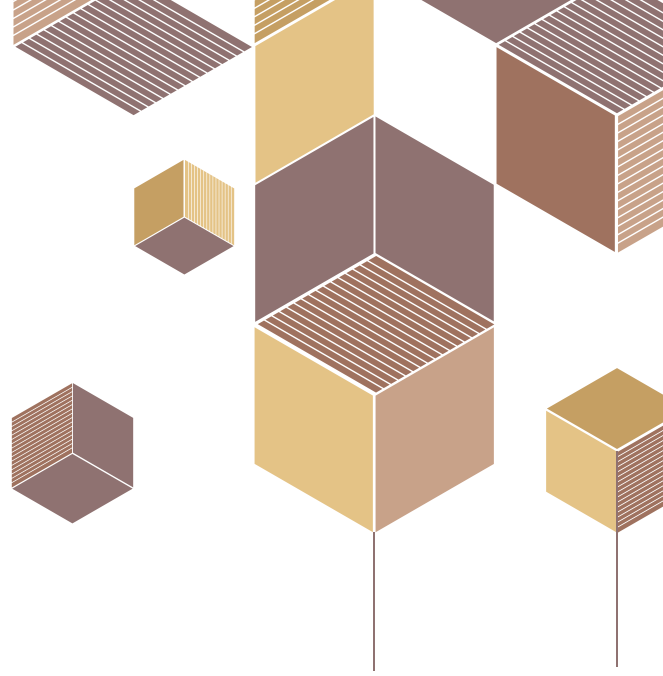




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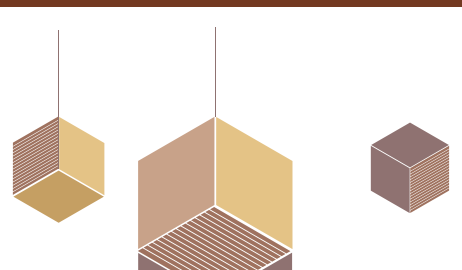
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BETTER LAWS. BETTER GOVERNANCE



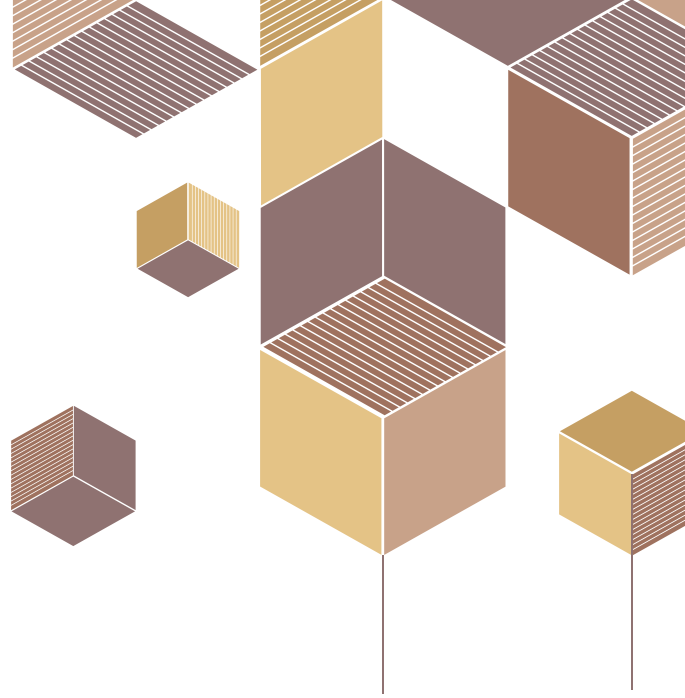
TOWARDS THE RULE OF LAW:

# 25 LEGAL REFORMS FOR INDIA



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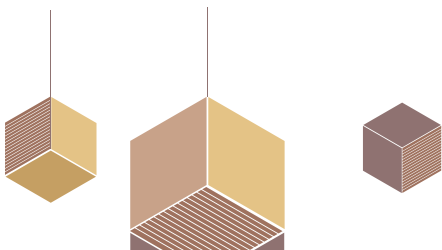


# Vidhi

Centre For Legal Policy

**BETTER LAWS. BETTER GOVERNANCE**

TOWARDS THE RULE OF LAW:  
**25 LEGAL REFORMS  
FOR INDIA**



The Vidhi Centre for Legal Policy is an independent legal policy advisory group whose mission is to achieve good governance in India by impacting legislative and regulatory design.

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# FOREWORD

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The mandate of 2014 is unquestionably a watershed in Indian democracy. After nearly three decades, once again, a billion people have laid their hopes on a government to set India free. Almost six and a half decades after 26th January 1950, there are some institutional changes that have become necessary.

The foremost is the process of appointment of judges. The Supreme Court of India, and the High Courts, have come to occupy a space of constitutional governance unlike their counterparts elsewhere, and have played a vital part in the survival of democracy. They have ensured the sensitisation of the system to the need for transparency. It is therefore ironic that judges are appointed to these institutions by a process that is opaque, and as the current controversies establish, extremely fragile. The first reform suggested in this briefing book rightly addresses this issue.

The second institution that can be given credit for ensuring the permeation of transparency through what was earlier an opaque government, is the media. The entry of private electronic media has revolutionised governance. If corruption and inept government have today upstaged caste and religion as primary electoral agendas, credit must rightly be given to the media for this evolution. Every powerful institution must have checks and balances. The media cannot be governed by the government – it can justly assert the right to be governed by a jury of its peers. However, this has to be done in a statutory framework with a content regulator who can effectively deal with the black sheep. India runs the risk of becoming an uncivil society where reputations can be tarnished without fear of consequence. Democracy will lose its vigour if reputations and respect are not sacrosanct and the right to privacy in non-public life is wasted away. The reform of the media has correctly been flagged in this briefing book as an important institutional change.

