Nyaya Panchayats with no fixed Educational Qualifications are Constitutional

- 32.** The Nyaya Panchayat Bill, 2009 also lays down that “Every person who is enrolled as voter in the Nyaya Panchayat area shall, unless disqualified under this Act or any other law for the time being in force and who has attained 25 years of age shall be qualified to be elected as a panch.”⁵² This is a significant aspect of the Bill that merits a close attention. It is relevant to make note of the following observations of The One Hundred Fourteenth Report of the Law Commission of India:

⁴⁹ *Kishna Kumar Mishra Vs. State*, AIR 1996 Patna 112 at p.135

⁵⁰ *Gurdial Singh Vs. The State*, AIR 1957 Punjab 149

⁵¹ A review of the State laws and its implications for the Nyaya Panchayat Bill 2009 is presented in later sections of the present study.

⁵² Section 4 of The Nyaya Panchayat Bill ,2009

“A popular though *unwarranted belief* generated and fed by the legal profession has been that no one is capable of rendering or dispensing justice unless he is trained in law. To support this unsustainable proposition it is often repeated that justice be done according to law. It is not suggested that to render justice one must violate the law, but knowledge of law is not an essential prerequisite for rendering justice.....In rendering justice knowledge of local culture, traditions of society, behavioural pattern and commonsense approach are primary and relevant considerations. More the administration of justice became characterized by application of law, a view developed that too much legalistic approach hinders justice. Knowledge of local interests and local customs must be allowed to continue to operate and taken note of in dispensation of justice. The Commission also accepts the notions of juristic talents of Indian people embodied in various systems of what has been termed as ‘people’s law’. All these considerations shaped the approach of Commission in devising a participatory forum for resolution of dispute at the grassroots level.”⁵³

33. Primarily aimed to resolve dispute through mediation and conciliation between the parties, the Nyaya Panchayat dispute redressal system is acceptable to the rural masses only for the reason that it doesn’t carry with it the ill effects of rigidity or complicated procedures of law. Thus providing for any legal qualification as eligibility criteria for the members of Nyaya Panchayat shall strip off its simplicity, which makes the whole system acceptable in the first place. A review of provisions of Nyaya Panchayats/Gram Kutchery/Gram Panchayats under the State laws can be very instructive as many of these do not provide for minimum educational qualification for nyaya panchas.⁵⁴ A Report of the Committee on Nyaya Panchayats submitted to the Union Ministry of Panchayati Raj in October 2007 also raised some pertinent points on this question: “The Indian Constitution does not wisely enact a literacy qualification for adult suffrage, meaning both the right to contest and vote at elections. The Panchayati Raj institutions, as constitutionally conceived, provide for no literacy/numeracy thresholds (and rightly so) for the constitutionally mandated tasks of democratic decentralized forms of local governance. Why, we may well ask, be the situation any the different with the decentralization of NPS adjudicative functions at the local level? The objection to the ‘lay’ and elected NPs, seen in this light, remains simply a function of *unconstitutional prejudice*.”⁵⁵

34. The objection to lay and elected Nyaya Panchayats are nothing more in the nature of unconstitutional prejudices is also affirmed by the judgment of the Punjab and Haryana High Court in 1957 wherein the Court categorically held that “The mere fact, therefore, that the Punjab Gram Panchayat Act, does not lay down any criteria for determining the qualifications of *panchas* who are later to exercise judicial functions would not contravene the provisions of the Constitution.”⁵⁶ It is also useful to note that there were other judgments where the ability of a Nyaya *Panch* to read and write

⁵³ One Hundred Fourteenth Report of the Law Commission of India at Para 3.3

⁵⁴ A survey of State laws is carried out in later sections of the present study.

⁵⁵ Report of the Committee on Nyaya Panchayats, Union Ministry of Panchayati Raj, Government of India October 2007

⁵⁶ *Gurdial Singh Vs. The State*, AIR 1957 Punjab 149

Hindi in *Devanagari* script fluently was held to be adequate and legally valid as this was the qualification required under Rule 85 of the U. P. Panchayat Raj Rules.⁵⁷ In none of these cases even while the literacy levels of the Nyaya Panchas were called into question did the Court ever rule that a certain fixed educational qualifications, let alone legal qualifications, were needed for Nyaya *Panchas* to discharge their statutory duties.

Nyaya *Panchas* are not the ‘Judicial Officers of the Lowest Rung’

35. Even as the High Court, as explained in paragraph above, laid down that absence of any criteria for determining the qualifications of *panchas* exercising judicial functions would not contravene the provisions of the Constitution, it is also relevant to note that the Supreme Court in the *All India Judges' Association v. Union of India* case prescribed three years' practice as a lawyer as essential qualification for recruitment of Judicial Officers at the lower rung. The Court observed:

"It has, however, become imperative, in this connection to take notice of the fact that the qualifications prescribed and the procedure adopted for recruitment of the Judges at the lowest rung are not uniform in all the States. In view of the uniformity in the hierarchy and designations as well as the service conditions that we have suggested, it is necessary that all the States should prescribe uniform qualifications and adopt uniform procedure in recruiting the judicial officers at the lowest rung in the hierarchy. In most of the States, the minimum qualifications for being eligible to the post of the Civil Judge-cum-Magistrate, First Class/Magistrate, First Class/Munsif Magistrate is minimum three years' practice as a lawyer in addition to the degree in law. In some States, however, the requirement of practice is altogether dispensed with and judicial officers are recruited with only a degree in law to their credit. The recruitment of law graduates as judicial officers without any training or background of lawyering has not proved to be a successful experiment. Considering the fact that from the first day of his assuming office, the Judge has to decide, among others, questions of life, liberty, property and reputation of the litigants, to induct graduates fresh from the Universities to occupy seats of such vital powers is neither prudent nor desirable....It is, hence, necessary that all the States prescribe the said minimum practice as a lawyer as a necessary qualification for recruitment to the lowest rung in the judiciary. In this connection, it may be pointed out that under Article 233(2) of the Constitution, no person is eligible to be appointed a District Judge unless he has been an advocate or a pleader for not less than seven years while Articles 217(2)(b) and 124(3)(b) require at least ten years' practice as an Advocate of a High Court for the appointment of a person to the posts of the Judge of the High Court and the Judge of the Supreme Court, respectively. We, therefore, direct that all States shall take immediate steps to prescribe three years'

⁵⁷ *Baleswar Singh Vs. District Magistrate and Collector, Banaras and Ors*, AIR1959All71

practice as a lawyer as one of the essential qualifications for recruitment as a judicial officer at the lowest rung."⁵⁸

