TOWARDS

THE RULE OF LAW

25 LEGAL REFORMS FOR INDIA

2019

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Centre for Legal Policy

Towards the Rule of Law

25 LEGAL REFORMS FOR INDIA

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This briefing book *'Towards the Rule of Law: 25 legal reforms for India'* is an organisation-wide publication of the Vidhi Centre for Legal Policy.

Vidhi Centre for Legal Policy is an independent think-tank doing legal research to make better laws and improving governance for the public good.

Foreword

by **Justice M.N. Venkatachaliah**

Former Chief Justice of India

Bengaluru. May 28, 2019

Vidhi Centre for Legal Policy in its publication "Towards the Rule of Law: 25 Legal Reforms for India" advocates twenty-five legal reforms for good governance. The recommendations are the result of an analysis of the extant problems and evaluation of the appropriate options of alternative remedial measures. The key issues considered cover the entire range of problems of contemporary relevance and urgency. They are well-thought and, if implemented, would assure a better society and a better nation.

The 21st Century will be a stunning period of unprecedented technological exploits. Everything is set to change and humanity would indeed need to adopt new ways of thinking if it is to survive in a world divided by technology and poverty and where the prosperity of nations is inextricably inter-linked with the pursuit of technological excellence. In a recent book on "21 Lessons for the 21st Century", the author says in the introduction:

> *"In a world deluged by irrelevant information, clarity is power. In theory, anybody can join the debate about the future of humanity, but it is so hard to maintain a clear vision. Frequently, we don't even notice that a debate is going on, or what the key questions are. Billions of us can hardly afford the luxury of investigating, because we have more pressing things to do."*

Research organisations like Vidhi do this work for the benefit of the society. They ring the alarm bells. Each of the twenty-five identified areas that are dealt with in this Briefing Book represent relevant, urgent and 'here and now' problems. The analysis is lucid and the suggested remedial action is essential and appropriate, particularly those on judicial reforms.

In 'development' discourse there are two narratives: one that pitches for ruthless economic growth disregarding everything inconsistent with it; the other which speaks of a more humane approach that emphasises the view that social progress, such as improvements in education and health, is the spur for better economic performance.

Hernando De Soto in his book "The Mystery of Capital" speaks of the 'savings' of the poor in third world countries, which he estimates at 9.3 trillion dollars. He says that it is very nearly as much as the total value of all the companies listed on the main stock exchanges of the world's twenty most developed countries: New York, Tokyo, London, Frankfurt, Toronto, Paris, Milan, the NASDAQ and a dozen others. It is more than twenty times the total direct foreign investment into all third world and former communist countries in the ten years after 1989, forty-six times as much as all the World Bank loans of the past three decades, and ninety-three times as much as all development assistance from advanced countries to third world countries in the same period. The author sends out the stirring message that the source of that prosperity is not foreign aid, but lies in our own unexplored backyard. These issues have generated great debates and will continue to do so.

But 'Good Governance' is the expression and outcome of good policies and practices. Vidhi has shown the way and each of the 25 ideas is sterling in its worth.

One only hopes that governments listen.

Introduction

India's democracy and liberal constitution are modern wonders of the world. The audacity of the founding fathers' and mothers' vision for India—universal suffrage, equal protection of the law and rule of law in a land which was not considered suitable for any or all of these, is truly remarkable. Each generation of Indian citizens has built upon the work of the previous generation in furthering this grand experiment in governance.

In that spirit, we at Vidhi Centre for Legal Policy are proud to present Towards the Rule of Law, our fifth briefing book on legal reforms for India.

There is no one overarching theme to the challenges India faces. Whether the demographic dividend threatening to become a demographic disaster, rapid technological advancement disrupting societies and economies, or climate change, India faces them all. But each is located in India's unique context and deeper down in particular regional and local contexts. Alongside all of these remain the overall challenges of creating an inclusive and free society for all.

As before, the solutions we have offered fall into four main categories—renewing basic institutions, clearing the thorns, building a modern India, and creating an inclusive India.

The changes we recommend are not just *legal* changes, that is new laws or rules, but also institutional changes (Set up Policy Innovation Labs) and creating a more informed citizenry (Make Indian Laws Machine-Readable). They provide solutions to long-standing problems (Prevent Abuse of Tax Exemption on Agricultural Income), address current controversies (Reform the CBI) and provide ideas for better governance in the future (Create a Culture of Risk Assessment).

In each of these recommendations, we not only provide the reform idea but also articulate the pathways for its implementation. After all, the hard work of reforming laws, policies and institutions will be successful not when the reform ideas are in place but after they are successfully implemented.

An election year in which a new government has taken charge seems the best possible time for initiating large-scale reforms. This is true not just for the Union Government but also for several State Governments which have recently been sworn in. We hope that the reforms we have suggested here can provide the blueprint for lasting and positive change for India.

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Renew basic institutions

ENACT

a Judicial Transparency Law

ISSUES

The enactment of the Right to Information Act, 2005 ("RTI Act") revolutionized transparency across all levels of the government. However, the judiciary through a series of judgments has largely shielded itself from any scrutiny under the RTI Act.

There are three main conflicts between the judiciary and citizens requesting information under the RTI Act. The first has been on the issue of disclosure of assets of the judges in the higher judiciary. The second is with regard to transparency in judicial appointments by the collegium of the five senior-most Supreme Court judges. In both instances, the administrative side of the Supreme Court was ordered to share the required information under the RTI Act by the Central Information Commission, and in one instance, additionally by the Delhi High Court. However, the information has never been disclosed publicly because the administrative side of the Court filed appeals before the judicial side of the Court where the matter has been pending for close to a decade. A recently constituted constitutional bench concluded hearings on the appeal on April 4, 2019 and the matter is reserved for judgment. The third point of conflict has been the reluctance of the judiciary to make available judicial records under the RTI Act. Courts across India, including the Supreme Court, have rejected applications under the RTI Act, to access this information, on the grounds that such information could be accessed only under their administrative rules which are generally more restrictive than the RTI Act.

Apart from these three issues, there are other transparency related issues with the judiciary, such as the lack of mandatory disclosures under the RTI Act, potentially illegal RTI rules across High Courts and the absence of a system

Greater transparency in the functioning of the judiciary will make the judiciary more accountable and efficient.

of releasing meaningful judicial statistics that can aid judicial planning.

SOLUTION

Since the lack of transparency in the functioning of the higher judiciary is a systemic issue, despite the existence of the RTI Act, the solution should be in the form of a transparency law targeted exclusively at the judiciary. The new legislation would tackle the issue of transparency and accountability at all three levels of the judiciary i.e. at district courts, the High Courts and the Supreme Court. The new law can achieve its objective by creating an obligation for proactive disclosure as well as empowering citizens with a positive right to demand information from the judiciary.

IMPLEMENTATION

A new legislation focusing on the following issues should be introduced:

- Mandate the proactive disclosure of judicial assets as a requirement for appointment to a judicial post.
- Create a statutory requirement for the Chief Justice of India to publish in the Official Gazette, the prominent judgments and legal contributions of persons being recommended to the President for appointment to the higher judiciary.
- Empower common citizens, journalists and academics with a right to access judicial records in a simple and convenient manner, at a reasonable fee without having to rely on intermediaries such as lawyers, clerks or other gatekeepers.
- Mandate all High Courts and the Supreme Court to publish quarterly statistics on disposal and pendency.
- Require the publication of minutes of all meetings of the administrative committees within the High Court.

REIMAGINE

High Courts in India

ISSUES

High Courts in India are the highest constitutional and appellate fora in every State. The oldest High Courts which are in Kolkata, Mumbai and Chennai were constituted under the Indian High Courts Act, 1861. Since independence, through different statutes (typically State reorganisation legislations), twenty-five high courts have been established across India, some serving more than one State. These statutes do not say much other than the fact that a High Court shall be created in the State. Thus, save for constitutional provisions safeguarding the appointment, salaries and removal of High Court judges, there is no common legal framework for High Courts across India that governs the mode of administration of the High Courts and the lower judiciary.

Some High Courts have enacted rules using their powers under Article 225 or Article 227 of the Constitution of India to govern the manner in which administrative decisions are taken. However, most of these rules do little to create a transparent and accountable legal framework to govern critical administrative issues like recruitment, budgeting or planning. Most of these rules instead confer unfettered power in the hands of the Chief Justice over internal processes of the High Court, and with regard to the supervision of subordinate judiciary in the State.

The administrative functions pertaining to the lower judiciary are discharged through a number of committees consisting of different High Court judges appointed by the Chief Justice at her discretion. Vesting such immense powers in the hands of a single official (even if it is the Chief Justice) has no parallel in Indian democracy. It is especially problematic because the Chief Justice of the High Court is an unelected official who is accountable to neither the State Government nor the people of the State for the manner in which she exercises these powers. Such a model of governance is a hangover from the Government of India Act, 1935 and is not keeping with the aspirations of a modern democracy.

Further, there is lack of transparency in the functioning of these powerful administrative committees. The proceedings of these committees are conducted behind closed doors, with High Courts refusing to proactively publish or share the minutes of these meetings with the general public under the Right to Information Act, 2005 ("RTI Act"). Applications filed with different High Courts under the RTI Act requesting copies of the minutes of these committees were rejected on the grounds that such information could not be shared with citizens under the RTI Act.

Enacting a new High Courts Act, laying down the governing structure for all twenty-five High Courts will improve the administration and functioning of not just the High Courts but also the subordinate judiciary which is supervised by the High Court.

SOLUTION

Any attempt to reform the Indian judicial system must begin by making High Courts more accountable and ensuring that their policy decisions are implemented transparently with adequate public debate and stakeholder engagement. To meet this end, Parliament should enact a High Courts (Powers and Functions) Act that provides a common framework governing the discharge of crucial administrative functions in a manner that makes judicial administration more transparent, accountable and consultative. Parliament has the competence to enact such laws on the 'constitution and organisation' of High Courts pursuant to Entry 78 of the Union List in the Seventh Schedule of the Constitution. Such reform will be aimed at creating a transparent and accountable framework of governance within the High Courts while ensuring the judiciary remains independent of executive influence.

IMPLEMENTATION

Parliament should enact the proposed High Courts Act. The proposed law should be framed post a consultative exercise and must lay down a framework containing the following provisions:

- Every High Court has some common administrative committees (like budgetary, arrears, e-governance and Prevention of Sexual Harassment at Work). The law should ensure that common committees performing vital functions, are set out and established across courts, with their membership being distributed equally amongst all judges. This is to check the concentration of administrative power.
- The new law should create statutory avenues for stakeholders such as the bar and the litigants to interact with the key administrators in the High Courts and provide their comments to any new policy impacting the lower judiciary or the High Court. Such guarantees can deter disruptive strikes by the bar associations.
- The statute must prescribe some frameworks like the constitution of a committee which is responsible for appointments, dismissals, or reprimands against lower court judges.