Labour reform is vital, as is the reform of environmental laws, including the set of Forest Acts. These have to be adapted to enable India to break the cycle of poverty, reminding ourselves that in the ultimate analysis, abysmal poverty is the primary cause of environmental degradation. Although Indians are respected the world over for their entrepreneurial spirit, the business environment in India has sapped their energy and demotivated most. This must change. This briefing book focuses on important areas that will herald a new relationship between the government and the citizens, based on trust rather than suspicion.

Commercial litigation and dispute resolution must be on commercial timelines – the slow dance from now to infinity is a luxury that business disputes cannot afford. The laws have to be changed – and more than that, the mindsets have to change. The appointment of regulators with domain knowledge to provide effective, yet transparent and fair regulation should be the object of regulatory reform – not to create a second tier of jobs for the retired!

The issues for reform raised in this briefing book are vital and I do hope they spark a debate and engage the attention of the Government so that India can finally embark upon its tryst with destiny.

Harish Salve,  
Senior Advocate,  
Supreme Court of India.



# INTRODUCTION

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New governments have traditionally advocated big-ticket policy reforms as part of their 100-day agenda. As this government sets its own 100-day agenda and takes steps towards its fulfilment, the time is opportune to introduce an oft-ignored area of reform – identifying the laws and rules that are in need of urgent introduction, amendment or repeal. Legal reform suffers from a strange paradox: while several big-ticket policy reforms require precise changes to law and regulation in order to be effective, very little public attention is paid to the actual shape such changes take in law. For example, it is widely accepted that labour laws need to be modernised, but what legal changes are imperative as we talk about modernisation? Are we talking about amendments to legislations, or large-scale repeal? What new laws and regulations need to be introduced, if at all, in this area?

This Briefing Book for the new government, ‘Towards the Rule of Law: 25 Legal Reforms for India’ is designed to draw the attention of government, civil society and citizens squarely to 25 reforms that ought to figure prominently on the agenda of the new government, with specific emphasis on the legal changes necessary to effectuate them. It is inspired by the fundamental vision of creating an effective legal framework for an equitably growing and humane India. With this in mind, four broad reform actions are suggested to the new government: *Renew Basic Institutions* – revitalise institutions fundamental to democracy and economic growth; *Clear the Thorns* – deregulate over-regulated sectors with overlapping rules; *Regulate the New India* – update laws and provide legal frameworks to confront new challenges; and *Build a Possible India* – assert India’s place in the world as a model constitutional democracy.

Through these reform actions, five key areas crucial for India’s growth and achievement are covered – judicial and administrative reform, economy, development, human rights and technology. In each of these areas, the overwhelming mandate given by the people in 2014 provides a historic opportunity to fundamentally fix broken systems, even by constitutional amendments if required. This opportunity must be capitalised on. At the same time, small victories are sometimes as important as major overhauls. To this end, we suggest a combination of big change and easy wins which we believe deserve the consideration of the Government of India.

As a legal policy think-tank, the vision of the Vidhi Centre for Legal Policy is to achieve better governance through better laws. Better laws must be high-impact and capable of positively affecting the lives of the people they intend to serve. It is with the firm belief that the 25 suggested legal reforms do so that this Briefing Book has been put together. We hope you enjoy reading it as much as we did researching and writing it.





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# THE BRIEFING BOOK: A FRAMEWORK

## KEY FOR TOPICS

Judicial and Administrative Reform

Economy

Development

Human Rights

Technology and Innovation

Renew Basic Institutions	Clear the Thorns	Regulate the New India	Build a Possible India
Streamline Judicial Appointments	Reduce Government Litigation	Simplify Nuclear Liability	Expand RTE Coverage
Make Tribunals Effective	Expedite Arbitrations	Promote Renewable Energy	Bolster Free Speech
Advance Police Reforms	Clarify Forest Laws	Ensure Safer Clinical Trials	Draft a New Anti-trafficking Law
Regulate the Media	Prevent Water Wars	Create a Two-tier Patent System	Strengthen Abortion Laws
Streamline PSU Governance	Harmonise Labour Laws	Protect Net Neutrality	Manage Refugee Influx
Reform Bankruptcy Laws for Individuals	Reform the Corporate Insolvency System	Allow Crowdfunding of Small Businesses	Consolidate Anti-corruption Legislation
Repeal Obstructionist Laws			

# MINISTRY-WISE REFORMS

The table below matches the 25 suggested reforms with the nodal ministry responsible for it.

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Make Tribunals Effective.....	11
Reduce Government Litigation.....	18
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Clarify Forest Laws.....	20
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<b>Ministry of New and Renewable Energy</b>	
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<b>Ministry of Water Resources</b>	
Prevent Water Wars.....	21
<b>Ministry of Women and Child Development</b>	
Draft a New Anti-trafficking Law.....	36
<b>Department of Atomic Energy</b>	
Simplify Nuclear Liability.....	26
<b>Department of Industrial Policy and Promotion</b>	
Create a Two-tier Patent System.....	29





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**RENEW BASIC  
INSTITUTIONS**

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# STREAMLINE JUDICIAL APPOINTMENTS

Making the process of appointments to the Supreme Court and High Courts participatory and transparent

## ISSUES

The Supreme Court of India and the High Courts are the guardians of the Constitution of India. Given their exalted constitutional status, it is imperative that the method of appointing judges to these courts is such that only persons of the highest integrity and aptitude are chosen. Unfortunately, the current system of appointments, led by a collegium of senior Justices of the Supreme Court, pursuant to a decision of the Court itself, has proven unequal to this task. The corridors of the judiciary are rife with widespread charges of nepotism and factors other than merit guiding appointment decisions. The process is completely opaque without any possibility of holding decision-makers accountable. It is inconsonant with best practices worldwide which have shown a discernible pattern of moving towards optimally transparent and accountable processes of appointment. Finally, it proceeds on an indefensible interpretation of Article 124(2) and Article 217(1) of the Constitution which prescribes the method of judicial appointments.