36. The above observations of the Supreme Court have often been wrongly cited by critics to argue that Nyaya Panchas with no legal qualifications violates the legal position on the subject. While the Supreme Court sure prescribed three years' practice as a lawyer as essential qualification for recruitment of Judicial Officers at the lower rung a close look at the above judgment can show that it is completely erroneous to extend the said prescription to Nyaya Panchayats. The "judicial officer at the lowest rung" that the Supreme Court had clearly in mind were the Civil Judge-cum-Magistrate, First Class/Magistrate and First Class/Munsif Magistrate even as the court noted that while in some states 'three years' practice as a lawyer as essential qualification' existed in respect of these judicial officers in other states this qualification was not there. The prescriptions for these classes of judicial officers in District and Subordinate Courts cannot be extended to Nyaya Panchayats as given their nature, character and status as 'a decentralized dispute redressal system' they cannot be equated with these regular courts. This aspect is further explained in the section below in the context of some judgments on independence of judiciary and on judicial appointments applicable to both superior and subordinate judiciary.

⁵⁸ *All India Judges' Association v. Union of India*, AIR 1993 SC 2493

IV

NYAYA PANCHAYATS AND INDEPENDENCE OF JUDICIARY AS A 'BASIC FEATURE' UNDER THE CONSTITUTION

The Scheme for Independence of Judiciary and as 'Basic Feature' under the Constitution of India

37. The scheme under the Constitution for establishing an independent judiciary is very clear. Article 236 (b) defines 'judicial service' to mean district Judges and Judges subordinate thereto.⁵⁹ Under Article 234 the Governor of the State makes appointments of persons other than District Judges to the judicial service in accordance with the Rules made by him in consultation with the High Court. Article 235 vests control over district courts and Courts subordinate thereto in the High Court. The judicial service whether at the level of district Courts or Courts subordinate thereto is under the control of the High Court in all respects. The subordinate judiciary which means the Courts subordinate to the district Courts consists of judicial officers who are recruited in consultation with the High Court.⁶⁰ The district judges are recruited from amongst the members of the bar and by promotion from the subordinate judiciary. The judicial service in a State is distinct and separate from the other services under the executive. The members of the judicial service perform exclusively judicial functions and are responsible for the administration of justice in the State. Interpreting these provisions of the Constitution of India the Supreme Court has opined as under:

"The Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States; it constitutes a High Court for each State, prescribes the institutional conditions of service of the Judges thereof, confers extensive jurisdiction on it to issue writs to keep all tribunals, including in appropriate cases the Governments, within bounds and gives to it the power of superintendence over all Courts and tribunals in the territory over which it has jurisdiction. But the makers of the Constitution also realized that "it is the Subordinate Judiciary in India who are brought most closely into contact with the people, and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question than in the case of the superior Judges. Presumably to secure the independence of the judiciary from the executive, the Constitution introduced a group of articles in Ch. VI of Part VI under the heading "Subordinate Courts". But at the time the Constitution was made, in most of

⁵⁹ The Supreme Court in *Kumar Padma Prasad Vs. Union of India*, AIR 1992, SC 1213 held the "Expression "Judicial Office" has not been defined under the Constitution, nevertheless, it has to be given the meaning in the context of the concept of judiciary as enshrined in the Constitution of India."

⁶⁰ As per Section 3 of the Legal Practitioners Act, 1879 "Subordinate Court" means "all Courts subordinate to the High Court, including Courts of Small Causes established under Act No. 9 of 1850 or Act No. 11 of 1865."

the States the magistracy was under the direct control of the executive. Indeed it is common knowledge that in pre-independent India there was a strong agitation that the judiciary should be separated from the executive and that the agitation was based upon the assumption that unless they were separated, the independence of the judiciary at the lower levels would be a mockery. So Article 50 of the Directive Principles of Policy states that the State shall take steps to separate the judiciary from the executive in the public services of the States. Simply stated, it means that there shall be a separate judicial service free from the executive control."⁶¹

The last point from the quote of the Supreme Court cited above - on the aspect of making judicial service free from the executive control - has been deliberated upon by the Court in a series of subsequent cases. Thus for example in a later case the Supreme Court explained further that "Justice.... can become 'fearless and free only if institutional immunity and autonomy are guaranteed'. The Constitution-makers, therefore, enacted several provisions designed to secure the independence of the superior judiciary by insulating it from executive or legislative control."⁶²

38. At this stage it is also useful to note that independence of judiciary is a "basic feature" of the Constitution of India. The Supreme Court recognized 'Basic Structure' concept for the first time in the historic *Kesavananda Bharati case* when, amongst other judges, the then Chief Justice explained that the basic structure of the Constitution included: Supremacy of the Constitution; Republican and democratic form of government; Secular character of the Constitution; Separation of powers between the legislature, executive and the judiciary and Federal character of the Constitution.⁶³ What can be the full list of basic features of the Constitution is a question that has been considered by the Court from time to time and several such features have been identified, but the matter still remains an open one. No exhaustive list of such features has yet emerged and the Court has to decide from case to case whether a constitutional feature can be characterized as basic or not.⁶⁴ However, the significance of these 'basic features' of the Constitution of India lies in the fact that they are deemed to be an integral and inseparable aspect of the Constitution and the provisions under the Constitution securing these basic features are non-amendable.

39. In a plethora of cases the Supreme Court has asserted that independence of judiciary is a basic feature of the Constitution.⁶⁵ In these line of cases the Supreme Court in a well known verdict in 1994 reaffirmed that separation of Judiciary from Executive, which is the life line of independent Judiciary', is a basic feature of the Constitution and after a detailed exploration on the subject inferred as follows:

⁶¹ *Chandra Mohan v. State of Uttar Pradesh*, AIR 1966 SC 1987 at p. 1993 and 1994

⁶² *Union of India Vs. Sankalchand Himmatlal Seth*, AIR 1977 SC 2328

⁶³ See *Kesavananda Bharati v. State of Kerala*, AIR 1973SC 1461

⁶⁴ See MP Jain, *Indian Constitutional Law*, Sixth Edition, Lexi Nexis Butterworths Wadhwa, 2010 at p.1787-88

⁶⁵ *Union of India Vs. Sankalchand Himmatlal Seth*, AIR 1977 SC 2328; *SC Gupta v. Union of India*, AIR 1992 SC 149; *Kumar Padma Prasad v. Union of India*, AIR 1992 SC 1213; and *State of Bihar v. Bal Mukund Shah*, AIR 2000 SC 1296.