IMPROVE

Community-Police Relations

ISSUES

Police in India are still broadly organised and operate under principles first introduced by the Police Act, 1861. Set up as a colonial force, the police retain strong authoritarian elements. This has been viewed as being at odds with the needs of an independent democratic nation in the 21st century. Reforms that have been proposed by the Supreme Court and various committees have focused largely on structural reform of the police. Suggestions to improve links between the police and the community have been confined to the margins of these proposals. In general, dissociation between the police and the community hampers the functioning of the police and adversely affects the society. In India, improving this relationship is especially relevant in light of findings of high rates of unreported crime and increasing vulnerability of marginalised sections to crime.

SOLUTION

Incorporating 'community policing' practices in India can be a useful approach towards resolving these issues. Ideas along these lines have been under consideration in India for some time now, with some States having incorporated certain elements of it in their police statutes. Broadly, community policing can be understood as a method based on collaboration between the police and local community to identify crime and related problems of the people and deriving ways to combat it through mutual cooperation and facilitation. This collaboration can be effectuated through statutorily establishing a committee for every police station, comprising of local residents and police officers. It should have adequate representation from all sections of society, including women, Scheduled Castes and Scheduled Tribes. The committee should meet at least once a month. The meetings should be open to the public with their minutes being recorded.

This can improve accessibility, while also creating a sense of accountability as members of the public can ask questions and raise grievances. It can also help with information-sharing, as emerging problems

Citizen-police committees, if created through a clear statutory mandate, have the potential to be transformative institutions in bringing about police reform in India.

requiring police intervention may be identified in such meetings, which can result in more effective police strategies. At the same time, the police can use this opportunity to inform the community about the various measures being undertaken for their security, and how the members of the community can assist the police in this regard.

Committee representatives from marginalised sections can use this platform to raise the specific concerns faced by such members of the community. Complaints can also be routed via the committee, providing an alternative to persons who may be otherwise hesitant to approach police stations. Regular interactions with police personnel outside the confines of the police station may go a long way in remedying the deep-seated mistrust and fear of the police harboured by certain sections of the society. This will in turn help police officers to understand and appreciate their importance and value to the local community. Further, regular meetings can also create a proactive image of policing in the local area, which may have a deterrent effect on crime.

Although the Model Police Bill, 2015 includes 'Community Liaison Groups', the provision is inadequately fleshed out. States like Uttarakhand, Rajasthan and Chhattisgarh in their police statutes merely mention that such a committee shall be constituted "to assist the police force". To be effective, these provisions need to be more detailed, specifying the composition, tenure, frequency of meetings, and functions of the committee, in the aforesaid manner.

IMPLEMENTATION

- All States should include a provision in their police statutes for the establishment of citizen-police committees for every police station, with representation from the community and from police officers.
- Specifically, the committee's composition and the requirement of holding public meetings at least once a month should be specified by this provision, so that the committee can be an effective platform for raising grievances, sharing information, and improving community-police relations.

REFORM

the Central Bureau of Investigation

ISSUES

The Central Bureau of Investigation ("CBI") was established by a Central Government resolution in 1963 and operates as per the Delhi Special Police Establishment Act, 1946 ("DSPE Act"). Referring to the manner of its establishment, the Gauhati High Court in 2013 had held that the CBI was unconstitutional, since the power to constitute a police force lies exclusively with the States as per the Seventh Schedule of the Constitution. It also held that the CBI is a non-statutory body as it was set up by a government resolution, and not by or under the DSPE Act. The Supreme Court has stayed this judgment, but is yet do decide the matter finally. A fundamental issue with the CBI is thus regarding its legal status itself.

Apart from this, there are issues regarding its functioning as well. The CBI has primary jurisdiction over investigation of offences (notified under the DSPE Act) in Union Territories. Its jurisdiction can be extended by the Central Government to cover States, provided that the concerned State Government consents to the same. There have been several instances of States denying consent to CBI investigations, often over political considerations. However, the Supreme Court and High Courts can supersede the requirement of State consent, and have in the past directed State Governments to transfer cases to the CBI. The uncertainty in this regard leads to Centre-State friction and also impedes the CBI's functioning in important cases. Besides, the present statutory scheme does not provide any guidance to the CBI regarding the kind of offences that it ought to investigate or contain sufficient safeguards as to its independence.

SOLUTION

To resolve the structural issues involved, CBI reform should be undertaken along two major prongs. First, the CBI must be given unequivocal statutory backing by enacting a separate, comprehensive law. Such a law can deal with other contentious issues as well, by clearly specifying the CBI's organisational structure, a charter of functions,

The proposed reforms will enable the CBI to perform its role efficiently and within the federal constitutional framework.

the types of offences that it can investigate, and the nature of superintendence and oversight that it is subject to. Some of these aspects are currently dealt with in other statutes, like the Central Vigilance Commission Act, 2003 and the Lokpal and Lokayuktas Act, 2013, which have been enacted as part of piecemeal reform measures.

Second, to enable the CBI to function effectively and to ensure better coordination with State police forces, a concept of federal crimes should be constitutionally introduced and statutorily developed. Adding an entry on federal offences in the Union List would provide constitutional backing for the proposed CBI law to designate certain crimes as federal offences, subject to statutorily defined criteria. These criteria could include, whether the offence has international, national, or inter-state implications, whether it relates to the activities of the Central Government, or to corruption in the All-India Services.

For federal offences, the State police and the CBI should exercise concurrent jurisdiction. This would mean that, while State consent would not be required for the CBI to investigate such offences, the State police can carry out the investigation themselves unless the CBI decides to intervene. For non-federal offences, State consent should be sought before transferring the case to the CBI. This would establish a clear demarcation between the roles to be played by the CBI and State police forces, and would also guide the CBI regarding the kinds of cases it should investigate.

IMPLEMENTATION

- Parliament should enact a CBI law in exercise of its powers under Entries 8, 93 and 97 of the Union List, and Entries 1 and 2 of the Concurrent List.
- 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”.

MAKE

Pollution Control Boards Accountable and Effective

ISSUES

It is a well-documented fact that India's pollution control boards ("PCBs") need more people and more money. In the most industrialised States, PCBs have only around 300 personnel to monitor a minimum of 50,000 plants. Being poorly staffed and under-resourced, PCBs are hard-pressed to enforce environmental laws. India ranked 177 out of 180 countries in a 2018 Environmental Performance Index. In 2016, in the backdrop of 4732 environment-related offences being reported, the Comptroller and Auditor-General indicted PCBs for failing to perform their monitoring functions. In fact, the state of enforcement is so dire that the National Green Tribunal recently ordered a performance audit to be conducted for all PCBs.

Given this lack of capacity, access to environmental information assumes critical importance because it allows citizens to play a role in enforcement by identifying violations and filing complaints. To allow this, PCBs must maintain and actively disclose accurate and comprehensive information. However, this is another area in which they appear to be failing. Although the Air (Prevention and Control of Pollution) Act, 1981 ("Air Act") and Water (Prevent and Control of Pollution) Act, 1974 ("Water Act") require PCBs to have publicly accessible registers of consents granted to industries, not all PCBs maintain them appropriately. For instance, the websites of the Assam, Gujarat, Haryana and Jharkhand PCBs contain no details about the consents granted, the Goa PCB has not updated this information since 2016, the Kerala PCB allows only industries themselves to view the status of consent applications, while the Karnataka PCB has no details of the conditions attached to consents.

Similarly, real-time information from continuous emission and effluent quality monitoring systems is available only patchily. While these systems were introduced in 17 categories of highly polluting industries in 2014, information from these systems is still not accessible through the websites of several PCBs, including Andhra Pradesh, Chhattisgarh and Gujarat. Without information about permissible standards or about the actual emissions or effluents released, it is impossible for individuals to spot violations and participate in enforcement.

Assuming these hurdles are overcome

Better enforcement through citizen monitoring and greater powers for the PCBs will strengthen environmental rule of law and have a direct impact on pollution reduction.

and PCBs initiate action against polluters by issuing directions to cut off water or electricity or close down operations, enforcement remains a problem. When industries fail to comply with closure directions (a not uncommon occurrence), PCBs can only initiate criminal action and more recently, direct payment of compensation for environmental damage. Unlike drugs and pesticides inspectors or food safety officers who can seize stock that they have reason to believe is violating the law, PCBs must rely on other authorities or the courts to enforce their own closure directions. In some instances, PCBs 'request' their own environmental engineers to exercise vigil over polluters, in others, they request the relevant State Government to constitute coordination committees comprising district collectors, revenue officers and police to enforce their directions. In most cases, a copy of the closure direction is forwarded to an overburdened District Magistrate for necessary action.