## SOLUTION

The Constitution (120th Amendment) Bill, 2013 and the Judicial Appointments Commission Bill, 2013 were introduced in the Rajya Sabha in August 2013. The Constitution Amendment Bill provides for the establishment of a Judicial Appointments Commission to appoint judges, the composition, functions and procedures of which are laid down in the accompanying Bill. In principle, the concept of an appointments commission is salutary. However three key amendments to the existing scheme are necessary.

First, too much latitude is allowed to Parliament to change the composition and functions of the Commission. It is thus necessary that not only the establishment of the Commission but also its composition and functions are laid down by a constitutional amendment. Second, there is no procedure or criteria laid down in the Act for shortlisting of candidates or for resolving disagreements in the Commission. The past experience of judicial appointments, both when it was led by the executive as well as the judiciary, suggests the definite need for dispositive rules in this regard thereby bringing an optimal degree of transparency into the process. Third, despite vesting the Commission with the power to transfer judges and Chief Justices from one High Court to another, the Bills neither specify the grounds nor the procedure for doing so. It is imperative that clearly delineated grounds for transfer of judges and the procedure to be followed are laid down in the Act.

## IMPLEMENTATION AND IMPACT

- The Constitution (120th Amendment) Bill, 2013 passed by the Rajya Sabha and The Judicial Appointments Commission Bill, 2013 pending in the Rajya Sabha should be withdrawn.
- A more detailed constitutional amendment should be introduced containing the following:
  - o The composition of the Judicial Appointments Commission;
  - o The functions of the Commission.
- A new, reworked bill must be introduced alongside the constitutional amendment providing for:

**WITHDRAW THE CONSTITUTION (120TH) AMENDMENT BILL, 2013 AND THE JUDICIAL APPOINTMENTS COMMISSION BILL, 2013.**

- o The criteria and procedures for shortlisting and selection of candidates;
- o The grounds and procedures for transfer of judges to be followed by the Commission.

Such reform will ensure that the best candidates for judicial office are selected in an optimally transparent manner. This will reaffirm respect for the institution of the judiciary currently sullied by wanton speculation and rumour surrounding the appointments process. Further, it will do so in a manner that is perfectly consonant with the independence of the judiciary.

## 2

## MAKE TRIBUNALS EFFECTIVE

Streamlining the nation's tribunals to improve efficiency and allow functional autonomy

### ISSUES

The idea behind tribunals is to provide a more efficient and specialised means of dispute resolution between citizens, and also between citizens and the State. At present 29 tribunals of various sizes and jurisdictions function under the aegis of different ministries. They operate outside the regular court structure, replacing the existing judicial structure in some cases, and providing for a specialised forum for dispute settlement in others.

However, three problem areas have called into question the very system of tribunals: *first*, there is a lack of functional autonomy as compared to courts – functionally, tribunals are dependent on allocation of funds by the appropriate ministry and do not always have the power to hire their own staff. *Second*, with respect to independence of appointees, tribunal members, unlike judges at all levels, have short tenures, subject to renewal by the Government at its pleasure. Further, in several tribunals the pool of possible appointees to the tribunal inevitably includes retired government officials whose administrative decisions are in fact being challenged before the tribunal. *Finally*, there is the problem of inefficiency – far from improving the disposal rate of cases and providing quick and ready justice delivery, tribunals seem to have become bogged down with cases in the same manner as the regular judicial system, attributable to the lack of appointments and adequate infrastructure.

Unsatisfactory dispute resolution in tribunals has resulted in increase in litigation at the High Court and Supreme Court levels, nullifying to some extent the benefits of having the tribunal supplement the Court.

In addition, where tribunals were supposed to divert the flow of cases from overburdened courts, they are becoming overburdened themselves, due to inefficient functioning.

### SOLUTION

The reforms necessary to revamp the tribunal system in India will require legislative, procedural, and systemic changes to their function. The legislation should look to bring about uniformity in the administration of the tribunal, and in appointment, removal, and terms and conditions of service of the tribunal Members. The mechanism to fund tribunals must be changed to allow tribunals to raise funds directly where possible. Their functioning must also be closely monitored through proper collection and collation of data related to the functioning of tribunals.

### IMPLEMENTATION AND IMPACT

- The existing Tribunals, Appellate Tribunals and Other Authorities Bill, 2014 needs to be amended to bring greater uniformity. This will also require amendments to the Allocation of Business Rules, 1961. Tribunals should be uniformly administered by the Law Ministry, and the coverage of the Bill should be expanded to encompass a wider set of tribunals. This will ensure that the Ministry whose decisions are being reviewed by the tribunal is also not the one which appoints members to the tribunal, granting the tribunals far more independence.

- New provisions must be introduced giving tribunals full functional autonomy. Where possible, tribunals should be allowed to raise their funds

**REDRAFT THE TRIBUNALS BILL, 2014 TO ENSURE UNIFORMITY IN APPOINTMENT, TERMS AND CONDITIONS OF SERVICE AND RETIREMENT OF TRIBUNAL MEMBERS.**

and draw up their own budgets, with funding allocated directly from the Consolidated Fund of India, and not from individual ministries' allocations. This will allow operational autonomy to tribunals from their parent ministries.

- The Law Ministry should set up a single, unified Tribunals Case Management IT infrastructure along the lines of 'courtnic' to allow the Law Ministry, litigants, lawyers and researchers to keep track of the manner in which tribunals are functioning, the judgments they deliver and their pendency positions. This will allow the Law Ministry to better monitor the functioning of tribunals and address the issues that they may face in terms of appointments or infrastructure. This makes it easier for the efficiency of the tribunals to be assessed and improved on an ongoing basis.