“There is no dispute that independence of judiciary is the basic feature of the Constitution. ... the exclusion of the final say of the executive in the matter of appointment of Judges is the only way to maintain the independence of judiciary. .. The second and the more important reason for giving weight to the opinion of the judiciary is that the appointments are made to the "superior judiciary" and to find out the suitable persons for such appointments the expertise for that purpose is only available with the judiciary.”⁶⁶

- 40.** It is clear from the foregoing paragraph that the exclusion of the final say of the executive in the matter of appointment of Judges is the only way to maintain the independence of judiciary. Under the Nyaya Panchayat Bill, 2009 ‘the exclusion of the final say of the executive’ in the matter of appointment of Nyaya Panchas is clear. The Nyaya Panchayat Bill, 2009 lays down that “Every Nyaya Panchayat shall consist of five panchas who shall be elected by the voters enrolled in the voters list of that village panchayat are group of village panchayat in the manner to be prescribed by the state government”⁶⁷ Being directly elected by the people, and having its powers laid down by the legislature under a specifically enacted statute, it is safe to say that the appointments and functioning of Nyaya Panchayats are not controlled by the Executive in any way whatsoever.

Independence and Regulation of Subordinate Courts: Implications for Nyaya Panchayats

- 41.** One inference from the judgments of the Supreme Court discussed in the preceding two paragraphs of this study i.e. paragraphs 35 and 36 above is that the constitutional imperative of separation of judiciary from the executive, as ordained by Article 50, also requires that even judicial appointments ‘at the lowest rung’ be made in consultation with the High Court. This is because the High Court has superintendence over all Courts and tribunals in the territory over which it has jurisdiction. As has been pointed out above in the context of *All India Judges Association case* (See Paras 35 and 36 above) the judicial appointment at the lowest rung refers to judicial officers like the Civil Judge-cum-Magistrate, First Class/Magistrate and First Class/Munsif Magistrate. While consultation with the High Court is constitutionally imperative for these judicial officers and for composition of the District Courts applying the same concept *pari-materia* for the Nyaya Panchayat system is not legal and proper besides violating the basic legislative scheme of the Nyaya Panchayat Bill 2009.
- 42.** In addition to the above, even while the High Court has no role in election of the Nyaya Panchas its regulation and control of the Nyaya Panchayats is integral to the legislative scheme laid out in the Nyaya Panchayat Bill, 2009. As discussed above under the Bill an appeal (Second Appeal) against decisions of full bench of Nyaya Panchayat lies before District Nyaya Panchayat Appellate Authority especially

⁶⁶ *S.C. Advocates-on-Record Association Vs. Union of India*, AIR 1994 SC 268

⁶⁷ Section 3 of the Nyaya Panchayat Bill, 2009

established for this purpose.⁶⁸ The establishment of District Nyaya Panchayat Appellate Authority and an Ombudsman under the Bill is to be done by the state government on the recommendation of selection committee in each district of the state and such selection committee is chaired by a Judge of the High Court of the State nominated by the Chief Justice of the High Court.⁶⁹

43. It has been pointed out above that Nyaya Panchayats represent ‘a decentralized dispute redressal system’ and it needs to be defined and seen as such. Equating them with regular courts has caused confusion in the past. It is surprising that this confusion has persisted even when right from the first decade of Indian independence the Report of the Law Commission of India (1958), the Study Team on Nyaya Panchayats (1962), the High Level Committee on Panchayati Raj of the Government of Gujarat (1972), the Working Paper that formed the basis for the One Hundred Fourteenth Report of the Law Commission (1985) and the Report of the Committee on Nyaya Panchayats submitted to the Union Ministry of Panchayati Raj (2007) has all clearly and consciously not regarded Nyaya Panchayat as judiciary in proper sense of the term but rather as ‘tribunals’ who have to ‘inspire the confidence of villagers’.⁷⁰ The simplicity, accessibility and affordability of the Nyaya Panchayat system, with the Panchas having knowledge and experience of local customs, usage and culture and not necessarily formal knowledge of law, with a specially defined and limited jurisdiction, and with the emphasis on dispute resolution through mediation and conciliation are all factors that gives the Nyaya Panchayat a character of tribunal than that of regular district or a subordinate court. A ‘tribunal’ literally means a seat of justice.⁷¹ It has been held by the Supreme Court that “The Tribunal as distinguished from the Court, exercises judicial powers and decides matters brought before it judicially or quasi judicially, but it does not constitute a court in the technical sense. Tribunal, according to the dictionary meaning, is a set of justice, and in discharge of its functions, it shares some of the characteristics of the court.”⁷² It is important to note that the tribunals differ from courts in an important way: not all its personnel may have legal training/certification or prior judicial experience. Further, the otherwise binding nature and scope of technical rules of procedure and evidence are often relaxed in case of tribunals.⁷³ In addition to the above, while judicial appointments in Courts of the lowest rung shall need to be made in consultation with the High Court in terms of the Constitution of India, no such consultation is needed for appointments made in tribunals.

⁶⁸ Section 36 (3) of the Nyaya Panchayat Bill, 2009

⁶⁹ Section 38 of the Nyaya Panchayat Bill, 2009

⁷⁰ In fact the Working Paper that formed the basis for the One Hundred Fourteenth Report of the Law Commission referred to Nyaya Panchayats as ‘altered system of administration of justice’ as it felt that “The psychological change that the rural poor would undergo by this alter system of administration of justice by their own peers in substitution of an alien system would be immeasurable. See Working Paper that formed the basis for the One Hundred Fourteenth Report of the Law Commission , 1985 at para 3.5

⁷¹ Wharton’s Law Lexicon, Fifteenth Edition, Universal Publishing Co., 2009

⁷² *Engineering Mazdoor Sabha v. Hind Cycles Ltd.*, AIR 1963 SC 874

⁷³ Report of the Committee on Nyaya Panchayats, Union Ministry of Panchayati Raj, Government of India October 2007