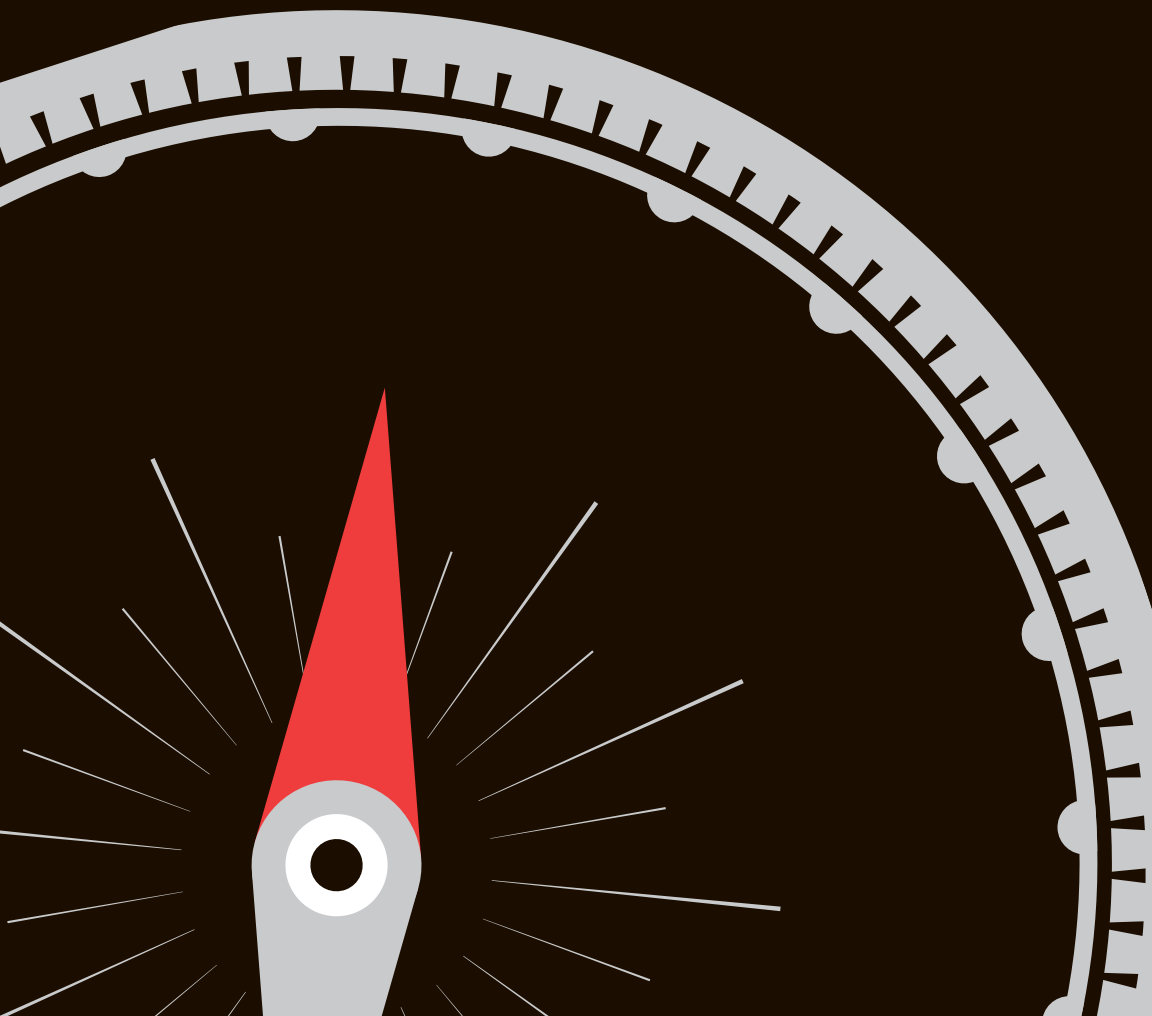
SOLUTION

Citizens should be enabled to play a greater role in the enforcement of environmental laws by improving their access to environmental information. A detailed and standardised format for the disclosure of such information should be prescribed for PCBs. PCBs themselves should be given greater powers, specifically by allowing them to enforce their own closure directions.

IMPLEMENTATION

- Rules should be framed under the Water Act and Air Act requiring PCBs to disclose certain categories of information in an accessible format. This information should include details of consents granted, public hearings, real-time pollution data, inspections conducted by PCBs, follow-up action taken and penalties imposed.
- The Water Act and Air Act should be amended to allow PCBs to seal units that continue to operate even after closure directions have been issued.
- Rules should be framed under the Water Act and Air Act to prescribe the procedure for such sealing, such as the officials that will be empowered and opportunities for appeal.

Clear the thorns



REVISIT

the Institution of Independent Directors

ISSUES

The institution of Independent Directors ("IDs") occupies headlines in the Indian corporate governance debate. The Securities and Exchange Board of India ("SEBI") Corporate Governance Committee Report (2017), acknowledging the role of IDs as 'gatekeepers' of corporate governance, emphasised the need to continuously assess the criteria for independence.

The role of IDs was originally contemplated in jurisdictions where companies have diffused ownership structures. While this concept was transplanted to India, it may not have yielded desired results since corporate structures in India continue to be concentrated. In a concentrated ownership model, IDs are expected to monitor related party and other transactions that affect public investors unlike just monitoring managers as is in the case of a diffused ownership structure. However, it is difficult to rely on IDs to perform their oversight role since they are appointed by controlling shareholders. Further, since IDs in state-owned enterprises ("SOEs") are appointed by the Government, there is room for political appointments, further doubting their independence. In the wake of repeated instances, where the institution of IDs has been questioned, amendments to secure their independence and effectiveness are necessary.

SOLUTION

The term 'independence' in corporate board dynamics means that IDs must be independent from the company, its executive and controlling shareholders, and must be independent to act in the best interests of their fiduciaries. While the Companies Act, 2013 ("Companies Act") contains certain 'independence' qualifications for appointment of IDs, they are nonetheless appointed at a general meeting with a special majority of at least 75% votes. This means that the controlling shareholder decides who will be appointed as an ID. To provide the non-controlling shareholders a seat at the table while appointing an ID, various alternatives have been suggested such as adoption of the principle of proportional representation by

Greater participation of non-controlling shareholders in the appointment process of IDs will make IDs more 'independent' from controlling shareholders and encourage participation of institutional investors.

a system of cumulative voting or appointment only through a resolution of 'majority of minority (non-controlling) shareholders'. While cumulative voting may be useful in certain instances, it is not a widespread practice. Also, having a process for appointment of all IDs solely by obtaining 'majority of minority (non-controlling) shareholders' approval may impair board comity and stall business processes. In order to keep a check on the controlling shareholders in the ID appointment process, the most adaptable solution lies in non-controlling shareholders playing a significant (but not a sole) role.

For instance, in the United Kingdom, Rule 9.2.2E R of the Listing Rules requires that appointment of an ID to the board of a premium listed company having one or more controlling shareholders (who holds more than 30% of voting rights, subject to certain exceptions) must be approved by all shareholders and the non-controlling shareholders separately. Further, if non-controlling shareholders disapprove the appointment of an ID, such ID can only be considered again for appointment, after a cooling period of 90 days, by the general body of shareholders as a whole. This rule is also applicable to sovereign controlled companies i.e. companies where the State holds more than 30% voting rights.

IMPLEMENTATION

- SEBI should amend the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("Listing Regulations") to provide for such dual voting mechanism for appointment of IDs for the top 500 listed companies (including SOEs) which have a controlling shareholder(s) (as may be defined by SEBI after a detailed study of the ownership pattern of Indian listed companies).
- This requirement shall be in addition to the minimum qualifications required for appointment as an ID under the Companies Act and the Listing Regulations.
- Drawing from the learnings, this provision may be later extended to a larger pool of companies.

CREATE

a Unified Investigative Agency

ISSUES

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 ("EoW"). The Serious Fraud Investigation Office ("SFIO"), Enforcement Directorate ("ED"), Central Bureau of Investigation ("CBI"), Securities and Exchange Board of India, Reserve Bank of India ("RBI"), Pension 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 regulators. Notably, in a recent case involving IL&FS Ltd., investigations have reportedly been initiated by SFIO, ED and the EoW. This conceivably 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. For instance, in a scenario where a bank and a company are suspected to have colluded to commit fraud, the company may be investigated by the appropriate authority under Companies Act, 2013 while the bank may be investigated by the RBI. Simultaneous investigations by both authorities may fail to create a clear picture of the incriminating events and compromise the quality of investigation. Additionally, lack of experience and consequential failure to follow due process by in-house investigation officers may also result in courts invalidating investigations or parts thereof. Sectoral regulators also deal with enforcement of civil penalties for non-compliance by regulated entities. Criminal action may take a back seat due to the administrative burden of enforcing civil penalties.

SOLUTION

In the United States, there are multiple agencies which have jurisdiction to prosecute economic wrongdoings. However, investigation of criminal economic offences is generally entrusted to the Federal Bureau of Investigation. Similarly, streamlining investigative functions

A unified investigation agency will help consolidate the currently fragmented regime and shall aid in making the investigation procedure uniform, curtailing duplicity of work, and providing a specialised cadre of investigators.

into one agency, in India, may aid in systematising the current process.

Creating a unified investigation agency for economic offences should therefore be considered. Such an agency will make the investigation procedure uniform, curtail duplicity of work and provide a specialised cadre of investigators. It will also reduce the burden on the subject by avoiding multiple investigations and, thus, promote ease of doing business.

When a financial sector regulator decides to initiate an investigation of an offence, it may be mandated to outsource the investigation function to this investigation agency. The task of this agency will be to come up with an investigation report that will be sent to the regulator. Based on this report, the regulator may exercise its discretion to decide on prosecution of the offence.

To ensure a link between the regulators and this agency, members of the respective regulators may comprise the governing board of the investigation agency. Given that multiple regulators will be in the know-how of ongoing investigations, information requests by various regulators may be consolidated. This will ease the burden on the person being investigated and facilitate thorough investigation without wastage of public resources. Officers in charge of investigation within this agency may be drawn from current investigative departments of regulators. They should be adequately trained and the provisions of the Code of Criminal Procedure, 1973 should guide the investigation process.

IMPLEMENTATION

- A committee consisting of representatives of various financial sectoral regulators and existing investigation agencies should be set up to propose a model for a unified investigation agency for economic offences.
- Safeguards should be built in to ensure timely investigation by the proposed agency.
- Cooperation and coordination mechanisms may be built to enable information sharing between the regulatory bodies and the proposed agency.
- The proposed agency must be adequately staffed with trained and skilled investigators. A special cadre of prosecutors may also be appointed.

ENSURE

a Mandatory Judicial Impact Assessment of all Laws

ISSUES

When a bill is introduced in Parliament, the rules of both houses require it to be accompanied by a financial memorandum, which gives an estimate of the expenditure that will be involved when the bill becomes a law. Most new laws would give rise to litigation and require additional judicial resources. While judicial backlogs are the focal point of every conversation on judicial reform, there is an absence of a mechanism that requires a determination of the effects of a new legislation on the judiciary.

The first issue therefore is the need for assessing financial burdens imposed on lower courts with regard to increased litigation. The second issue is the complexity of assessing litigation demand under a new law since it is dependent on many factors. These factors include whether the law involves procedural changes or substantive ones, the judicial time required for disposal of different cases, the non-judicial resources required for such purposes, the socio-economic profile of litigants and the costs of litigation.

SOLUTION

The solution to this problem lies in establishing a mandatory impact assessment mechanism at the time of the enactment of a law followed by periodic assessments at regular intervals to determine the probable consequences of legislation on courts with regard to caseloads, dockets, personnel requirements and establishment costs. Such an impact assessment should not be restricted to the new laws but should also be conducted for existing laws in force at periodic intervals. This will also address the need to understand the differential requirements of judicial time pertaining to the nature of the case. Additionally, the regional variations in nature of disputes needs to be studied for local factors having an influence on litigation. The financial assessment

Using judicial statistics to assess the demand for litigation will help the government and the judiciary to plan better for the additional expenditure that will be incurred as a result of the new law.

and consequently budgeting for the lower judiciary can be based on such data.

In 2008, a task force was constituted by the Ministry of Law and Justice, as per directions of the Supreme Court in Salem Advocates Bar Association (II) v Union of India. The taskforce suggested the creation of a judicial impact office, which would conduct judicial impact assessment for new laws. For unknown reasons, the suggestion was never implemented.