With these changes, tribunals will no longer be under the control of the Ministry whose decisions they are supposed to be examining. An autonomous and fully functioning tribunal system will ease the burden of cases before the High Courts, and provide for certainty in dispute resolution while re-affirming the faith of citizens and foreign investors in the justice delivery system in India.

## ADVANCE POLICE REFORMS

A way forward for a new Delhi Police Act that focuses on consultation

### ISSUES

Law enforcement in India is a legacy of the British *Raj* – a system put in place with the intention of controlling the public and stifling civil liberties. Since independence, efforts have been made to change the police into a force that is more integrated with the society it serves. But police reform remains one of those issues that is caught in an endless loop of commissions, committees and public interest litigation ('PIL'). In recent years, under pressure from the judiciary and the public, some states have acknowledged the importance of an effective and independent police force, and taken some positive steps in this area. The Delhi Police Act of 1978, however, has remained largely untouched.

Reform measures have been proposed since the late nineties, most notably by the Police Act Drafting Committee (PADC) in 2005 and the landmark Supreme Court ruling in *Prakash Singh v. Union of India* [(2006) 8 SCC 1]. In that PIL, the Supreme Court directed the Centre and States to comply with the seven binding directives laid out in the judgment. However, Delhi has lagged behind in this process. Under pressure to replace the archaic 1978 Act, the Ministry of Home Affairs ('MHA') produced the Draft Delhi Police Bill, 2010 which was sent to the Delhi Government for its views. The Draft Bill was condemned by both civil society and the Delhi Government – the former on the ground that the recommendations of previous Committees had been ignored, and the latter because the Bill gave no control of the police to the Delhi Government.

Since then, there has been little success in building consensus among

various stakeholders to pass a new Delhi Police Act. Clearly, a different approach is needed to resolve this gridlock.

### SOLUTION

The Kerala Legislative Assembly, before enacting a new Police Act, referred the Bill to a Select Committee headed by the Home Minister of the state. The Select Committee toured the state and held town hall meetings in each district. Feedback on the Bill was also invited through the internet and this effort was widely publicised in the media which resulted in a high level of public participation in this consultation process. As a result of this process, the Select Committee suggested 790 amendments to the Bill, 240 of which were passed in the House after debate. The process resulted in what is widely acknowledged as one of the best Police Acts of the country.

A similar consultation procedure that clarifies the people's mandate may prove to be a way out of the current impasse surrounding the Delhi Police Act. Therefore, a Bill that is drafted along the lines of the Model Police Bill of the PADC, should be subjected to an extensive consultation process. Such a process must incorporate the principles in the recently introduced Pre-Legislative Consultation Policy, and also include widespread grass-roots consultations as was done by the Kerala Government.

**INITIATE EXTENSIVE PUBLIC CONSULTATIONS AS PART OF A PRE-LEGISLATIVE PROCESS FOR A NEW DELHI POLICE ACT.**

### IMPLEMENTATION AND IMPACT

The following process is recommended as a way forward to a new Delhi Police Act –

- The MHA should draft a new Delhi Police Bill in accordance with the Model Police Bill of the PADC. The Bill should incorporate the *Prakash Singh* directives in letter and spirit.
- The draft Bill should be sent to the Delhi Legislative Assembly that then makes a committee responsible for eliciting views from the public through extensive consultations.
- The Legislative Assembly should debate the views of the people and recommend a modified Bill to the Centre. The Delhi Government should maintain a dialogue with the Centre to tackle unresolved issues.

Involving the public in such an unprecedented manner would result in a way out of the current impasse surrounding police reforms. If the experience in Kerala is any indication, it is also likely to lead to an inclusive Bill that accurately reflects society's expectations from its police.



## 4

## REGULATE THE MEDIA

A mandatory system of self-regulation for the news media that balances media freedom and public interest

### ISSUES

Calls for better governance of the news media have been heard in recent times around the world, not least in India. The debate on this issue, however, seems stuck in the binary of self-regulation versus institution of a statutory regulator.

The existing regulatory framework demonstrates the shortcomings of both these approaches. News media regulation in India is fragmented, with multiple regulatory bodies. In most cases, decisions made by these bodies are not enforceable. The Press Council of India, a statutory body governing the print media may entertain complaints and issue admonishments for violation of its guidelines, but does not have the power to enforce compliance. The self-organised News Broadcasting Standards Authority governing news broadcast media has the power to fine, but its jurisdiction extends to only those organisations that choose to be members of the News Broadcasters Association. Therefore its efficacy depends on voluntary compliance with its orders.

Calls for more vigorous statutory regulation, such as setting up a media regulatory authority to offset these drawbacks, lead to widely expressed fears of censorship and state suppression of free media. It is therefore necessary to move beyond a simplistic binary of self-regulation and statutory regulation, and to explore models that incorporate the best elements of each.

### SOLUTION

One such mechanism that incorporates elements of self-

**ENABLE, THROUGH STATUTE,  
A MANDATORY SYSTEM OF  
SELF-REGULATION OF THE  
NEWS MEDIA INDUSTRY THAT  
ALLOWS NO OPT-OUTS.**

regulation and statutory regulation is the system of Bar Councils, established under the Advocates Act, 1961. Under the statute, the State Bar Council consists of members elected through the system of proportional representation by means of a single transferable vote from amongst advocates on the electoral roll. The Bar Council of India comprises certain ex-officio members such as the Attorney General of India, and one member elected from each State Bar Council. The Bar Councils are responsible for admitting advocates on their rolls, setting standards of conduct and enforcing compliance through suspensions or disbarment.

