Vidhi

Centre For Legal Policy

BETTER LAWS. BETTER GOVERNANCE

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Dear Sir/Ma'am,

By way of introduction, I am Dr. Arghya Sengupta, the Research Director of Vidhi Centre for Legal Policy, a legal policy think tank with offices in New Delhi and Bangalore. Vidhi does independent research and assists the Government of India and State Governments in the drafting of legislation and regulations in law and technology, financial sector regulation, judicial reforms and human rights. Some of Vidhi's key projects include assisting the Committee of Experts led by Justice Srikrishna on a data protection framework for India, Net Neutrality regulations enforced by the telecom regulator and the Insolvency and Bankruptcy Code passed by Parliament. It has further undertaken extensive research and produced reports on significant governance issues such as the working of the NDPS Act in Punjab and tackling air pollution in New Delhi. It comprises 53 lawyers with a founding team of early career academics from Oxford and doctoral candidates from Harvard.

Vidhi is committed to producing innovative ideas to resolve systemic governance issues. As part of our endeavour, we have come up with a list of ideas that go beyond traditional electionspeak and provide new solutions to existing problems. The ideas range from issues of structural reform to progressive ideas that are essential for building a modern India. They broadly fall under the following two themes:

- Making our Public Institutions Efficient
  - Introducing a Judicial Transparency Law
  - Creating a Unified Investigative Agency for Economic Offences
  - Reforming the CBI

- Moving towards a Modern, Progressive and Inclusive India
  - Reforming Indian Marriage Laws
  - Making our laws Accessible
  - Abolishing laws that discriminate against persons with disabilities
  - Providing primary education that is inclusive of all children

The ideas have been detailed in the Annexure attached to this letter. We feel that these ideas are truly bipartisan and should find a place in every political party's manifesto. They go beyond hackneyed political issues and present new and refreshing perspectives on what a manifesto should include. We hope that these ideas are included in your manifesto for the upcoming General Elections. Please feel free to reach out to us in case of any further queries on these ideas.

Warm regards,

Arghya Sengupta

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Annexure: New Ideas for a New Manifesto

I. MAKING OUR PUBLIC INSTITUTIONS EFFICIENT

A] Introducing a Judicial Transparency Law

While the Right to Information Act, 2005 (RTI Act) has brought about transparency into government functioning, the judiciary, through a series of judgments, has largely shielded itself from any scrutiny under the RTI Act. The unsettled law leads to three major issues. *First*, the lack of disclosure of assets of judges in the higher judiciary; *second*, the lack of transparency in appointments to the higher judiciary that take place through the collegium; and *third*, the opacity in accessing judicial records under the RTI Act. Other issues include the differing RTI rules across High Courts, the failure of the Supreme Court to notify its RTI rules, and the lack of a system that provides meaningful judicial statistics.

To resolve these systemic issues, a transparency law targeted exclusively at the judiciary should be enacted to tackle the issue of transparency at all three levels: district courts, the High Courts and the Supreme Court. This would provide a strong right to the citizens that can be asserted against the judiciary, and will be more effective than the present RTI framework in its application to the judiciary.

Implementation

The proposed judicial transparency law should include the following:

- Transparency in asset disclosure, by mandating proactive disclosures as a requirement for judicial appointment.
- Transparency in judicial appointments, by listing a well-defined metric including indicators such as age, seniority, merit and integrity that is made public prior to judicial appointment.
- Accessibility of judicial records, by empowering common citizens with a right to directly access judicial records in a simple and convenient manner.
- Publication of judicial statistics, by mandating all judicial institutions to publish annual statistics on disposal and pendency of cases along with annual reports.
- Publication of minutes of all administrative committees within the High Courts, by requiring proactive publication of the same.

B] Creating a Unified Investigative Agency for Economic Offences

The responsibility of investigation of economic offences in India is currently fragmented into various government agencies, sectoral regulators and the economic offences wing of the police. The Serious Fraud Investigation Office, Enforcement Directorate, Central Bureau of Investigation, Securities Exchange Board of India, Reserve Bank of India, Pensions Fund Regulatory and Development Authority of India, Insurance Regulatory and Development Authority of India, etc., all have jurisdiction to investigate various economic offences.

Though this approach aids in providing expertise, it may often cause multiple investigations by different regulatory bodies. This leads to duplication of work and, consequently, increases expenditure of public resources. It may also impose an undue burden on the subject to participate in investigations by multiple agencies. Further, certain offences arising out of common facts may fall within the regime of different

regulators. To address this, the merits of creating a unified investigation agency for economic offences may be considered. Such an agency shall aid in making the investigation procedure uniform, curtailing duplicity of work, and providing a specialised cadre of investigators. It shall also reduce the burden on the subject by avoiding multiple investigations and thus promote ease of doing business.