The task of preparing a judicial impact assessment has theoretically become easier in the last decade due to the creation of the National Judicial Data Grid ("NJDG") which maintains a record of all data. The NJDG records the enactment under which cause of action arises at the district level. This data can be utilised to undertake a survey of litigation assessing the trends in nature of disputes and also inform the demand for litigation under new laws.

IMPLEMENTATION

- The Rules of Procedure and Conduct of Business of both the Lok Sabha and Rajya Sabha should be amended to make it mandatory for every new bill to be accompanied by a memorandum detailing the future impact of the law on judicial resources.
- A judicial impact office should be created at the Ministry of Law and Justice and at the law departments of States with a mandate to conduct impact assessments of new legislation on the judiciary. This shall inform the sponsoring ministries in the preparation of financial memorandums before introducing new bills.
- The additional function of this office would include, assessing the laws in force on the basis of litigiousness and analysing the trends of litigation and caseload composition to aid planning and provisioning for the judiciary.

ENACT

a Law Limiting Surveillance

ISSUES

A number of intelligence agencies and law enforcement agencies ("LEAs") in India are engaged in the systematic access, collection, storage and analysis of personal data of individuals for the purpose of ensuring security of the State. This is often done in a covert manner without the consent of the concerned individuals.

Pursuant to the judgment of the Supreme Court in Justice K.S. Puttaswamy (Retd.) v Union of India, any invasion of the right to privacy must meet a three-part test: (i) the proposed action must be sanctioned by law enacted by Parliament; (ii) the proposed action must be necessary in a democratic society for a legitimate aim; and (iii) the extent of such interference must be proportionate to the need for such interference.

The Court in the Puttaswamy case held that protecting national security is a legitimate concern of the State and would constitute a restriction on the right to privacy. However, the interception of data by the government in the interests of national security cannot be unregulated.

At present, there is no general law to govern the activities of intelligence agencies and LEAs in order to ensure sufficient checks and balances in their functioning. Sporadic provisions such as section 5 of the Telegraph Act, 1885 exist, permitting a largely opaque regime of interception. Therefore, the first prong of the three-part test itself is not satisfied.

Consequently, the activities of surveillance agencies may not meet the mandate laid down by the Supreme Court. The report of the Srikrishna Committee on Data Protection has recommended that intelligence gathering must be done under the remit of a law with sufficient checks and balances.

SOLUTION

Notwithstanding the legitimate aim of national security, intelligence agencies and LEAs should be bound by norms which ensure that any non-consensual collection of data is not a disproportionate invasion of privacy. To this end, Parliament must enact a law specifying the permissible extent of non-consensual collection of data in pursuance of the

A surveillance reform law will go a long way towards ensuring that surveillance activities carried out by intelligence agencies and LEAs are subject to adequate regulation and are in compliance with the directions of the Supreme Court.

legitimate aim of security of the State.

The law should contain adequate safeguards to closely regulate the nature and extent of any surveillance. It is possible to develop safeguards that do not blunt or otherwise affect the efficacy of intelligence operations. Such safeguards could include obligations on data storage limitation, data quality, privacy by design, strong auditing/reporting requirements, strictly narrowing down surveillance powers of general LEAs and requiring data protection officers in both intelligence agencies and LEAs. Further, the law should outline the permissible scope of mass surveillance and the agencies allowed to carry out such activities. This requires a thorough relook at the operations of agencies employing mass surveillance for intelligence gathering currently.

Moreover, a legal procedure to review surveillance measures can be put in place. For example, interception requests may be reviewed ex-ante to determine their necessity and proportionality. Permits may be issued for approved requests. Ex-post, an aggrieved individual affected by the permit may challenge it in closed door proceedings before a specialised judicial forum. Further, judicial review may operate ex-post through deferred notice to wrongfully surveilled persons and compensation for unlawful surveillance.

IMPLEMENTATION

➤ Parliament should enact a surveillance reform law which is designed in a manner that respects the privacy of individuals while simultaneously addressing the legitimate requirements of intelligence agencies and LEAs. Surveillance operations must be narrow-tailored and should in no case constitute a disproportionate invasion of privacy.

➤ The nature and extent of surveillance must be closely regulated by law. This can be achieved by incorporating a diverse set of safeguards which ensure that privacy is adequately protected while not affecting the efficacy of necessary surveillance operations.

➤ The surveillance reform law should provide adequate remedies to individuals whose personal data has been collected, stored and disclosed without sufficient justification. There should be penal consequences for erring officials.

RETHINK

the GST Rate Policy

ISSUES

The initial idea behind the Goods and Services Tax ("GST") was a simple and uniform tax structure with minimal exemptions. However, the present regime has a four-rate slab structure, a list of exemptions, and other rate brackets for specific supplies such as those made to merchant exporters. Revenue authorities including the Union Finance Minister and the Revenue Secretary have often acknowledged the need as well as the scope for rate rationalisation. However, they state that such measures would be prioritised only once revenue collection under the GST stabilises.

The determination of rate brackets and the categorisation of goods and services within each bracket were initially decided from the point of view of maintaining revenue neutrality. Subsequently, GST rates applicable to several goods and services were amended by the GST Council based on representations by stakeholders. As a result, even after nearly two years of its implementation, the GST continues to function with numerous rate brackets and no standard principle behind the classification of goods and services under such brackets. A review of the products included in the 28% rate bracket clearly demonstrates the absence of a standard categorisation principle. The list includes goods such as portland cement, granite, certain road tractors, and molasses along with 'sin' and 'luxury' goods such as cigars, smoking pipes, yachts and aircrafts for personal use.

These problems have significantly complicated compliance under the regime, which has adversely affected revenue collection. They have also substantially contributed to the volume of litigation. A majority of the applications filed before the Advance Ruling Authority relate to issues concerning the appropriate categorisation of goods and services and the rate of GST applicable thereon.

SOLUTION

Given India's socio-economic diversity, the levy of GST at a single rate across all goods

Rethinking the GST rate structure and devising a standard mechanism to classify goods and services under different brackets would result in the introduction of a stable and certain structure, and would translate into facilitating compliance and tax buoyancy.

and services would be regressive and grossly violate the principle of equity. That said, it is vital that the Government actively works towards rationalising the GST rate brackets and devising a standard mechanism to classify goods and services under these brackets. Moreover, the grant of exemptions must also be minimised as it blocks the chain of credit and dilutes the essence of the GST regime.

It would be fruitful to draw reference from established GST/Value Added Tax ("VAT") jurisdictions such as the United Kingdom ("UK") or Australia. The UK VAT regime for instance functions on three primary rate brackets, with a standard rate of tax applicable to most goods and services, a reduced rate for some goods and services, such as children's car seats and energy-saving materials in the home and a zero rate for goods and services such as most food and children's clothes. A similar structure is followed in Australia as well.

In addition to economic factors, parameters such as the nature of the product or service, its use, the nature of a typical customer, should be considered while ascertaining the categorisation of goods and services under rate brackets.

Thus, a reduction in the number of rate slabs and the attachment of a rationale behind the categorisation of goods and services under such slabs would help give the regime stability and facilitate compliance.

IMPLEMENTATION

- The GST Council, which is empowered to make recommendations regarding GST rates, should establish a committee comprising Central and State revenue authorities, economists and other key stakeholders.
- The committee should formulate the principles behind the GST rate policy. This process ought to include rounds of public consultations.

PREVENT

Abuse of Tax Exemption on Agricultural Income

ISSUES

The Constitution of India separates the tax treatment of non-agricultural and agricultural income. While the Central Government taxes the former in a uniform manner all across the country, the decision to tax the latter has been left to the States. Given that the agricultural sector was highly unorganised at the time the Constitution was drafted, it was determined that the revenue generated through the levy of tax on this sector would not be substantial. Further, the administrative cost attached with its collection was considerably large. Therefore, most States chose not to tax agricultural income.

However, the position of various players in the agricultural sector has seen a paradigm shift. Along with unorganised farmers, the sector today also comprises many multinational companies. Some of these companies report profits in hundreds of crores, and parallely claim tax exemption on agricultural income. For instance, reportedly in 2014-2015, Kaveri Seed Company Ltd. claimed an exemption of INR 186.63 crore as agriculture income, Monsanto India claimed exemption of INR 94.4 crore as agricultural income, McLeod Russel, a tea company claimed exemption of INR 73.1 crore as agricultural income, etc. This has substantially contributed to the amount of revenue foregone by the government.

Since none of the justifications initially offered in support of exempting agricultural income apply to companies earning large profits, the current position is not justifiable. It is a blatant violation of principles of equity that are of paramount importance in any progressive income tax

Reconsidering the tax exemption on agricultural income as suggested here would help in widening the tax base and hence contribute towards nation building.

structure. Such a position is highly unjustifiable as many lower and middle-income groups are required to pay taxes on their non-agricultural incomes whereas other persons deriving substantial income from agriculture are exempted from income tax.

SOLUTION

The solution to this anomaly must be devised by adopting a balanced approach. While availability of exemptions to the identified companies must be minimised, adequate benefits to incentivise continued operations in the agricultural sector must also be granted. This solution would aid in widening the income tax base.

A comprehensive assessment must be conducted to identify the companies that would be covered by such provisions. For this purpose, determinants such as the nature of activity conducted by the assessee, the amount of book profits earned by them in the last financial year, and the amount of land held by the assessee may be considered.

Finally, given that the assessees identified for the application of these provisions would be centrally registered under the Companies Act the power to administer the levy of such tax should be with the Central government.

IMPLEMENTATION

- In order to empower the Centre to tax the identified assessees, the definition of 'agricultural income' under the Income Tax Act, 1961 should be amended.
- This should be done in accordance with Article 274 of the Constitution.

REFORM

the Disbursal of Environmental Compensation

ISSUES

The National Green Tribunal ("NGT") was set up in 2010 to provide a speedy and specialised forum for the adjudication of environmental disputes, specifically to provide compensation to victims of environmental damage. This is a pressing need in India - nearly 35 years after the Bhopal Gas Leak Disaster, the Supreme Court is still hearing claims on behalf of survivors to enhance the compensation initially awarded for failing to take into account long-term medical rehabilitation needs. India's vulnerability to climate change will see environment-related compensation claims flood the courts in the coming years. Therefore, a critical measure of the NGT's success will be the competence with which it assesses environmental damage and quantifies environmental compensation, as well as the speed with which it is disbursed.