V

**OVERVIEW OF STATE LEVEL PROVISIONS ON NYAYA
PANCHAYATS/GRAM KUTCCHERY**

44. After the 73rd Constitutional Amendment, only five States in India provided for Nyaya Panchayat by law. They are – Bihar, Himachal Pradesh, Punjab, Uttar Pradesh, and West Bengal. Jammu and Kashmir had their old Act of 1958 providing for Nyaya Panchayats. A relatively recent study found out that amongst the states only in Himachal Pradesh Nyaya Panchayats are functioning satisfactorily.⁷⁴ It is also relevant to take note of the fact that States of Andhra Pradesh, Gujarat, Haryana and Karnataka made no provisions for Nyaya Panchayats in their post -73rd Amendment law, though they had the provisions in their earlier laws. Out of five States, providing for Nyaya Panchayats or its equivalent judicial system at grass-root level, three have adopted election as a mode of constituting Nyaya Panchayats while rest have adopted nomination or combination of nomination and election. A brief survey of these laws is useful for the purposes of the present study and is carried out in the paragraphs below.
45. The provisions of both the Himachal Pradesh Panchayati Raj Act, 1994 & Punjab Panchayati Raj Act, 1994 reveal that the Gram Panchayats in the states have also been entrusted with the judicial function of deciding and settling of disputes at the level of the Panchayats. The adjudication so far either by way of compromise or on merits by these Panchayats have rarely seen challenges before the law courts. As distinguished from both Himachal and Punjab, The Bihar Panchayat Raj Act, 2006 provides direct election of members as a mechanism for constitution of *Gram Kutchery* while keeping the same as a separate body and insulated from Gram Panchayat.⁷⁵ Thus, the Bihar model only differs from Himachal Pradesh & Punjab model to the extent that it provides a judicial body, separate from the executive body and thus is in accord with the mandate, expressed in Article 50 of the Constitution of India. Some provisions for *constitution of Gram Katchahry* and *election of Sarpanch and Panches* of the *Gram Katchahry* are useful to note as a ready reference and they are reproduced in the box below:

Box: Legal Provisions for Constitution of directly elected Gram Katchahry in Bihar

Section 90 of the Bihar Panchayat Raj Act, 1993 provides for “*Constitution of Gram Katchahry and election of Sarpanch and Panches*” as under:

(1) There shall be a Gram Katchahry in every Gram Panchayat area for the purposes of discharging the judicial functions imposed upon it by or under this Act and the Gram Katchahry shall consist of-

⁷⁴ The study said that “They have generated so much faith among the rural people that HP government gave them matrimonial jurisdiction in addition to normal civil and criminal jurisdictions.” Whereas “West Bengal did not give operational effects to its nyaya panchayat provisions. They only embellish the statute.” See Bandopadhyay, D. *Nyaya Panchayats: The Unfinished Task*, Economic and Political Weekly, December 17, 2005.

⁷⁵ Section 88(1) (b) of the Act.

- (a) A Sarpanch of the Gram Katchahry elected under the provisions of this Act, and
(b) Such number of directly elected Panches as may be notified from time to time by the District Magistrate and each Panch representing as nearly as five hundred population of the Panchayat area. Its territorial constituency will be the same as those of the members of the Gram Panchayat.
(2) Each territorial constituency shall directly elect one Panch in the manner prescribed under the provisions of this Act.
(3) Every Gram Katchahry constituted under the provisions of this section shall be published in the District Gazette and shall come into force from the date fixed for its first meeting.”

“Section 93. *Election of Sarpanch and Up-Sarpanch* - (1) A Sarpanch of the Gram Katchahry shall be directly elected by a majority of votes by the voters enrolled in the voters’ list of that Gram Panchayat.

Section 94 holds provision for-“Assistance to Gram Katchahry” including:

- (1) There shall be a secretary in every Gram Katchahry to be appointed in the manner as may be prescribed.
(2) There shall be a person called Nyaya Mitra having at least a three year Law Degree from a recognised Institution or University to assist the Gram Katchahry or any bench thereof in the discharge of its duties. Such Nyaya Mitra shall be appointed in the prescribed manner.
(3) In order to enable the Gram Katchahry to perform its functions effectively, the State Government shall, in the prescribed manner, make arrangements for training of the Sarpanch, the Up-Sarpanch and Panches of the Gram Katchahry.”

Source: The Bihar Panchayat Raj Act, 2006.

It is interesting to note that the Bihar model of directly elected Gram *Katchahry* is closest to the directly elected Nyaya Panchayat provided under the Nyaya Panchayat Bill, 2009. More recently State of Bihar has also notified Bihar Gram Katchahry Conduct Rules, 2007 under The Bihar Panchayat Raj Act, 2006. These 2007 Rules in Bihar deserves to be closely seen as it provides elaborate procedures for civil and criminal cases before the Gram Katchahry as well as well detailed procedure for Appeal before the Bench of Gram Katchahry. It is also useful to refer to the Bihar Gram Katchahry Nyaya Mitra (Employment, Service Conditions and Duties) Rules, 2007 notified under The Bihar Panchayat Raj Act, 2006.⁷⁶

46. Jammu and Kashmir Panchayati Raj Act, 1989 and Jammu and Kashmir Panchayati Raj Rules, 1996 prescribes for a procedure of nomination by the prescribed authority (Director Rural Development) to constitute the *Panchayati Adalat* out of a panel prepared and recommended by the *Halqa Panchayat* out of its electorate.⁷⁷ Thus, even though on the face of it the mechanism appears to be that of nomination, a closer scrutiny shows that in the system the prescribed authority has not much of options and he has to pick and choose from a panel provided by elected members of *Halqa Panchayat*.

⁷⁶ These Rules give effect to the provision under The Bihar Panchayat Raj Act, 2006 that says that “There shall be a person called Nyaya Mitra having at least a three year Law Degree from a recognised Institution or University to assist the Gram Katchahry or any bench thereof in the discharge of its duties. Such Nyaya Mitra shall be appointed in the prescribed manner.” See section 94(2) The Bihar Panchayat Raj Act, 2006

⁷⁷ Section 48(2) of the Act read with Rule 110(1) of the Rules.