The Advocates Act therefore does not leave it to the discretion of either the government or the industry to appoint a governing body, but instead sets up a framework according to which such a body shall be constituted. A process of election is similarly mandated under the Chartered Accountants Act, 1949 for the constitution of its governing Council.

While this system cannot be emulated wholesale for the regulation of the media, certain elements which incorporate facets of self-regulation and statutory regulation are worthy of consideration. One such element is a statutorily laid down selection process of an independent governing body from amongst members of the profession. Guidelines to determine

who constitutes a news media professional/ news media entity will have to be introduced for this purpose. Another is the power to impose penalties on errant members including the power to fine and to direct the government to revoke licenses. A comprehensive law that incorporates these elements is clearly the need of the hour.

### IMPLEMENTATION AND IMPACT

The following principles must therefore be incorporated in a new comprehensive law that sets up a news media self-regulatory authority for print and broadcast media. While regulation of internet news media is also an important issue, it is best dealt with separately in a manner that takes into account the unique characteristics of the open internet.

- With the convergence of media platforms, it is necessary that such a self-regulatory authority's jurisdiction encompasses both print and broadcast media.
- Enrolment according to the procedures laid down by the authority must be made mandatory for all news media entities, so that it is not possible to opt out. The authority must lay down procedures for licensing and delicensing.
- The members of the authority must be media professionals selected by the industry in a transparent manner, along with some *ex-officio* members.
- The authority must be statutorily granted the power to lay down rules of conduct backed by punitive measures, including fines and directions to government for delicensing.

## STREAMLINE PSU GOVERNANCE

Streamlining ownership and improving corporate governance in public sector undertakings to unshackle the economic powerhouses

### ISSUES

Public Sector Undertakings ('PSUs') contribute significantly to the Indian economy. However, due to problems associated with (a) lack of autonomy and (b) lack of financial and technical expertise at the management level (in certain sectors), PSUs are often criticised for failing to make optimal use of national resources and assets available at their disposal. While disinvestment is seen as a way of bringing market discipline to PSUs and improving their performance, it is not always a politically acceptable way of doing so. The political economy in India has not always been conducive to disinvestments and the process is susceptible to hurdles in the form of backlash from the work force and legal challenges in Courts.

The regulatory framework that attempts to improve the corporate governance of companies in general has not been very effective in relation to the PSUs. The Securities and Exchange Board of India has in the past initiated proceedings against many listed PSUs for failing to appoint independent directors in accordance with the requirements of listing agreements of stock exchanges. Given that the Articles of Association of such PSUs provide for appointment of directors by the President of India (through the relevant Ministry), the process is prone to delays, undermining the globally acceptable standards of corporate governance. An efficient way of improving the productivity of PSUs without subjecting them to any large-scale disinvestment is to streamline their governance structure and professionalise the management.

**RESTRUCTURE NON-BANKING  
PSUs IN A PARTICULAR SECTOR  
(ENERGY, FOR EXAMPLE)  
ON A PILOT BASIS BEFORE  
IMPLEMENTING THIS ON A WIDER  
SCALE.**

### SOLUTION

The Government should consider repealing all statutes establishing non-banking PSUs and transferring its shareholding in those PSUs to companies incorporated under the Companies Act, 2013 and classified in accordance with the business of the PSUs under consideration ('Operating Cos'). The Government's shareholdings in all the Operating Cos could then be transferred to a common parent company ('Parent Co'), incorporated under a framework law drafted for the formation and governance of the Parent Co and the Operating Cos. The Government may directly control the board composition of such Parent Co, while allowing a sufficient degree of independence for its functioning. The Government should have very little or no direct involvement in the board composition or management (including matters of employment and remuneration) of the Operating Cos, leaving such matters to be controlled and overseen by the Parent Co board. The management of the PSUs could be regulated through rules drafted by the relevant Operating Cos and incorporated in their Articles of Association. The Parent Co could also be entrusted with vigilance enforcement for all the Operating Cos. Further, the governance related provisions of the Articles of Association of the Parent Co and

Operating Cos should provide for the presence of technical and financial experts on their respective boards and sub-committees. While the Parent Co may supervise the functioning of the Operating Cos under its control, the day-to-day operations could be largely left to the discretion of the Operating Cos' Boards. Any governmental supervision at the Operating Co level may be exercised through the Government's representatives on the board of the Parent Co.

### IMPLEMENTATION AND IMPACT

A new framework law will have to be drafted for the overall governance of PSUs under the restructuring proposition outlined above. A study of similar ownership models in other jurisdictions will be useful before introducing the above concept in India. A study of competition law implications of the proposed restructuring will also be required. Implementing the above could unlock the true potential of the PSUs in a big way and provide them with a level playing field with market participants in many sectors. The Parent Co may also be used as a Sovereign Wealth Fund at an appropriate stage and used for making investments in (a) different kinds of assets (both domestically and internationally) and (b) developmental activities, as long as there is no risk posed to the financial and operational security of the PSUs under its control.

## 6

# REFORM BANKRUPTCY LAWS FOR INDIVIDUALS

Modernising the personal insolvency regime in India to ensure better bankruptcy protection for individuals

## ISSUES

One of the main purposes of insolvency law is to support the collection efforts of creditors by providing a mandatory and collective procedure, where the assets of the debtor are distributed among the stakeholders in an orderly manner. Once triggered, insolvency laws typically suspend the exercise of individual enforcement rights (moratorium). In the context of personal insolvency, such suspension of individual enforcement rights of the lenders can provide breathing space to the bankrupt individual for redeeming himself financially. With the growth of organised consumer lending and micro-finance in India, an effective mechanism for resolving personal insolvencies is critical for providing adequate protections to borrowers facing the risk of insolvency. Personal insolvency in India is primarily governed by the Presidency Towns Insolvency Act, 1909 (for the erstwhile Presidency towns) and Provincial Insolvency Act, 1920 (for the rest of India).