While the NGT is disposing cases steadily enough (it had an 87% disposal rate as of February 2018), the actual grant of compensation to victims is proceeding more slowly. There appear to be at least two reasons for this. First, some of the largest awards of compensation by the NGT have immediately been challenged before the Supreme Court. This includes awards of INR 25 crores and INR 95 crores for the impact of two separate port expansion projects on fishing communities in Hazira, Gujarat and Raigad, Maharashtra respectively and an award of INR 9.26 crores against the Alaknanda Hydro Power Corporation to be paid to persons affected by the Uttarakhand floods in 2013. Although the Supreme Court has often ordered some percentage of the award to be deposited in escrow, the very fact of the appeal automatically delays the disbursal of compensation.

Second, the rules prescribed under the National Green Tribunal Act, 2010 ("NGT Act") for the disbursal of compensation also contribute to the delay. Compensation must first be remitted to the Environment Relief Fund ("Fund"), which was set up under the Public Liability Insurance Act, 1991. When the NGT awards compensation to victims of environmental damage, it must be transferred from the Fund to the district collector having local jurisdiction for disbursement. In practice, when there are a large number

Streamlining the disbursal of compensation will give teeth to the polluter pays principle, further environmental justice and fulfil the intent of the NGT Act.

of victims, the NGT awards a lump sum, leaving it to the collector to determine individual claims. This goes against the objective of the NGT Act, which was to set up an expert tribunal to investigate the complex factual questions that are necessarily involved in assessing and quantifying environmental damage. In fact, Rule 36 (3) of the National Green Tribunal (Practices and Procedure) Rules, 2011 only vest the collector with the duty to arrange to disburse compensation. This implies that individual awards of compensation should already have been determined by the NGT. Vesting this responsibility in the collector instead clearly slows down the process. In the Hazira Port case, although compensation was deposited with the collector in 2016, it has not yet been paid to the affected community.

Not only has the NGT delegated its core function, it does not appear to be superintending the process of disbursal either. In response to a question filed under the Right to Information Act, 2005, the NGT replied that it does not maintain any records regarding the amount of compensation deposited in or disbursed from the Fund. This damages the NGT's credibility.

SOLUTION

Appeals to the Supreme Court should be formally disincentivised. The capacity of the NGT to adjudicate individual compensation claims should be strengthened and there should be transparency in the disbursal of money from the Environment Relief Fund.

IMPLEMENTATION

- Section 22 of the NGT Act should be amended to allow appeals to the Supreme Court only after depositing 50% of the compensation awarded by the NGT in the Environment Relief Fund.
- A permanent panel of technical assessors to assist the NGT in surveying damage and quantifying compensation should be instituted.
- Detailed rules regarding the operation of the Environment Relief Fund, including the publication of information regarding money deposited and disbursed should be framed.

Build a modern India

PROMOTE

Social Impact Entrepreneurship

ISSUES

Entrepreneurs who are focused on meeting social objectives in India have limited options to structure and scale their enterprises. Their enterprises are typically organised as not-for-profit "charitable institutions" such as trusts, societies and section 8 companies. Such entities have significant constraints in distributing profits. At the same time, since entities such as trusts and societies do not have robust and transparent governance mechanisms, these entities may find it hard to raise finance, especially for non-project based requirements that are hard to monitor. Where these enterprises wish to organise themselves as for-profit entities, they find it challenging to communicate that social impact is embedded in their mission and raise finance for social impact.

Thus, a lack of flexible structuring options impedes the ability of social entrepreneurs to raise financing for their ideas. This also denies social impact investors a chance to channel their finances in transparent and well-governed socially usefully enterprises, which further increases pressure on government social service delivery.

SOLUTION

To promote social entrepreneurship and investment in social impact, a new class of companies, that is 'social impact companies' should be created. These social impact companies may be for-profit companies which are run to create social impact, similar to 'community interest companies' in the United Kingdom and 'benefit corporations' in the United States.

These companies may by-and-large have the same structure as typical companies, with separate legal personality, the ability to charge their assets, the ability to issue securities, the ability to plough back dividends/profits to their shareholders, etc. However, the key features of social impact companies and their corporate governance framework

The creation of social impact companies will provide a much needed impetus to social impact entrepreneurship in India by providing a for-profit and well-governed structure to carry out social impact activities.

may be defined to serve their social impact purpose. For instance, fiduciary duties would be placed on the directors of these companies to give primacy to 'social impact'. The company should be mandated to report social impact and non-financial information in addition to financial information. The mandatory audits of the company may extend to auditing their social impact and non-financial performance as well as financial performance. Further, the profits and assets of these companies may be 'locked' such that only reasonable amounts (linked to the level of social impact) may be distributed to investors.

The creation of such a class of companies will improve the ability of social ventures to raise finance since a larger pool of investors would be willing to 'invest' in social impact, than simply donate to social causes. Moreover, the features of the corporate governance framework are likely to give confidence to investors regarding the ability of the company to meet its stated objective. Further, this is likely to improve the overall governance of private enterprises in the social sector, both by increasing incentives of investors to monitor the companies by linking their financial returns to social impact, and by creating a corporate governance framework modeled towards accountability for social impact. In addition to raising finance, the company could use the branding to market their products to conscious consumers and attracting talent.

IMPLEMENTATION

- The Companies Act, 2013 should be amended to allow the setting up of a new class of 'social impact companies' with the abovementioned corporate governance framework.
- Additional subordinate legislation may need to be introduced to put in place detailed structural, governance, audit and reporting requirements.

SET UP

a National Pilgrimage Fund

ISSUES

In India, expenditure for undertaking religious obligations is considerable. Religious travel is estimated at almost four times the share of business-related travel, and over seven and a half times the share of education-related travel, as per statistics from the National Sample Survey Office.

Individuals save over their lifetimes to be able to undertake religious obligations such as pilgrimages and yet are constrained by a lack of accessible, safe and sustainable savings products targeted towards helping them save for undertaking such obligations. On a macroeconomic level, such savings represent pools of untapped funds, which could be gainfully employed to create public assets.

Therefore, it may be desirable to nudge individuals towards a sustainable method for actively building a corpus for undertaking pilgrimages. Support for this may be derived from nations such as Malaysia, which have specific savings products enabling pilgrims to save for undertaking religious obligations such as Hajj, through instituting a specific fund managed by the Lembaga Tabung Haji, a specially incorporated body.

SOLUTION

To harness deposits from individuals towards meeting their religious goals and creating access to a safe financial product backed by the State, while ensuring that this corpus is gainfully employed in meeting national developmental goals, an independent fund, called the National Pilgrimage Fund ("Fund") maybe established. Participation in the Fund would be open to devotees across all religions, who are Indian citizens and who wish to invest periodically into a pilgrimage-funding product, to meet their needs at the time of undertaking pilgrimages.

To administer the Fund, safeguard depositor contributions and make payouts, an independent Authority known as the National Pilgrimage Fund Authority ("Authority") should be set up and entrusted inter-alia with the management, regulation and oversight of the Fund. To gain further clarity on the design and administration of the Fund and the Authority, the model

Setting up the National Pilgrimage Fund will enable individuals to save for religious obligations in a sustainable manner, while harnessing such savings for development purposes.

of the Lembaga Tabung Haji, in Malaysia, which enables pilgrims to save for their religious needs, while also helping in creating infrastructure, may be considered.

The Authority should ensure that deposits are collected from subscribers in an accessible manner, ensure sound investment, and pay-out subscribers at maturity. In discharging its functions, the Authority would be mandated to ensure safety and security of subscriber funds, and would at all times be required to uphold subscriber interest. The Authority would require a specified proportion of investor funds, across all schemes to be available for investment in creating public infrastructure. This would not only make a corpus available for infrastructure-building and thereby assist in development, but also provide individuals with the security of government-backing of deposits

Additionally, the Authority may formulate various schemes, under the aegis of the Fund, to assist individuals in opting for a scheme that best suits them. This could be done by designing various schemes under the Fund that could inter-alia address concerns which maybe important to different subscribers. These may include higher returns, investment in safer assets and providing varying payout mechanisms. These elements could be further detailed subsequently, and may be considered to provide subscribers with an innovative, yet safe financial product, which would help them undertake their religious obligations in a sustainable manner.

IMPLEMENTATION

- An independent fund, to be called the National Pilgrimage Fund, should be set up under the supervision and control of an independent authority, known as the National Pilgrimage Fund Authority.
- The proposed legislation setting up both the Fund and the Authority would indicate, inter alia, the composition of the Fund, establishment of the Authority as a body corporate which administers the Fund, prescribe conditions on the use of the Fund and prescribe accountability mechanisms (such as audit, furnishing of annual returns).

MODERNISE

the Law governing Private Trusts

ISSUES

Private trusts are a preferred structure for wealth management and succession planning. They are also increasingly being used to structure corporate transactions. The last few years have witnessed the emergence of sophisticated trust structures in the private wealth and funds sector and the rise of professional trustees. Despite such developments, private trusts in India are governed by a British era legislation i.e. the Indian Trusts Act, 1882 ("Trusts Act") that has not undergone any substantial reform or review since its enactment. This is in contrast to the approach in other common law jurisdictions like the United Kingdom, Hong Kong, Singapore and New Zealand that have undertaken comprehensive reviews of their trust law to modernise it.

Traditionally, trusts have been viewed as private arrangements. Therefore, they are typically not subject to registration and reporting requirements like other corporate vehicles. Minimal regulation, lack of transparency and greater autonomy that trusts enjoy as compared to other corporate vehicles make them susceptible to being misused for illicit purposes (tax evasion, money laundering, etc.) and also creates challenges for law enforcement agencies. Recent leaks in the Panama Papers and Paradise Papers indicate the scale of using trust structures for tax evasion purposes. Using complex control structures involving multiple entities (including offshore trusts), trusts have been employed to retain control over assets while disguising ownership.

SOLUTION

There is a need to revisit the legal framework governing private trusts in India. The focus of the review should be two-fold: (a) reforming the law to strengthen the core institution of trusts to reflect modern day realities for its continued efficacy; and (b) deliberating the need to subject private trusts to regulatory oversight of the Government.

Presently, the Trusts Act does not deal with several issues that are relevant to a modern-day trust. First, the duty of care imposed on trustees fails to account for the emergence of professional trustees who should be subject to a higher duty of care having regard to the particular knowledge or

Reviewing the law governing private trusts in order to align the legal framework with evolving trust structures will provide a renewed approach to govern modern day private trusts. This will facilitate better trust administration and prevent its misuse.

experience of such trustees. Second, given that the complexities of asset management and investment decisions may require considerable skill, it may not be possible for a lay trustee to undertake all functions personally. The law should specifically enable trustees to appoint investment managers and custodians with adequate safeguards. Third, the emergence of institutional trusteeship raises issues pertaining to enforceability of trustee exemption clauses that purport to exclude or restrict the liability of trustees. Widely drafted exemption clauses tend to reduce the protection of beneficiaries. Accordingly, the law should clarify that the trust instrument cannot exonerate a trustee in specified circumstances, especially in cases arising from the trustee's own fraud, wilful misconduct, etc.