47. Similar provisions exist for the establishment of Nyaya Panchayat in the state of Uttar Pradesh. The Uttar Pradesh Panchayat Raj Act, 1947 read with the Uttar Pradesh Panchayat Raj Rules, 1947 provides that the members of the Nyaya Panchayat are to be appointed by the prescribed authority (Sub-Divisional Officer) from amongst the members of Gram Panchayat.⁷⁸ The Act and Rules further provide that in case the requisite number of Gram Panchayat members is not available, the *Gaon Panchayat* proposes names from amongst the members of *Gaon Sabha* and the District Magistrate then fills the vacant seats from the names so proposed. Thus the U.P. Act provides for a combination of election and nomination as a mode of appointing members of Nyaya Panchayat.
48. A detailed comparative chart on key features of Nyaya Panchayat Bill, 2009 when compared with the existing state laws including the *Uttar Pradesh Panchayat Raj Act, 1947*, *The Bihar Panchayat Raj Act, 2006*, *West Bengal Panchayati Raj Act, 1973* and *Himachal Pradesh Panchayati Raj Act, 1994* and *The Panchayati Raj Act, 1994* is annexed to the present report as **Annexure A**. The comparative chart shows that state legislations establishing Nyaya Panchayats have substantially similar, but in many cases divergent provisions also, on the Nyaya Panchayats. It is notable that most state legislation has provisions giving powers of supervision to the Chief Judicial Magistrate or the District Judge over the processes and decisions of the Nyaya Panchayat. No such supervisory jurisdiction either to the Chief Judicial Magistrate or the District Judge rest under the Nyaya Panchayat Bill, 2009.
49. A review of case laws of the High Court of Bihar as also of the High Courts of Himachal and Punjab makes it clear that very rarely decisions of *Gram Katchahry/ Nyaya Panchayats* have been challenged in the law courts. Thus, generally speaking, it can safely be said that the parties to such *lis* in majority cases came out satisfied and have received substantial justice. If we go just by the numbers perhaps a larger number of cases against the Nyaya Panchayats have come before the Allahabad High Court in Uttar Pradesh but here again instances where the Court found fault with the processes and decisions of the Nyaya Panchayat in the state have been few and far between.

⁷⁸ Section 43(1) of Uttar Pradesh Panchayat Raj Act, 1947 read with Rule 83(1) of Uttar Pradesh Panchayat Raj Rules, 1947.

VI

SPECIFIC SUGGESTIONS FOR AMENDMENTS FOR FURTHER STRENGTHENING THE NYAYA PANCHAYAT BILL, 2009

50. The present report in its first four sections have identified essential premises of the Nyaya Panchayat Bill, 2009 and shown that each of the core attributes of the Nyaya Panchayats as proposed under the Bill are in accordance with the letter, spirit and mandate under the Constitution of India. The Bill in its present form can be said to be a legally robust proposed law. Nevertheless, in this section of the report an effort is made to identify specific provisions/amendments that may be considered for incorporation under the Nyaya Panchayat Bill, 2009 for further strengthening of the Bill. In the paragraphs below the reasons for these specific suggestions are briefly mentioned, followed by a possible draft of the provisions and the place where it could be introduced under The Nyaya Panchayat Bill, 2009. The Amendments proposed are not in any order of importance but to the extent possible as they figure sequentially under The Nyaya Panchayat Bill, 2009.
51. Provision for a No-Confidence motion against the Nyaya Panchayat Pramukh: It has been pointed above in this report that as a participatory forum for resolution of dispute at the grassroots level the success of Nyaya Panchayat critically hinges on the fact that the Nyaya Panchas constituting the Panchayat inspire the confidence of the village people. The direct election of the Nyaya Panchayats is nothing but a vote of confidence in their favour. Given the nature of conciliation, mediation and settlement such people with the vote of confidence in their favour are likely to be most effective. In this context it is useful to note that all such states which provide election as mode of appointment of members does also hold provision for a no-confidence motion against the Nyaya Panchayat head. Although the Bill on Nyaya Panchayat, 2009, holds provision for disqualification of members as well as related provisions in section 3 of the Bill, yet it is advisable that the voters, who have been given the right to elect members of Nyaya Panchayat must also be given the right to vote them out by way of no-confidence motion and if any such provision is incorporated in the Bill, it shall further make the system more accountable and transparent.

Possible Draft of the Provision:

“Removal of Nyaya Panchayat Pramukh by no confidence motion—Every Nyaya Panchayat Pramukh shall be deemed to have vacated his office forthwith if a resolution expressing want of confidence in him is passed by a simple majority of the total number of voters of the Gram Panchayat, or a group of Gram Panchayat as the case may be, at a meeting especially convened for the purpose. The requisition for such a special meeting shall be signed by not less than one fifth of the total number of voters of the Gram Panchayat, or group of Gram Panchayat as the case may be, and shall be delivered to the District Panchayat Raj Officer. The District Panchayat Raj Officer shall, within seven

days from the date of receipt of the requisition, fix a date for the meeting of Gram Panchayat at any place within the Gram Panchayat area. The meeting shall be held within fifteen days from the date of issue of the notice of the meeting. The meeting shall be presided over by the District Panchayat Raj Officer :

Provided that during the first two year period of the tenure, no such motion of no confidence shall be moved against the Nyaya Panchayat Pramukh.

Provided further that if the motion of no confidence against the Nyaya Panchayat Pramukh is once rejected, no fresh motion of no confidence against the Nyaya Panchayat Pramukh shall be brought within a period of one year from the date of such rejection of the motion;

Provided further that no motion of no confidence against Nyaya Panchayat Pramukh shall be brought during the last six months of the term of Nyaya Panchayat.”

The provision could be inserted at the end of Chapter II after the existing Section 8 of *The Nyaya Panchayat Bill, 2009*.

- 52. Strengthening provisions in cases where Nyaya Panchas may abstain from being part of Nyaya Panchayat proceedings:** The existing provision under the Nyaya Panchayat Bill, 2009 makes clear that No Panch shall participate in proceedings where any party is either “a near relation or business partner” [Section 6(1)]. These two categories can be defined and explained further to include “any near relation, employer, employee, debtor, creditor or partner.” Besides, what constitutes a near relation can be problematic in village societies so it is best to define them clear as is done under the Himachal Pradesh Panchayati Raj Act, 1994.

Possible Draft of the Provision:

Amending Section 6(1) of the Nyaya Panchayat Bill, 2009 by substituting the words “a near relation or business partner” with “any near relation, employer, employee, debtor, creditor or partner.”; and adding an Explanation at the end of the section as follows:

“Explanation.- ‘near relation’ means father, grand father, father-in-law, maternal or paternal uncle, son, grand-son, son-in-law, brother, nephew, brother-in-law, wife, sister , sister’s husband,mother, daughter, niece, month-in-law, daughter-in-law and husband.”

- 53. Explaining further the ‘Preventive Jurisdiction’ of the Nyaya Panchayat:** While the *Civil Jurisdiction, Criminal Jurisdiction* and *Additional Jurisdiction* of the Nyaya Panchayats have been explained and provided for in detail under the Nyaya Panchayat Bill, 2009, the “*Preventive Jurisdiction*” of the Nyaya Panchayats have been mentioned without making clear as to how the Nyaya Panchayat can give effect to this jurisdiction. The Bill says that “Nyaya Panchayat shall have preventive jurisdiction in matters of public disharmony or causing communal tension [Section 13(3)].” There are specific provisions in the Nyaya Panchayat in Uttar Pradesh and Gram Katchahry in Bihar suggesting what they can do in exercise of this jurisdiction. The provision

under The Bihar Panchayat Raj Act, 2006 in this regard is useful and is recommended for possible incorporation under The Nyaya Panchayat Bill, 2009.