This regime has not seen many substantive changes over the past 100 years and has proved to be very ineffective in practice. The system is prone to delays, and does not provide sufficient incentives for debtors or creditors to initiate proceedings. Moreover, the system remains inaccessible to a large section of society due to the costs associated with initiating proceedings. The present law on personal insolvency provides considerable powers to the courts on various matters, which require detailed adjudication at several stages. For instance, the moratorium (that suspends individual enforcement rights) can only be imposed after a

### AMEND EXISTING PERSONAL INSOLVENCY LAWS FOR LIMITING JUDICIAL DISCRETION AND MAKING THE SYSTEM OBJECTIVE.

court 'declares' that the concerned person is insolvent. If the assets of a bankrupt individual are not sufficient to discharge his obligations, the law permits discharge of the outstanding obligations in certain circumstances that are subject to the discretion of the courts. Such provisions requiring adjudication at the early stages of the proceedings subject the system to considerable delays.

## SOLUTION

The decision-making institutions of an insolvency system (courts and administrators) play a vital role in the success or failure of a system. The practices of Indian courts, lawyers and insolvency administrators that cause delays in insolvency proceedings need to be closely examined and appropriately reformed. Specific time limits need to be introduced for resolving insolvencies without any possibility of extensions. Further, measures like imposition of an automatic moratorium at the time of filing an insolvency petition must be introduced to facilitate quick renegotiation of debt during the moratorium. Discharge of debt (in cases where assets are not sufficient) should be automatic if certain objective criteria are satisfied. Further, special bankruptcy courts should be established for the poor where the costs of the proceedings are covered by the State.

## IMPLEMENTATION AND IMPACT

The Government should consider implementing the above institutional and substantive changes through a single comprehensive law that takes into account modern best practices. An efficient mechanism for resolving personal insolvencies can benefit lenders by providing a predictable system of recovery. It will also benefit bankrupt individuals by allowing debts to be renegotiated in the insolvency proceedings. Such renegotiated debts may cause some losses for the lenders, and increase their incentives to conduct proper screening of the debtors at the time of lending and discourage predatory lending and insufficient monitoring. Over a period of time, as seeking insolvency protection becomes a matter of ordinary course, this may also reduce the stigma associated with individual insolvency and reduce the incidence of insolvency-related suicides in the country.





**CLEAR THE  
THORNS**

# REDUCE GOVERNMENT LITIGATION

Revising the National Litigation Policy to unlock the judicial gridlock

## ISSUES

The Central Government is the single largest litigant in the country in terms of initiating cases, and responsible directly for a significantly large number of cases as a respondent. Ill-conceived appeals by the Government only add to the economic costs of a slow and inefficient judicial machinery that is barely able to handle the explosion of cases in its docket. Serious measures are therefore needed both in the short and long term to handle the problem. One solution to the problem is to fix the 'demand side' of litigation – reduce the number of cases that reach the courts. As the single largest litigant, the Government is in a unique position to lessen the burgeoning docket.

Government litigation, unlike private litigation, suffers from an agency problem. Given the length of time needed to finally dispose of a case, it is always easier and less of a burden to kick the ball further down the field by filing an appeal or petition, than to take a call to resolve the dispute amicably. In addition, direct costs of litigation are actually much lower for the government than for the private party given that the government can take advantage of economies of scale in engaging lawyers, et al. Thus, litigation is a cost-effective option for the government, even if the actual costs are borne by the larger judicial system and the economy at large.

## SOLUTION

The remedy for the present state of affairs is a combination of normative rule changes and technological solutions. Without technological solutions, normative rule changes will be ill-informed and divorced from

**GIVE ENFORCEABILITY TO THE NATIONAL LITIGATION POLICY BY PRESCRIBING PENALTIES AND CONSEQUENCES FOR FAILURE TO ADHERE TO IT WHILE FILING CASES.**

reality, and without normative rule changes, technological solutions will be inconsequential.

Normatively, the National Litigation Policy should be made binding and enforceable against officers of the Government, in a manner akin to the procedure adopted by the Central Board of Direct Taxes, to ensure that appeals are restricted only to high value tax disputes. A lower monetary threshold should be introduced for appeals in matters that form the bulk of government litigation, and alternative dispute resolution methods should be made an option. Additionally, there should be greater monitoring of the number of pending cases where the Government is a litigant.

## IMPLEMENTATION AND IMPACT

- The Cabinet should issue a revised National Litigation Policy which will be binding on all Departments and officers, and which will also set up a Committee of Secretaries to monitor the implementation of the Policy, in coordination with the Ministry of Law and Justice.
- The specific responsibilities of the Committee of Secretaries should include the task of monitoring cases and the power to recommend

disciplinary action against officers who recommend routine appeals or who collude to stop litigation.

- Administrative procedures should be introduced that place strict monetary limits on routine appeals, especially in areas that tend to see greater litigation – tax, land acquisition, and service law.
- Alternate remedies like conciliation and negotiation should be made available in matters which purely involve monetary pay-outs and do not involve serious breaches of law by the private litigant.
- The Central Government should, in conjunction with an Information Technology service provider, set up a database in the Central Agency and each of the regional branch secretariats of the Law Ministry, which will contain details of cases in the region, and train staff to use the system properly, allowing the Law Ministry and the Committee of Secretaries to monitor litigation effectively.

The immediate impact, if implemented by the Government through binding office orders and prompt monitoring of implementation of the orders, would be to reduce the Government's litigation burden significantly. This would also ease up the Court system for the general public, as well as for more significant disputes brought by the government or private parties.