For dealing with concerns about the misuse of trust structures stemming from lack of transparency, imposing registration and reporting requirements on trusts may be considered. Any such approach should ensure that the privacy and confidentiality of trust arrangements are not negatively impacted. Imposing a statutory duty on trustees to maintain certain information about the trust, including contracts entered, resolutions passed by trustee(s), etc. over and above financial statements, etc. may also be considered.

IMPLEMENTATION

- There should be a comprehensive review of the legal framework governing private trusts, including the Trusts Act, anti-money laundering law, taxation laws, etc., for redesigning a legal framework suitable for modern day trust structures. This review should be based on a consultative exercise.
- Review of the Trusts Act should focus on issues pertaining to duties of trustees, powers of trustees, right of information of beneficiaries (if any), dispute resolution and impact of amendments on existing trusts.
- Deliberations on a registration and reporting framework for private trusts should deal with conditions for applicability of the framework, information to be reported and grounds on which and persons with whom such information may be shared (ideally may be restricted to law enforcement agencies), subject to privacy considerations.

SET UP

Policy Innovation Labs

ISSUES

A common refrain in discussions surrounding technology law and regulation is that such interventions simply cannot keep pace with digital developments. The creation of digital health records raises issues of interoperability, seamless access and privacy. Platforms aggregating day-to-day services require clear-headed and decisive policy action that allows innovation while mitigating risks. These risks could vary widely — from consumer complaints regarding food delivery apps to the applicability of labour laws to driver partners with cab aggregator platforms. There is a need to understand such risks and respond quickly, albeit appropriately.

To do this, the State needs to be supple in its regulatory responses. Unfortunately, the bureaucracy, including those in newly established regulators, are typically slow to react to emerging issues. When they do react, their responses are not always proportionate and holistic in their assessment – for instance, the ban on Ola Cabs for operating bike taxis in Bengaluru. The issue of bike taxis may lead to several regulatory questions—how are questions of liability between the bike rider and Ola determined? Should a bike registered for personal purposes be allowed as a bike taxi as well? However, instead of addressing these questions in a nuanced manner, a knee-jerk reaction was taken (and then reversed) to ban the service altogether. This demonstrates state failure in understanding technology (capacity failure), in using appropriate regulatory tools (policy failure) and lack of long-term vision (expertise failure).

Currently, these failures are sought to be addressed through ad-hoc interventions from non-state entities providing outside support to government. At the same time, the NITI Aayog, the government's premier think-tank, provides support in a few areas. India's complex and diverse governance needs far more systemic, focused and supple policy interventions at scale.

SOLUTION

Policy innovation labs that aim at applying scientific approaches and methodologies in a "lab setting" to solving societal problems should be established in India. In terms of methodology, such

Policy Innovations Labs promote expertise, fill up existing gaps in state capacity and promote transparency in policy-making. Critically, they bear the promise of allowing India to respond appropriately in technology regulation—leading the way, rather than merely following other countries.

labs worldwide focus on experimental development, evidence and data-based policy and the incorporation of design-based approaches. They ordinarily work within or primarily for government and provide support in terms of substantive policy-making and better implementation. Examples include the Innovation Lab in Belfast (United Kingdom) which leads projects on diverse and specialised areas such as waste management and tools for ensuring that patients better stick to their medicines, and GovLabAustria in Austria which acts as a central research hub in the field of governance.

To make their work interdisciplinary, such policy innovation labs in India may be staffed with domain experts from diverse fields such as law, policy, sciences, etc. They must act independently of political will, which allows for greater collaboration with interested actors and facilitates active citizen-engagement.

In terms of translation into sovereign policy, the output of policy labs should be recommendatory with those in government being responsible for final decision-making and implementation.

IMPLEMENTATION

- The Ministry of Electronics and Information Technology ("Ministry") should designate two policy areas as ones where national policy will be framed on the basis of recommendations of policy innovation labs.
- To qualify as a recognised lab, the Ministry should provide criteria pertaining to independence and expertise. Necessary conflict checks should be performed.
- For designated areas, the Ministry should issue a policy challenge inviting recommendations from recognised labs.
- The Ministry, along with NITI Aayog, should select between the policy options submitted by various labs as the base policy draft on which it may iterate further.
- Recognised labs should be incentivised to participate in policy challenges in two ways — by credit sharing with the lab by the Ministry in the formulation of the policy and by demonstrating impact within its peer group of labs.
- The Ministry should retain final control of the policy that is formulated.
- A framework for Pilot Policy Lab Design should be formulated by the Ministry to initiate this process and capture the aforementioned points.

CREATE

a Culture of Risk Assessment

ISSUES

99 pesticides banned in other countries are still available in India. Of 118 fixed dose combination antibiotics sold in India, only 5 have approval in the United Kingdom or the United States of America. India's National Ambient Air Quality Standards prescribe an annual mean of 40 µg/m3 for fine particulate matter, four times higher than World Health Organisation recommendations. Clearly, Indian and global standards of health and environmental risk vary. This is to be expected - risk assessment is as much a function of culture and politics as it is of objective evidence. However, when Indian standards appear to fall so glaringly short of international benchmarks, the values and methods underlying risk assessment should be consistent and open to public scrutiny.

This is currently not the case in India, given the many different sources of risk to human and ecological health and their different regulators. For instance, when an expert appraisal committee under the Environment Impact Assessment Notification assesses the impact of a coal power plant, does it place the same value on preserving endangered species as the Atomic Energy Regulatory Board does while assessing the risk of nuclear power? Do the Central Insecticides Board and the Genetic Engineering Appraisal Committee use the same process to invite expert testimony on the risks of pesticides and genetically modified organisms respectively? Are public participation processes equally robust in setting food safety and environmental quality standards? The answers to these questions are unclear because there is not enough transparency about risk assessment processes in the first place.

This lack of transparency is perpetuated when questions about risk are referred to the Supreme Court. The reasoning underlying the Court's application of the precautionary principle is unclear and there appears to be no consistency regarding its deferral to expert evidence over public opposition. Failure to address public concerns about risk has human and economic costs—13 people were killed in police firing on protesters against the Thoothukudi copper smelter, while costs at the Kudankulam nuclear power plant have swollen by INR 4,000 crore, partly because of delays caused by public apprehension. Public opinion

A consistent, transparent and uniform approach to risk assessment will ensure public safety, reduce litigation, create regulatory certainty and encourage innovation.

should not be discounted in favour of a technocratic approach on the grounds that the latter is unbiased. Technocrats might have the dual role of assessing risk and promoting a technology, as in the case of the Department of Biotechnology. When biased and opaque processes result in standard-setting that makes Indians more unsafe than citizens in other countries, a loss of public confidence is inevitable.

SOLUTION

India needs a risk-assessment framework that can operate across all sectors where there is a significant risk to the health and safety of humans and the environment, whether this is from the use of artificial intelligence in medical diagnosis to the use of antibiotics in food, or from nanotechnology to single-use plastics.

While sector-specific regulators will continue to take ultimate decisions about the risk they deem acceptable, they must be guided by common principles and processes that focus on transparency, public participation, proportionality, consistency and evidence-based decision-making.

A Risk Ombudsman should be created to monitor observance of these principles and processes, to entertain complaints in case of deviance, and to empanel risk experts across different sectors. In order to reduce regulatory bias, only such empaneled experts should be eligible to participate in risk assessment. When faced with complex questions about risk, courts should also make a reference to the Risk Ombudsman.

IMPLEMENTATION

- Existing regulators of health and environmental risk and their corresponding processes of risk assessment to identify similarities, differences and best practices should be mapped.
- Using this information, a Risk Assessment law that contains a clear definition of the precautionary principle, lays down general principles of risk assessment, prescribes a common minimum set of risk assessment procedures and creates a Risk Ombudsman should be enacted.
- Manuals should be prepared and training sessions should be conducted about the new law for different sectoral regulators as well as civil society organisations.

MAKE

Indian Laws Machine-Readable

ISSUES

Access to free and accurate legal text is challenging for a majority of people in India. Although bare acts are published, they can become outdated quickly, are expensive to access, often inaccurate, or at times, simply unavailable. Finding laws is a challenge for everyone, even the government. In court proceedings related to the liquor ban on highways, the Maharashtra Government admitted that they could not find a notification they had issued earlier, even after they googled it.

Many government and private sources allow access to digitally scanned legal text. However, some of these are digital scans of print documents which function more like images. Therefore, online search engines have to perform optical character recognition or OCR and compare words against user queries, as opposed to being able to infer context and meaning from the document itself. This results in less accurate search results.

While text-based PDFs of some laws do exist, they usually do not hyperlink to specific portions. This forces users to manually read through the table of contents or an index and then proceed to the relevant section. Furthermore, these scans succumb to the same faults of the printed word—they are hard to update when changes happen. Instead, a new document is usually uploaded to reflect the updates. Older versions which cannot be updated thus continue to exist online, leading to further confusion.

Moreover, the legal system is an intricate and complex structure. It is difficult for a lay person to get a complete picture as the legal position on any topic can only be ascertained through a combined reading of laws, judgments, rules, regulations, notifications, etc., which are not generally available as a consolidated whole. For example, to gain an understanding of the Sexual Harassment Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, one would need to know the existence of the Vishakha Judgement and the rules given under the Act. Yet, such cross-linking of laws and rules is not generally available.

Making laws machine-readable has benefits for draftsmen, policy makers, lawyers and most importantly, the citizens of India.

SOLUTION

Making legislative texts available in a machine-readable format can go a long way towards addressing these concerns. The availability of machine-readable laws will significantly improve the accuracy of search results, as algorithms will be able to read and find specific portions of the law that more accurately reflect search queries. Further, if these laws are stored in a markdown format as a repository that tracks changes (like Github), users will be able to see the history of changes that the law has undergone alongside its most recent version. This will not only ensure that the most recent and correct versions of legal text are being accessed, but will also provide context to users.

Machine-readable laws can also facilitate legal tech projects, by paving the way for apps that, for instance, hyperlink specific sections of a legal text to judgments on that point. A consolidated picture of the legal position on any given topic can thus become readily available. These features can also be implemented across various digital platforms, which promises to provide greater and more in-depth access to the law to a vast user base.

For making laws machine-readable, it is preferable to opt for a widely used open-source solution that has plenty of documentation and support, instead of a new or custom format. Markdown syntax, which is 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. It is simply a way of adding certain markers before text to indicate its meaning, be it in English, Hindi or any language, with keyboard support. It is easy-to-write, easy-to-read and easy-to-extend.