Possible Draft of the Provision:

“Order for Securing Peace and Public Tranquillity - (1) Whenever the Nyaya Panchayat Pramukh has reason to believe that a breach of the peace or disturbance of the public tranquillity is imminent and immediate prevention or speedy remedy is desirable, he may, by a written order stating the material facts of the case and served in the prescribed manner, direct any person to abstain from a certain act or to take action with respect to a certain property in his possession or under his management.

(2) As soon as the Nyaya Panchayat Pramukh has issued an order under sub-section (1) he shall submit the proceedings of the case to the Sub-divisional Magistrate who may either confirm the order or discharge the notice after hearing the parties to the dispute, if they so desire.

(3) An order passed under sub-section (1) shall remain in force for thirty days.

(4) Any order passed under sub-section (1) shall be promptly given effect to by the concerned local authorities.”

The provision could be inserted at the end of Chapter IV after the existing Section 21 of *The Nyaya Panchayat Bill, 2009*.

54. Provision reaffirming the need for Nyaya Panchayat to make evidence based Orders:

Although a close reading of *The Nyaya Panchayat Bill, 2009* makes clear that Nyaya Panchayats have to issue Orders that are based on evidence a specific section/subsection reaffirming this aspect will be useful. In many situations a specific reminder that it is the duty of Nyaya Panchayat to ascertain the facts of every civil or criminal case by hard evidence would serve in making the Nyaya Panchayat proceedings more robust legally.

Possible Draft of the Provision:

“Procedure and power to ascertain, truth – (1) The Nyaya Panchayat shall receive such evidence in a civil case or criminal case as the parties may adduce and may call for such further evidence as, in their opinion, may be necessary for the determination of the points in issue. It shall be the duty of the Nyaya Panchayat to ascertain the facts of every civil case or criminal case before it by every lawful means in its power and thereafter to make such decree or order with or without cost, as to it may seem just and legal. It may make local investigation in the locality to which the dispute relates. It shall follow the procedure prescribed by or under this Act.”

The provision could be inserted at the end of Chapter IV after the existing Section 21 of *The Nyaya Panchayat Bill, 2009*.

55. Provision for Contempt of Nyaya Panchayat: The *Nyaya Panchayat Bill, 2009* have no provision for Nyaya Panchayats to deal with a situation where it is intentionally

insulted. Thus it is useful to introduce a section on the Contempt of Nyaya Panchayat. Other state laws have this provision. This is more so as the Courts have also upheld the power of the Nyaya Panchayat to deal with its contempt.

Possible Draft of the Provision:

“Contempt of Nyaya Panchayat – (1) If any person intentionally offer any insult a Nyaya Panchayat or any member thereof, while it is sitting in any stage of judicial proceedings in its or his view or presence or refuses to take oath duly administered or sign a statement made by the said persons when legally required to do so, the Nyaya Panchayat may at any time before rising on the same day take cognizance of the offence and sentence the offender to a fine not exceeding two hundred rupees.

(2) The fine imposed under sub-section (1), shall be deemed to be a fine imposed in a criminal case.”

The provision could be inserted at the end of Chapter IV after the existing Section 21 of *The Nyaya Panchayat Bill, 2009*.

56. Strengthening Provision for Settlement between Parties to a Dispute: One of the points that need emphasis while explain the essential premises of The Nyaya Panchayat Bill, 2009 is that as a dispute redressal mechanism in local village society it is interested more in settlement and conciliation of disputes rather than its adjudication. To reflect this attribute of the Nyaya Panchayat better, it is suggested that the provision on Settlement that at present is Section 31 of the Bill may be brought forward as the opening section of Chapter V [Dispute Resolution] of The Nyaya Panchayat Bill, 2009. This rearrangement will also logically show the endeavour of the Nyaya Panchayat from ‘Settlement’ to ‘Conciliation’ to finally, ‘Adjudication’. In addition to the above, the provision on Settlement may also be strengthened as suggested below:

Possible Draft of the Provision:

The existing Section 31(1) of The Nyaya Panchayat Bill, 2009 which at present reads as:

“(1) On a claim being made, the Nyaya Panchayat may invite parties to engage in informal discussions with a view to arriving at a settlement.”

May be changed to:

“(1) On a claim being made, the Nyaya Panchayat may invite parties to engage in informal discussions with a view to arriving at a settlement *and in so doing may do all such lawful things as it thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement*”

57. Provision for Training of Nyaya Panchayat Pramukh and Nyaya Panchas: It is useful to specifically provide for training of Nyaya Panchayat Pramukh and Nyaya Panchas

once they are elected to their office under The Nyaya Panchayat Bill, 2009. It is arguable that while there would sure be need to build capacities of the Nyaya Panchayat Pramukh and Nyaya Panchas, a provision for the same need not be put in the Bill. However, given that the need for training will be vital and central to the success of the Nyaya Panchayats there is no harm in specifically incorporating a provision under the Bill in this respect. The Bihar Panchayat Raj Act 2006 has a provision for training of Gram Kutchahry and it is worth emulating across the country.

Possible Draft of the Provision:

“Training of Nyaya Panchayat Pramukh and Nyaya Panchas : In order to enable the Nyaya Panchayat to perform its functions effectively, the State Government shall, in the prescribed manner, make arrangements for training of the Nyaya Panchayat Pramukh and Nyaya Panchas of the Nyaya Panchayat.

The provision could be inserted in Chapter VII after the existing Section 46 of *The Nyaya Panchayat Bill, 2009*.

- 58.** In addition to all the specific suggestions for Amendments/ insertion of new provisions under The Nyaya Panchayat Bill, 2009 there are other aspects that can be thought through to strengthen the Bill. This includes possibly a fixation of time within which the District Nyaya Panchayat Appellate Authority shall be obliged to give its decision on appeal from the Nyaya Panchayat (At present there is only a ‘best effort’ provision [Section 38(6)]); and a provision enabling the Nyaya Panchayat to *suo moto* invoke the Ombudsman under Section 39(5) of the Bill (this aspect seemed to have been missed under the present Bill).