2

# EXPEDITE ARBITRATIONS

Amending the Arbitration and Conciliation Act to speed up arbitration in India

## ISSUES

The intention behind the Arbitration and Conciliation Act, 1996 was to provide speedier private resolution of disputes. However, practice in India over the last two decades does not demonstrate the achievement of this goal. One of the primary reasons for this is the recourse to courts at various stages of arbitration. Arbitration petitions and enforcement proceedings get entangled with the general backlog of cases and lead to an inordinate delay in final awards being rendered and enforced. Although the Indian law is modelled on the UNCITRAL Model Law on International Commercial Arbitration, there remains much room for improvement in the Act. While other aspects of India's legal and regulatory framework have been shaped to attract more and more foreign investment, several potential investors shy away from projects in India that would require contracts with Indian parties and naturally require dispute settlement clauses. Arbitration clauses are especially desired in contracts with Indian parties, since foreign parties are keen to avoid long delays in litigation before Indian courts. However, a 2013 Ernst & Young study shows that even Indian parties prefer to seat their arbitrations in Singapore or London, rather than anywhere in India. Most survey participants were of the view that arbitration in India was not cost-effective and did not provide timely solutions.

## SOLUTION

Of course, amending the law is not the single solution to the several problems mentioned above, but a few small amendments to the Act can go a long way in effectively moving disputes out

of courts and in converting India into an attractive destination for arbitration.

To achieve the above, three key interventions are necessary:

- An effective way of reducing the role of courts is to prevent appeals from orders of the Chief Justice under section 11(5) of the Act, appointing arbitrators when parties have failed to appoint one. Section 11 orders comprise a large number of arbitration matters before courts, and preventing appeals from these orders would reduce delays to a great extent.
- Another possible strategy for reducing delays is to pre-empt challenges to arbitrators by illustrating the grounds described in section 12 as 'justifiable doubts as to his independence or impartiality'. Clarifying the scope of 'justifiable doubts' would reduce chances of delay in enforcement of the award due to a challenge to the award under section 13(5).
- A further method of reducing the scope of challenges to awards is narrowing the definition of 'public policy' in sections 34(2)(b)(ii) and 48(2)(b), as laid down by courts. Inclusion of the concept of 'patent illegality' within the meaning of 'public policy', even in the context of international arbitrations, has far widened the scope of challenge to arbitral awards. Limiting the definition of public policy to the 'fundamental policy of India' and 'interests of India' and 'justice' or 'morality' would not render it devoid of meaning, but would eliminate the scope for challenge in a large number of situations.

## IMPLEMENTATION AND IMPACT

The following changes can be made to the statute to implement the above proposed solutions:

- Inserting an explanation to section 11, that any order of the Chief Justice under that section is an administrative order, and is thus not subject to appeal.
- Illustrating the circumstances giving rise to 'justifiable doubts' under section 12(1) and 12(3)(a), modifying and inserting the IBA Guidelines on Conflicts of Interest in International Arbitration as a Schedule to the Act.
- Inserting an explanation to sections 34(2)(b)(ii) and 48(2)(b), excluding 'patent illegality' from the meaning of 'public policy of India', as a ground for refusing enforcement of an international arbitral award, even if seated in India.

Each of the above changes would work towards significantly reducing the number of times parties approach courts in connection with arbitrations, thereby speeding up the overall arbitral process. This in turn would provide an important fillip to the investment climate in India.

**MAKE CHIEF JUSTICE ORDERS  
APPOINTING ARBITRATORS  
ADMINISTRATIVE ORDERS, TO  
PREVENT APPEALS.**

## CLARIFY FOREST LAWS

Reconciling statutory regimes for a better balance between conservation and the rights of indigenous forest-dwelling tribes

### ISSUES

The implementation of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (the 'FRA') is plagued by several problems. The forest department is reluctant to relinquish the control that it enjoyed under the colonial-era statute, the Indian Forest Act 1927 (the 'IFA'), perpetuated post-independence through the Wildlife (Protection) Act 1972 (the 'WPA') and the Forest (Conservation) Act 1980 (the 'FCA'). Forest officials have filed petitions to block the implementation of the FRA. They have failed to create awareness among indigenous forest-dwellers about their rights and continue to obstruct implementation by rejecting legitimate claims to forest land for arbitrary reasons.

Clearly, there is a fundamental clash between the IFA, WPA and FCA on the one hand and the FRA on the other – the former statutes vest control over forest land in the State and its bureaucratic machinery, while the latter seeks to wrest this control away and empower local communities instead.

Further, the process of settling claims to forest land under the FRA is markedly different from the other statutes, with the result that indigenous forest-dwellers, in the interests of wildlife conservation, are often denied their rights to land contained in 'protected areas' or 'national sanctuaries' under the WPA. Section 13 of the FRA states that it is to be read in addition to and not in derogation of other laws in force, save as otherwise provided in the FRA. However, this has not proved useful in reconciling the different statutory regimes because the IFA, WPA and FCA do not contain reciprocal

**AMEND THE INDIAN FOREST ACT, WILD LIFE (PROTECTION) ACT AND THE FOREST RIGHTS ACT TO REFLECT THAT THE LAST WILL PREVAIL IN CASE OF CONFLICT.**

provisions that indicate that the FRA is to override them in case of conflict.

Finally, the promotion of joint forest management schemes by the forest department under the National Afforestation Programme undermines section 4(e) of the FRA which seeks to empower Gram Sabhas with the protection and conservation of forests and biodiversity (Jha, 2010).

### SOLUTION

In the long term, the solution must lie in the ultimate repeal of the IFA and its replacement by an expansion of the rights-based FRA. Overlapping sources of authority under the different statutes ought to be minimised and a uniform procedure for balancing interests in forest conservation with the rights of indigenous forest-dwellers ought to be introduced.