IMPLEMENTATION

- The Ministry of Electronics and Information 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 liaison with the private sector to get external experts attached with the project.

Create an inclusive India

PUBLISH

Annual Judicial Diversity Statistics

ISSUES

The social representativeness of the judiciary is integral to the legitimacy it enjoys. In the sixty-nine years of its existence, the Indian Supreme Court has seen only eight women judges, one Dalit Chief Justice and no woman Chief Justice. At the level of the High Courts, there has been negligible representation of Scheduled Caste and Scheduled Tribe communities. Further, only 10% of the judges in High Courts are women. Representation is only slightly better in the lower judiciary with 25% of judges in the lower judiciary being women. The issue of judicial diversity has been raised by the President in 2017 when he pointed to the lack of representation of marginalised communities in the higher judiciary. Some politicians have demanded reservations of judicial posts for Scheduled Castes and Scheduled Tribes to ensure representation from their communities.

However, the focus on this issue has been intermittent at best. This could be because judges' demographic data is not housed anywhere centrally. The Union Minister of Law and Justice has stated in Parliament that such data for judges is not maintained by the government. Thus, every time, a parliamentary question is raised on the composition of the judiciary, the Ministry of Law and Justice has to write to States to gather that information thus making the process of data collection ad-hoc. Similarly, no information is regularly collated on the demographics of enrolled advocates under the State Bar Councils which largely constitutes the pool of applicants/candidates from where judges are appointed.

SOLUTION

In light of this, a small but crucial step to enable more systematic prioritisation of diversity in the judiciary is to

Publishing annual judicial diversity statistics could become a catalyst for change by providing policymakers with aggregate numbers on the demographics of judges. Publishing such statistics would also promote a culture of judicial accountability by revealing the discrepancy between diversity of the applicant pool and those hired, thus creating public pressure on these institutions to address it.

publish Annual Diversity Statistics for both the judiciary and the bar. Such a report would include demographic data on currently employed judges and the pool of candidates for the judiciary.

Internationally, the United Kingdom ("UK") has made a coordinated effort in addressing judicial diversity by setting up the Judicial Diversity Taskforce in 2010 to oversee the implementation of recommendations to make the judiciary more inclusive. As part of this effort, the Government of UK publishes annual Judicial Diversity Statistics to provide information on the diversity of the judges and non-legal members appointed to the judiciary. It gives information regarding the gender, ethnicity, age and professional background of judges. This information is collected in the form of voluntary, non-mandatory self-declarations by the judges. The Ministry thereafter, undertakes an extensive validation of the data collected.

IMPLEMENTATION

➤ The Department of Justice under the Ministry of Law and Justice, should be the coordinating agency that publishes Annual Judicial Diversity Statistics in collaboration with the judiciary. Such an annual publication should record self-declared information pertaining to age, gender, caste, religion, educational and professional backgrounds of currently serving judges. In addition, it should also publish data on the qualified pool of candidates who are eligible for being considered for appointment as judges.

➤ In order to collect and publish such data, a Coordination Committee should be set up that streamlines the data collection process by developing a standard protocol for collecting the data. The committee should consist of representatives from the government, judiciary and the bar.

TRANSLATE

Laws into Regional Languages

ISSUES

In India over 121 languages are spoken yet the law is inaccessible in these languages due to the monopoly of English and Hindi in legislative drafting. The Constituent Assembly in 1949 accepted Hindi as the Official Language of the Union of India, while also agreeing to use English only for the next fifteen years. However, given the common use of English for all official purposes, it was instead made permanent through the Official Language Act of 1963, thus making both Hindi and English the official languages of the Union. Apart from the Union, the States also have the prerogative to recognise languages for the purposes of the State, through the State Official Language Acts.

Today there are 22 languages which are recognised under the Eight Schedule to the Constitution and the Authoritative Texts (Central Laws) Act, 1973 provides a legal framework to help translate Central laws to these languages. As per the President's Order, 1960 ("P.O. 1960") an Official Language (Legislative) Commission (now Official Language Wing") ("OLW") was instituted with the task of translating Central laws into regional languages which are given in the Eighth Schedule. The OLW does the work of translations of Central laws in close collaboration with State Official Language (Legislative) Commissions ("State Commissions") or Law Departments of States.

One of the issues in the existing structure is that only a few States, which include Assam, Karnataka, Kerala, and Tamil Nadu have State Commissions. Further, the existing structure for translations is opaque and the P.O. 1960 is silent on the criteria of picking the laws for translations. The power to choose the laws in the priority list lies only with the OLW and not the States. Also, the translation process efforts are neither time-bound nor mandatory. The P.O. 1960 requires the OLW to undertake translation efforts into "regional languages" but it is not clear whether these "regional languages" are only the Eighth Schedule languages or they include other languages recognised by the States as well.

Mandatory translation of Central laws into regional languages through fully functional State Language Commissions will make laws more accessible, empower people and strengthen the goal of inclusive governance.

SOLUTION

The framework for the translation of laws into regional languages requires to be reworked. To strengthen the existing framework for translations, there is a need for granting more funding both at the Central and State levels. The States should retain the discretion of picking the laws relevant to them for translation efforts. Furthermore, the publication of these translated laws should be made available on State databases in order to increase access to the same.

IMPLEMENTATION

- The Ministry of Law and Justice should increase funding for the State commissions to incentivise their translation efforts, vet the translations done by them on a time-bound basis and collate these translations into a Central Database.
- State Governments, which do the translation work through their Law Departments should create State Language Commissions.
- State Governments should incentivise and allocate funding specifically for translation work.
- Translations should be done for the language(s) mentioned in State Official Languages Acts, including for those that are not included in the Eighth Schedule.
- Criteria for picking the laws should be decided in a transparent manner and through public consultation with stakeholders such as legal practitioners, legal academics, translators, civil society organisations etc.
- All translation work should be made mandatory and should be done on a time-bound basis.
- The translated laws should be published in the State Official Gazette mandatorily within 30 days of receiving the authorised translations. They should mandatorily be uploaded onto respective Department websites so that it is accessible to the common person.

UPGRADE

India's Special Marriage Law

ISSUES

The Special Marriage Act, 1954 ("SMA") was a radical departure from existing religion-based personal laws and was 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/house-holder 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.

For instance, the law prescribes differential ages of consent for marriage, thereby perpetuating gender stereotypes. Further, the exclusion of couples outside the male-female binary is discriminatory. Continuance of impotency as a ground to nullify marriage makes consummation central to all marriages. There is also a persistence of remedies such as the restitution of conjugal rights that violate the decisional autonomy of individuals. Various progressive concepts such as irretrievable breakdown of marriage and community of marital property that mark a more egalitarian approach to marriage law also do not form part of the SMA currently.

The SMA is in need of a procedural overhaul as well. Many procedural provisions of the SMA are onerous and impose hardships on the couple seeking to solemnise their marriage. Provisions such as the requirement to issue a notice, which is further required to be publicly displayed, to the marriage officer a month prior to the solemnisation of marriage and the procedure to hear objections to the same, have resulted in moral policing especially in cases of inter-caste and inter-religious marriages. While this procedure has been supported since it prevents elopements, it violates the right to privacy in the Indian Constitution and

Upgrading India's Special Marriage Law would ensure that the legal framework becomes truly equal and representative of changed social realities.

impinges on the decisional autonomy of the persons seeking to enter into marriage.

SOLUTION

Formulating a law that furthers a more equal vision of marriage between persons, while also accounting for protective provisions for the vulnerable parties to a marriage, is thus essential. A new law is necessary since the interconnectedness of the substantive and procedural provisions of the SMA makes selective amendments unfeasible. Such a law must treat marriage as an equal partnership but at the same time factor in Indian social realities such as power imbalances between genders and the lived experiences of persons in negotiating relationships. An equal vision 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. Further, the law should provide for sensitisation measures for personnel entrusted with enforcement to minimise practical issues. The proposed law should thus bridge theory and practice to ensure that while furthering the rights of persons who enter into marriages, it actually works on the ground as well.

IMPLEMENTATION

- Parliament should enact a new and progressive law that furthers the rights of persons entering into marriage, while being in tune with Indian social realities.
- Such a law must be comprehensive and provide a complete code for marriage and divorce, including provisions on maintenance and support of the financially vulnerable spouse and any children arising out of marriage.
- 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.

ELIMINATE

Discrimination against Persons with Disabilities

ISSUES

In January 2019, the Supreme Court upheld a Tamil Nadu government notification that prohibited partially blind persons with more than 50% disability from applying for the position of a civil judge. The Court held that such judges required some faculties of hearing, sight and speech, in light of which this 50% cap was 'fair, logical and reasonable.' The Court, however, failed to provide any reasoning to demonstrate why persons with a disability greater than 50% would not be able to carry out the functions of a civil judge.

A similar lack of reasoning is evident in many laws that unthinkingly impose even more sweeping restrictions on the rights of persons with disabilities, despite the entry into force of The Rights of Persons with Disabilities Act, 2016 ("RPWD Act") in April, 2017. Section 3 of the RWPD Act prohibits discrimination on the ground of disability, unless 'it is shown that the impugned act or omission is a proportionate means of achieving a legitimate aim.' The RPWD Act replaced the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ("1995 Act") and was enacted to align India's law on disability rights with the UN Convention on Rights of Persons with Disabilities, 2006.

However, it sits side by side with hundreds of Central and State laws that discriminate against persons with leprosy, with intellectual, hearing and speech disabilities by depriving such persons of fundamental and statutory rights and liberties, such as the freedom to access public transport, to practise a profession, or to contest for public office. For instance, in the context of persons with hearing and speech disabilities alone, there are over a hundred such discriminatory provisions. These include provisions that disqualify such persons from contesting for certain posts (for instance, Section 37 of the Sri Venkateswara Vedic University Act, 2006), or permit their removal from certain posts (Section 49 of the Tamil Nadu Music and Fine Arts University Act, 2013), and those that deny them voting rights (Section 53 of the Madras District Boards Act, 1920).

A large number of these provisions are found in laws that predate the 1995 Act.

The elimination of discriminatory provisions is a necessary first step in the societal inclusion of persons with disabilities and in the effective implementation of the RPWD Act.

However, some of these laws were enacted after the 1995 Act, suggesting that even a stand-alone law guaranteeing the rights of persons with disabilities could not prevent legislative discrimination. For instance, as recently as 2013, a law setting up the Tamil Nadu Music and Fine Arts University permits a 'deaf-mute' person to be removed from any authority of the University. Therefore, it is likely that the enactment of the RPWD Act, while a landmark achievement for disability rights, is in itself not enough.