Implementation

- A committee should be set up to propose a model for a unified investigation agency for economic offences. This committee may consist of representatives of the various existing financial sectoral regulators and investigation agencies.
- The discretion to choose the matters to investigate and to prosecute must remain with sectoral regulators or other authorities which presently have such power. Safeguards should be built in to ensure timely investigation by the proposed investigation agency.
- Cooperation and coordination mechanisms may be built to enable information sharing between the regulatory bodies and the proposed unified investigation agency.

C] Reforming the CBI

The Central Bureau of Investigation (CBI) does not have adequate statutory backing, which has led to questions being raised regarding its legal status. It was established by a Central Government resolution in 1963 and currently operates as per the Delhi Special Police Establishment Act, 1946. Apart from the validity of its establishment, there are problems regarding its functioning as well. The CBI has jurisdiction only over union territories, which can be extended to cover states only with the latter's consent. States have in the past withheld this consent, leading to courts superseding state consent in certain cases and directing the CBI to take over investigations. The present constitutional and statutory framework does not provide any guidance regarding the kinds of cases that the CBI should investigate, while also resulting in delays and centre-state friction.

To resolve these issues, first, Parliament should enact a dedicated CBI law to conclusively resolve concerns regarding the manner of the CBI's establishment. This law should also deal with other contentious issues regarding the CBI's organisational structure, its charter of functions and its superintendence and oversight. Second, "federal offences" should be included in the Union List of the Constitution, which would enable the proposed CBI law to designate certain federal offences based on appropriate criteria laid down in the statute itself (for example, offences which have inter-state implications). The CBI should have primary jurisdiction regarding the investigation of such offences, meaning that state consent would be unnecessary for this category of cases. If the CBI chooses not to intervene, then the state police can proceed with the investigation. This would clearly demarcate the respective roles of the CBI and state police, and enable the former to function efficiently and within the federal constitutional framework.

Implementation

- Parliament should enact a law to provide statutory backing to the CBI. The law should specify the CBI's organisational structure, charter of functions, and superintendence and oversight.
- Through a constitutional amendment, Entry 93 of the Union List should be amended to read as "Offences against laws with respect to any of the matters in this List, and federal offences".

II. MOVING TOWARDS A MODERN, PROGRESSIVE AND INCLUSIVE INDIA

A] Reforming Indian Marriage Laws

The Special Marriage Act, 1954 (SMA) was a radical departure from existing religion-based personal laws and intended to facilitate inter-caste and inter-religious marriages. Enacted as a modern marriage law in the 1950s, it explicitly recognised 'marriage between any two persons', and for the first time in the Indian legal context acknowledged the independent identity of an individual outside of traditional community identity. The SMA's vision of marriage, however, continued to be informed by traditional views of marriage such as overarching community interests in marriage, the binary of a breadwinner/householder and stereotypical notions associated with gender identity amongst others. With changing societal mores and developments in the rights jurisprudence, underlying assumptions of the SMA represent an outdated understanding of marriage law.

Thus a new law needs to be enacted that not only treats marriage as an equal partnership but also factors in Indian social realities such as power imbalances between genders and the lived experiences of persons in negotiating relationships. An equal vision for a new law may entail legal recognition of relationships between persons irrespective of gender, identity or sex with no difference in the age of consent. Provisions reflecting social realities such as post-separation support of the vulnerable spouse should also be part of such a law. Existing problematic provisions such as provisions for notice period and the remedy for restitution of conjugal rights must be removed. At the same time, progressive concepts such as irretrievable breakdown and community of marital property must be considered.

Implementation

- Repeal the SMA and enact a comprehensive new and progressive law that furthers the rights of persons entering into marriage, while being in tune with Indian social realities.
- In the context of relationships outside the male-female binary, views of the LGBTQ+ community must be considered while formulating the scope and contours of the legal recognition of such relationships. Thus a law should only be enacted after extensive public consultations with all concerned stakeholders to account for diverse viewpoints and interests.

B] Making India's laws accessible to the citizenry

Access to free, accurate and comprehensive text of laws in India is challenging for a majority of Indian citizens. Books are published containing the bare act, but they can become quickly outdated, are expensive to access, inaccurate, or at times, simply unavailable. While text-based PDFs of laws exist, they lack the ability to hyperlink to specific portions and users are forced to manually read through the table of contents or an index and then proceed to that section. Furthermore, these scans succumb to the same faults of the printed word and are hard to update when changes happen, resulting in a scan of the update uploaded as a new document. The legal system is an intricate structure of laws, rules, regulations, notifications etc. which cannot be treated like a collection of words where one searches for the occurrence of a term. Yet, such cross-linking of laws and rules is not available in printed versions. Hyperlinks to specific sections and subsections of the law and judgements would vastly aid in more accurate search results too as algorithms can find specific portions of the law that apply to a search term and give greater context to the reader who is interpreting the law.