VII

KEY INFERENCES AND RECOMMENDATIONS

The major inferences and recommendations of the study to strengthen Nyaya Panchayats in India are summarized as under:

NYAYA PANCHAYATS AND THE CONSTITUTIONAL IDEAL OF JUSTICE

- Improving access and administration of justice to all citizens of the country is a constitutional ideal and mandate with the Government of India. The Draft Nyaya Panchayat Bill, 2009 responds to this constitutional mandate. The proposal for constitution of Nyaya Panchayats throughout the country as contained in the Draft Nyaya Panchayat Bill, 2009 deserves to be seen as a dynamic and strategic mechanism for redressal of legal disputes, and for delivery of justice to the village people, taking into account the socio-economic conditions prevailing in the country. The Bill also responds to *the mandate to promote Justice 'in all possible ways' under Article 39A of the Constitution of India.*
- “*Substantial Justice* is an appropriate description of what is sought by hundreds of societies” in the villages across the country. Committees of the Government of India in the past have also emphasized that if distributive justice is to become a reality for those in deprivation and poverty, “Nyaya Panchayats at the village level is the only answer.” The strategies for seeking justice - and the means to redress conflicts in local village societies - rest with the leaders and enlightened people of the same local village society. This is one of the essential premises of the Draft Nyaya Panchayat Bill, 2009.
- An adequate account of a dispute requires a description of its total social context - its genesis, successive efforts to manage it, and the subsequent relationship between the parties. In settling such disputes in villages lay persons - and not necessarily law persons - have a vital and decisive role to play. This role is recognized and is integral to the scheme of the proposed Nyaya Panchayat Bill, 2009.
- Nyaya Panchayats being a dispute redressal system and being local institutions, staffed by local community members, and answerable to local attitudes and locally defined needs can provide operative effect to the usage and practice of ‘*law from below*’. Nyaya Panchayats as an institution has the potential to reshape our legal culture by making it more ‘people-oriented’, while augmenting the capacity of the legal system to deliver substantive justice across the country.

KEY POINTS AND SAFEGUARDS BUILT IN THE NYAYA PANCHAYAT BILL, 2009

- The preambular emphasis of the Nyaya Panchayat Bill 2009 points out the Nyaya Panchayats represent ‘a decentralized dispute redressal system’ and it needs to be defined and seen as such. Equating them with regular courts has caused confusion in

the past that needs to be done away with. The preamble to the Bill makes the objective further clear by stating that “*establishment of a decentralized dispute redressal system through mediation, conciliation and compromise at the grass-root level requires to be institutionalized with the involvement of the people living in that particular area*”.

- The Nyaya Panchayat Bill 2009 emphasizes the pre-eminent role of conciliation and mediation in handling village level disputes as would be expected of any decentralized dispute redressal system.
- While modes of selection and appointment and of nomination can be conceived as possible ways of constituting a Nyaya Panchayat, Nyaya Panchayat Bill 2009 has chosen election as the mode for constituting these Panchayats. Recognising that this is the only mode which goes with the objectives of democratization of justice delivery mechanism adequate safeguards has been built in the Bill.

ASPECTS OF CONSTITUTIONALITY OF NYAYA PANCHAYATS

- One argument that is often made is that since the subject of “administration of justice” was not one of the listed items in the 11th Schedule to the Constitution that provided subjects with respect to which the powers and functions could be vested in the panchayats, it is clear that panchayats can have no role to play in this field. This argument is flawed for two reasons. One, list of items provided in the 11th Schedule is only illustrative and not exhaustive. Hence, non-listing of “administration of justice” would not debar panchayats from dealing with that subject. Secondly, and more importantly, under the Constitution the primary function of panchayats at each tier is “the preparation of plans for economic development and social justice” The inclusion of ‘social justice’ here makes it clear that administration and dispensation justice in local village societies is a constitutional mandate that rests with the Panchayats.
- The legislative competence of the Centre to enact a law on Nyaya Panchayats should be sourced to the entry of ‘Administration of Justice’ under Entry 11 A, Concurrent List. Confusion is often caused by also citing Entry 95, Union List that relates to “Jurisdiction and power of all courts...” for sourcing the Nyaya Panchayat Bill. This has contributed to giving an impression that Nyaya Panchayats can be equated with regular courts.
- Historically speaking, the ideology of separation of judicial from the executive power embodied in Article 50 was clearly one impulse that led to the creation of Nyaya Panchayat in states which did not have such separate bodies. Thus it clear that far from Nyaya Panchayats violating Article 50 of the Constitution these Panchayats were in fact constituted in response to it.
- There is nothing under the Nyaya Panchayat Bill, 2009 that is prohibited by the Constitution of India or is in conflict with it. Besides, the legislative scheme proposed under the Nyaya Panchayat Bill 2009 and provisions explained above are based on reasonableness and none of its essential features are arbitrary as each one has a direct

nexus with objective that the Bill seeks to achieve. Nyaya Panchayats are founded squarely on the constitutional ideal of justice and its essential features i.e. the establishing of a decentralized dispute redressal system, focus on conciliation and mediation and having elected *nyaya panchas* inspiring confidence of the village people are all central to the objective that the Bill seeks to achieve. The legal and constitutional policy adumbrated in the Nyaya Panchayat Bill 2009 answers the test of Article 14 of the Constitution of India.

- While there has been a series of judgments, especially at the levels of the High Courts, where the proceedings and decision of the Nyaya Panchayat has invited legal scrutiny, none of these judgments have held the institution of Nyaya Panchayat itself as unconstitutional. On the other hand, both the Supreme Court and the High Courts in different cases have respectively held that “The Constitution does not prohibit the establishment of Nyaya panchayats. On the other hand, the organization of the Nyaya panchayats will be in promotion of the directive principles contained in Article 39-A of the Constitution...” and that there is no illegality in the appointments on Panchas in the Gram Kutchery/ Nyaya Panchayats by way of election. Cases from the Patna High Court and the Punjab and Haryana High Court makes clear that the question as to whether conferring of judicial power on elected *panchas* is constitutional has been judicially answered in the affirmative.
- The other aspect that deserves notice from a survey of appeals/cases against the decision of the Nyaya Panchayat to the High Courts is that they are just very few in numbers. a comprehensive study of Nyaya Panchayats in 1997 also found out that it is only in 10 percent of *panchayat* judgments that parties moved the regular courts and in most cases, these higher courts have upheld the judgments of *nyaya panchayats*.⁷⁹ The findings above also show that the existing Nyaya Panchayats are proving to be effective vehicles in securing the constitutional ideal of justice.
- The objection to lay and elected Nyaya Panchayats are nothing more in the nature of unconstitutional prejudices is also affirmed by the judgment of the Punjab and Haryana High Court in 1957 wherein the Court categorically held that “The mere fact, therefore, that the Punjab Gram Panchayat Act, does not lay down any criteria for determining the qualifications of *panchas* who are later to exercise judicial functions would not contravene the provisions of the Constitution.”
- Observations of the Supreme Court have often been wrongly cited by critics to argue that Nyaya Panchas with no legal qualifications violates the legal position on the subject. While the Supreme Court sure prescribed three years' practice as a lawyer as essential qualification for recruitment of Judicial Officers at the lower rung a close look at the above judgment can show that it is completely erroneous to extend the said prescription to Nyaya Panchayats. In the specific context of *All India Judges Association case* before the Supreme Court the judicial appointment at the lowest rung referred to judicial officers like the Civil Judge-cum-Magistrate, First Class/Magistrate and First Class/Munsif Magistrate. While consultation with the High Court is constitutionally imperative for these judicial officers and for composition of the