The problem that needs to be addressed is the existence, on the statute books, of discriminatory provisions against persons with disabilities. The RPWD Act does not have overriding effect since section 96 of the Act states that its provisions operate in addition to provisions of other laws that are in force. Therefore, the entry into force of the RPWD Act does not mean that the discriminatory provisions described above are automatically of no effect.

SOLUTION

Existing laws relating to or affecting persons with disabilities must be mapped comprehensively and uniformly tested against the provisions of the RPWD Act. Where they are found to fall short of the standards of the RPWD Act, appropriate amendments must be made.

For future laws, there must be greater awareness about the RPWD Act so as to not perpetuate similar discriminatory provisions.

IMPLEMENTATION

- The Chief Commissioner and State Commissioners for Persons with Disabilities should exercise their powers under sections 75 and 80 of the RPWD Act respectively to identify provisions of laws inconsistent with the RPWD Act.
- Based on this identification exercise, appropriate amendments to such inconsistent laws should be drafted to ensure that they are aligned with the anti-discrimination provisions under the RPWD Act.
- Sensitisation sessions for legislative drafters should be conducted to ensure that provisions inconsistent with the RPWD Act are not indiscriminately replicated.

IMPLEMENT

a Substantive Right to Inclusive Education

ISSUES

Under the existing legal framework, the right of children with disabilities to access primary education is governed by both the Right of Children to Free and Compulsory Education Act, 2009 ("RTE Act"), and the Rights of Persons with Disabilities Act, 2016 ("RPWD Act").

The RTE Act guarantees the right to free and compulsory elementary education to all children between the ages of 6-14, in a neighbourhood school. This right extends to all children, including children belonging to a disadvantaged group, which in turn covers children with disabilities.

This right must be read harmoniously with the RPWD Act, which recognises 'inclusive education', a system of education where students with and without disability learn together by addressing their different learning needs. Section 16 of the Act requires appropriate governments to take steps to ensure inclusive education in institutions funded or recognised by them, while section 31 guarantees children with benchmark disabilities the right to choose between free education from 6-18 in a neighbourhood school or a special school.

The effective implementation of both these laws is essential to ensure the social and economic integration of persons with disabilities. A 2017 report by IndiaSpend which examined the implementation of the Sarva Shiksha Abhiyan and the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, noted that 45% of India's disabled population is illiterate, in comparison with 26% of all Indians, while children with special needs are the largest out-of-age school group in India.

Today, even with the coming into force of the RPWD Act, provisions of the RTE Act continue to be at variance with it. For example, while the RTE Act extends the right to primary education to children with disabilities, it does not allude to the right to 'inclusive education' as defined in the RPWD Act. In fact, it grants children with 'severe disabilities' the right to opt for home-based education, which has instead been misused to deny children with disabilities admission to mainstream schools. The RPWD Act, on the other hand, refers to children with 'benchmark disabilities' and makes no mention of home-based

A substantive right to inclusive education will facilitate the creation of a learning ecosystem that treats children with disabilities with equality and dignity, thereby ultimately reducing the number of out-of-school children.

education, giving children the choice only between mainstream and special schools.

In addition to this, neither law fleshes out how inclusive education ought to be provided. The Schedule to the RTE Act prescribes general norms and standards for schools, but not for inclusive schools. Apart from a definition of inclusive education, the RPWD Act is also silent regarding the norms and standards of inclusive education.

SOLUTION

The RTE Act and the RPWD Act must adopt a unified approach to education for children with disabilities. This includes, one, the legislative harmonisation of the two statutes, and two, the incorporation of detailed common standards that govern various aspects of inclusive education in the parent laws. The authority currently responsible for the implementation of the right to education must also be responsible for the right to education of children with disabilities.

IMPLEMENTATION

➤ RTE Act should be amended to ensure consistency with the RPWD Act. The latter Act represents a more progressive approach to education for children with disabilities. In particular, the terms 'inclusive education' and 'child with benchmark disabilities' should be added to the RTE Act in place of 'child with severe disability.'

➤ The Ministry of Human Resource Development should be recognised as the nodal authority for the administration of education for children with disabilities, including the functioning of special schools.

➤ Through a consultative process, a comprehensive National Inclusive Education Policy should be developed providing detailed guidance on infrastructural norms and standards for schools (mainstream and special), qualifications and training for educators and appropriate curriculum and evaluation methods.

➤ On the basis of this policy, the RTE Act should be amended to introduce a new Schedule specifying norms and standards that schools must comply with to be recognised as inclusive. Non-compliance should result in withdrawal of recognition under section 19 of the Act.

ENACT

a Law for Pre-Legislative Consultation and Engagement

ISSUES

The Pre-Legislative Consultation Policy, 2014 ("Policy") was issued by the Government of India with an aim to enhance public participation in law-making. The Policy states that the concerned agency of the Central Government may place a draft law in the public domain for stakeholder comments or at least the information related to the draft law, including — a brief justification for such law, financial implications, and impact assessment of the said law on environment, fundamental rights, livelihoods of stakeholders, etc. Feedback received from the public is expected to be published and additional consultations may also be held by the concerned agency. Further, a summary of the pre-legislative process should be placed before the cabinet and subsequently before the concerned parliamentary committees when the law is sent to Parliament.

The Policy, being a policy document, is a non-binding instrument. While the Ministry of Law and Justice, at the time of reviewing the draft law, is supposed to determine if the concerned agency has complied with the Policy, the consequences for non-compliance are not provided in the Policy. Further, the Policy makes it optional for agencies to conduct stakeholder consultations (in addition to placing the draft law in the public domain) and allows them to also dispense with such consultation if they deem fit. In this context, the Policy gives unguided discretion to agencies and does not provide basic procedural guidelines.

Moreover, it is unclear if other legislative instruments such as ordinances, constitutional amendments or amendments to existing laws are covered. The Policy is also silent on stakeholder engagement at other crucial stages of law-making such as formulating white or green papers, impact

A law for pre-legislative participation and scrutiny would ensure greater levels of transparency and accountability in the law-making process in India.

assessments, committee discussions, etc. Furthermore, the Policy does not cover pre-legislative scrutiny for State laws.

SOLUTION

In order to address the gaps in the Policy, a statute on pre-legislative engagement process should be passed by Parliament. This would ensure a basic level of accountability and transparency in the law-making process. Such a law should apply to law-making at both the Central and State levels. It should also apply to various stages of law-making prior to drafting a bill and different types of legislative and policy instruments, as discussed above.

The law should set out the baseline obligations on Central and State agencies to undertake public/stakeholder consultation or engagement, depending on the type, subject-matter, sensitivity and impact of the legislative instrument concerned. However, it should lay down guidance on instances where such consultation or engagement obligations may be modified or dispensed with. Codified obligations would ensure that legislative instruments passed or implemented without adequate consultation or engagement can be successfully challenged in courts. The scheme of such a law is similar to the Consultation Procedure Act (Switzerland) and the Administrative Procedure Act (United States of America).

IMPLEMENTATION

- Parliament should pass a law on pre-legislative participation and engagement, setting out the parameters as discussed above.
- Given the organisational differences between Central and State agencies, the law should empower States to formulate their own procedure while fulfilling their baseline obligations for consultation and engagement.

REGULATE

the Impact of Algorithmic Bias

ISSUES

Algorithms are increasingly being used in public and private decision-making, especially in finance, law, criminal justice, education, and healthcare. Their primary benefit is that they can comb through and identify correlations in vast and disparate data sets more quickly and efficiently than human beings. Algorithmic decisions are preferred for their superiority and perceived trustworthiness.

However, algorithms, in looking for and exploiting data patterns, can produce skewed or biased decisions. Such unfair outputs occur because of under-representative data sets and inherited historical prejudices. Algorithms may thus systematically and unfairly discriminate against certain individuals in favour of others. Therefore, a predictive policing algorithm would make future decisions based on criminal history, criminal activity, and arrest records. If this data demonstrates that more people of a particular community have been arrested in the past, then this algorithm could inherit that prejudice, replicate similar results, and unfairly target that community.

In India, various legislative and executive proposals to make better use of data raise the fear of such discriminatory outcomes if combined with applications employing algorithms. The DNA Based Technology (Use and Regulation) Bill, 2018 intends to collect, use and retain genetic substances of criminal suspects for creating DNA profiles. If algorithms are used to analyse this data, there is a possibility of perpetrating discrimination against vulnerable populations already facing police bias. The Delhi Police has recently started using CMAPS or Crime Mapping Analytics and Predictive System. This utilises real-time data from police helplines and satellite imaging to visualise and identify crime hotspots. While this may be beneficial, it raises concerns as predictive policing systems rely on historical data, creating feedback loops, leading to unfair targeting of certain neighbourhoods and individuals.

Other areas where algorithms are being used for decision-making include employment, finance and housing. Applications that judge employee performance or suitability for grant of a loan using algorithms may be advantageous as they eliminate human biases. However, minimising human

Regulating the impact of algorithmic bias would ensure accountability and transparency in the creation and use of algorithms by government and private entities.

intervention could permit more insidious biases from algorithms that are difficult to detect or scrutinise due to phenomena such as black box effects. The consequences of such bias may be drastic as they could result in harms such as unfair termination from employment or an unequal denial of services such as housing or finance.

SOLUTION

To mitigate the harms caused by the inscrutability and bias of algorithms, a two-pronged approach should be adopted. It should be aimed at ensuring: (i) accountability of algorithm designers and organisations using such algorithms; and (ii) transparency in the decision-making process.

This calls for a law mandating algorithmic accountability and transparency. Such a law could mandate accountability for algorithm designers via auditing standards and codes of conduct. Similarly, widespread use of algorithms that are used for governance and enforcement by state entities must await the results of pilot projects or must be used within sandboxes. Further, automated decision-making must be held to the same standards of care and redress as human decision-making. Similarly, such law must make transparency and explainability essential, in terms of informing an individual about an entirely automated decision pertaining to her and the underlying contributing factors, if not the code itself, as they are often protected as a trade secret.

IMPLEMENTATION

- A law mandating algorithmic accountability and transparency should be enacted.
- Multiple checks should be implemented at every stage of creating and testing algorithms to ensure that the data used to design and train algorithms are as representative and free from bias as possible.
- Ministries that intend to use algorithms for governance and enforcement purposes should issue public notices to enable close scrutiny by the public and avoid misuse. Further, such ministries could establish task forces to work closely with algorithm designers and preemptively identify potential areas of bias.
- Public-facing grievance redressal mechanisms should be developed, to provide an opportunity to challenge unfair algorithmic decisions.

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