It is in this context that machine-readable laws become necessary. Instead of opting for a new/custom format, opting for a widely used open-source solution that has plenty of documentation and support is key. Markdown syntax, a lightweight markup language with plain text formatting syntax that is designed to easily convert text to html and many other formats, meets this requirement. In *Union of India* vs *Vansh Sharad Gupta*, the High Court of Delhi has supported the suggestion of creating technical standards for the publication of all legislative documents. The Court has also mentioned the relevant entities who can undertake the responsibility of implementing this.

Implementation

- The Ministry of Information and Technology and the Ministry of Law and Justice should do a beta test for investigating the feasibility of using markdown syntax for publishing Indian laws.
- NITI Aayog should be the agency overseeing the process, since this is an extension of para 19.6 of their three-year action agenda. They can also collaborate with the private sector to get external experts to consult on the project.

C] Abolishing laws that discriminate against persons with disabilities

The Rights of Persons with Disabilities Act, 2016 (RPWD Act) recognises a broad range of rights and entitlements including the right to equality and non-discrimination, the right to community life, reproductive rights and access to justice. Additionally, it imposes obligations on the appropriate government to ensure access to education and employment for persons with disabilities. Despite these statutory guarantees, persons with disabilities continue to face discrimination due to the inconsistency of other laws with the RPWD Act. To illustrate further, although section 3 of the RPWD Act states that no persons with disability shall be discriminated on the ground of disability, this prohibition is flouted across hundreds of central and state laws, specifically in the context of persons with hearing and speaking impairments. There are provisions that disqualify them from contesting for certain posts, deny them voting rights, or permit their removal from certain posts, etc. Also, other laws that similarly discriminate against persons affected by leprosy and persons with intellectual disabilities remain in our statute books. Such discrimination violates the fundamental right to equality and dignity of such persons and is not proportionately linked to any legitimate aim.

The continued existence of such other laws in the statute books is problematic because section 96 of the RPWD Act states that the provisions of the RPWD Act are in addition to, and not in derogation of, the provisions of any other law for the time being in force.

Implementation:

- Carry out a comprehensive mapping exercise to identify laws that discriminate against persons with disabilities and amend them appropriately to ensure that they are aligned with the RPWD Act, 2016.
- To this end, direct the Chief Commissioner for Persons with Disabilities to exercise her powers under section 75 of the RPWD Act and identify provisions of laws inconsistent with the RPWD Act and recommend necessary corrective action.
- Ensure that the draftsmen of the Legislative Department (Ministry of Law and Justice) undergo sensitisation/training sessions so that provisions that discriminate against persons with disabilities are not transplanted wholesale to new laws.

D] Providing primary education that is inclusive of all children

At present, the rights of children with disabilities to access primary education is not only governed by the Right to Education Act, 2009, but also by the Rights of Persons with Disabilities Act, 2016 (RPWD Act). While the RTE Act and the RPWD Act may be read harmoniously to argue for a substantive right to inclusive primary education for children with disabilities, there are certain inherent contradictions that persist in both laws. For instance, while the RPWD Act recognises the concept of inclusive education, the RTE Act permits children with severe disabilities to opt for home-based education. In practice, this provision has been used as a ground for denying children with disabilities admission into mainstream schools.

Further, neither law has adopted a comprehensive approach towards building an ecosystem that would ensure meaningful implementation of the mandate of inclusive education. This premise is reinforced in the absence of (a) minimum norms and standards for schools to become 'inclusive'; (b) posts for special educators to be staffed at such schools; (c) obligation on the Academic Authority to create an inclusive curriculum and evaluation procedure in the RPWD Act.

Implementation:

- Evolve a comprehensive Inclusive Education Policy that develops an inclusive ecosystem including a) infrastructural norms and standards for schools; b) trained cadre of qualified inclusive education experts; and c) appropriate curriculum and evaluation methods.
- Such Inclusive Education Policy should specify the manner in which the models of home-based education (under the RTE Act) and special schools (under the RPWD Act) will be implemented.
- Make appropriate amendments to the RTE Act to ensure implementation of the right to inclusive primary education for all children, and to ensure harmonisation with the RPWD Act, 2016.
- Take steps to bring all schools under the Ministry of Human Resource Development, including special schools, since expertise in the field of education vests with it, and not the Ministry of Social Justice and Empowerment.