⁷⁹ Mathur S.N., *Nyaya Panchayats As Instruments Of Justice*, 1st ed. (1997), p. 44

District Courts applying the same concept *pari-materia* for the Nyaya Panchayat system is not legal and proper besides violating the basic legislative scheme of the Nyaya Panchayat Bill 2009.

NYAYA PANCHAYATS AND INDEPENDENCE OF JUDICIARY AS A 'BASIC FEATURE' UNDER THE CONSTITUTION

- Case law of the Supreme Court makes clear that the exclusion of final say of the executive in the matter of appointment of Judges is the only way to maintain the independence of judiciary. Under the Nyaya Panchayat Bill, 2009 'the exclusion of the final say of the executive' in the matter of appointment of Nyaya Panchas is clear. Being directly elected by the people, and having its powers laid down by the legislature under a specifically enacted statute, it is safe to say that the appointments and functioning of Nyaya Panchayats are not controlled by the Executive in any way whatsoever.
- Even while the High Court has no role in election of the Nyaya Panchas its regulation and control of the Nyaya Panchayats is integral to the legislative scheme laid out in the Nyaya Panchayat Bill, 2009. The establishment of District Nyaya Panchayat Appellate Authority and an Ombudsman under the Bill is to be done by the state government on the recommendation of selection committee in each district of the state and such selection committee is chaired by a Judge of the High Court of the State nominated by the Chief Justice of the High Court.
- Right from the first decade of Indian independence the Report of the Law Commission of India (1958), the Study Team on Nyaya Panchayats (1962), the High Level Committee on Panchayati Raj of the Government of Gujarat (1972), the Working Paper that formed the basis for the One Hundred Fourteenth Report of the Law Commission (1985) and the Report of the Committee on Nyaya Panchayats submitted to the Union Ministry of Panchayati Raj (2007) has all clearly and consciously not regarded Nyaya Panchayat as judiciary in proper sense of the term but rather as 'tribunals' who have to 'inspire the confidence of villagers'. The tribunals differ from courts in an important ways: not all its personnel may have legal training/certification or prior judicial experience; the otherwise binding nature and scope of technical rules of procedure and evidence are often relaxed in case of tribunals; and while judicial appointments in Courts of the lowest rung shall need to be made in consultation with the High Court in terms of the Constitution of India, no such consultation is needed for appointments made in tribunals.

STATE LEVEL PROVISIONS ON NYAYA PANCHAYATS/GRAM KUTCHAHRY

- After the 73rd Constitutional Amendment, only five States in India provided for Nyaya Panchayat by law. Out of five States, providing for Nyaya Panchayats or its equivalent judicial system at grass-root level, three have adopted election as a mode of

constituting Nyaya Panchayats while rest have adopted nomination or combination of nomination and election.

- The provisions of both the Himachal Pradesh Panchayati Raj Act, 1994 & Punjab Panchayati Raj Act, 1994 reveal that the Gram Panchayats in the states have also been entrusted with the judicial function of deciding and settling of disputes at the level of the Panchayats. The Bihar Panchayat Raj Act, 2006 provides direct election of members as a mechanism for constitution of *Gram Kutchery* while keeping the same as a separate body and insulated from Gram Panchayat. Thus, the Bihar model only differs from Himachal Pradesh & Punjab model to the extent that it provides a judicial body, separate from the executive body and thus is in accord with the mandate, expressed in Article 50 of the Constitution of India. The Bihar model of directly elected *Gram Katchahry* is closest to the directly elected Nyaya Panchayat provided under the Nyaya Panchayat Bill, 2009.
- It is notable that most state legislation has provisions giving powers of supervision to the Chief Judicial Magistrate or the District Judge over the processes and decisions of the Nyaya Panchayat. No such supervisory jurisdiction either to the Chief Judicial Magistrate or the District Judge rest under the Nyaya Panchayat Bill, 2009.
- A review of case laws of the High Court of Bihar as also of the High Courts of Himachal and Punjab makes it clear that very rarely decisions of *Gram Katchahry/ Nyaya Panchayats* have been challenged in the law courts. Thus, generally speaking, It can safely be said that the parties to such *lis* in majority cases came out satisfied and have received substantial justice.

*SPECIFIC SUGGESTIONS FOR AMENDMENTS FOR STRENGTHENING
THE NYAYA PANCHAYAT BILL, 2009*

- The present report have identified essential premises of the Nyaya Panchayat Bill, 2009 and shown that each of the core attributes of the Nyaya Panchayats as proposed under the Bill are in accordance with the letter, spirit and mandate under the Constitution of India. The Bill in its present form can be said to be a legally robust proposed law. Nevertheless, in a separate section an effort is made to identify specific provisions/amendments that may be considered for incorporation under the Nyaya Panchayat Bill, 2009 for further strengthening of the Bill. These specific proposed Amendments include *Provision for a No-Confidence motion against the Nyaya Panchayat Pramukh; Strengthening provisions in cases where Nyaya Panchas may abstain from being part of Nyaya Panchayat proceedings; Explaining further the 'Preventive Jurisdiction' of the Nyaya Panchayat; Provision reaffirming the need for Nyaya Panchayat to make evidence based Orders; Provision for Contempt of Nyaya Panchayat; Strengthening Provision for Settlement between Parties to a Dispute; and Provision for Training of Nyaya Panchayat Pramukh and Nyaya Panchas.*