In the short-term, the solution lies in explicitly clarifying the supremacy of the FRA in cases of conflict.

### IMPLEMENTATION AND IMPACT

The harmonisation of the various statutory regimes ought to be accomplished as follows:

- Amending Sections 5 and 20 of the IFA and WPA respectively to clarify

that the bar on the accrual of rights that these sections impose does not apply in the case of rights granted under the FRA.

- Amending Section 13 of the FRA to clarify that in the case of conflict with other statutes, its provisions are to prevail.
- Introducing a uniform procedure for the settlement of claims to forest land, whether such land falls under a 'reserve forest', 'protected forest', 'national park', 'national sanctuary' or 'protected area' as defined under the IFA and WPA.
- Changing the composition and functioning of joint forest management committees to reflect the shift in emphasis from the forest department to local citizens.
- In the long term, repealing the IFA and subsuming its provisions in modified form under the FRA.

These changes will reduce the confusion that currently prevails about the rights of indigenous tribes in forest lands demarcated for wildlife conservation and ensure that their legitimate claims are not denied. Conflicts among forest, revenue and tribal affairs departments will be reduced, ultimately paving the way for an administrative machinery that adopts a uniform, coherent and rights-based approach to forest conservation.



## 4

## PREVENT WATER WARS

Providing more effective inter-state river water disputes tribunals

### ISSUES

Given the growing industrialisation of India and the increased demand for water from non-agricultural sectors, the issue of how to use inter-state rivers will continue to arise in more than one context. Thus, a coherent and certain method of dispute resolution needs to be evolved. Further, any proposal to interlink rivers, as has been widely suggested, must include a plan on how to effectively deal with disputes about river water use. A stable and certain dispute resolution mechanism is also essential to any attempt to clean up polluted inter-state river waters, which will require agreement and coordination between states as to how to use water sustainably, as well as a mechanism to enforce such sustainable use.

The present mechanism for resolution of inter-state water disputes is wholly unsatisfactory. Inter-state river water disputes are placed before ad hoc tribunals set up under the Inter-State River Water Disputes Act, 1956 ('ISRWD Act'). However, the enforcement of awards under the Act are subject to publication by the political executive, rather than being directly enforceable as with any other court. In addition, vacancies commonly arise in the tribunals due to delay in disposing the cases. New judges then have to be appointed, causing further delays and adding to conflict over river water use. In the absence of a certain dispute settlement mechanism, river water disputes can spiral into causes for ethnic and sub-national conflict.

**AMEND THE ISRWD ACT TO MAKE AWARDS BINDING AS SOON AS THEY ARE ISSUED.**

### SOLUTION

The problems with inter-state river water dispute settlement can be attributed to the faulty manner in which the Tribunal itself is envisaged. The Act thus needs to be amended to ensure that the disputes are heard and decided in a time-bound manner and that the order of the Tribunal becomes binding on the parties with immediate effect.

### IMPLEMENTATION AND IMPACT

Amendments to the ISRWD Act, 1956 ought to be made on the following lines:

- The Tribunal should be composed of sitting Supreme Court judges with a term of at least three years, who will continue to hold the post in the Tribunal only as long as they remain sitting Supreme Court judges. This ensures that the Tribunal works within a fixed time period. Such judges should continue to function as sitting judges and as Members of the Tribunal in a manner akin to the Tribunal under the Unlawful Activities Prevention Act, which has a sitting High Court judge.
  - The award of the Tribunal should become binding and enforceable as soon as it is issued and should not depend on publication by the Central Government in the Gazette.
  - No further appeal to the Supreme Court should be permitted since the proceedings will be on par with an original suit between States being tried by the Supreme Court itself.
- With these amendments the resolution of the inter-state river water disputes will be time bound and certain, leaving less scope for conflicts over river water sharing to become politicised. In

addition, a stable and certain dispute resolution will also allow for the concerns of river water pollution to be addressed in a systematic way, once states are aware how much water they are entitled to draw and how to preserve it for future generations.

## HARMONISE LABOUR LAWS

Standardising definitions in labour law for more effective targeting in labour welfare

### ISSUES

That labour law reforms are long overdue in India is evident. While many of the areas of reform are contentious, as a first step, loopholes, contradictions and overlaps in the law must be identified, correcting which will have the greatest acceptability amongst all stakeholders.

One such issue is the varying definitions of ‘workman’ and related terms across labour laws. The term is defined differently under the Industrial Disputes Act, the Factories Act, and the Contract Labour (Regulation and Abolition) Act.

A related term ‘employee’ also suffers from similar problems. The Minimum Wages Act uses the term ‘employee’ while the Payment of Wages Act uses the term ‘employed person’ and the Mines Act uses ‘employed’. Even where the same term is used, as in the Payment of Bonus Act and the Payment of Gratuity Act, the language used to define them is different.

The varied definitions bring with them different wage limits for the applicability of similar benefits. Protection under the Payment of Wages Act, the Payment of Bonus Act and the Employees’ State Insurance Act all mandate different wage limits. This impinges on the usability of the law, since it is extremely difficult for a worker to know what protections and advantages he qualifies for under multiple labour laws.

The distinction between the workman and employees was created to separate out a managerial class which did not need a higher level of protection under the law. However, amidst numerous definitions, this

purpose has not been served. Certain categories of employees who receive far greater remuneration than the average manager, and enjoy more authority, are treated as workmen while protection is sometimes not granted to deserving employees (2nd National Labour Commission). The lack of consistency therefore contributes to misinterpretation and unequal application of the law (Debroy, 2005).

### SOLUTION

There is a need to revisit the definition of two terms – ‘employee’ and ‘workman’ – across all Central labour laws, draft a single definition for each that addresses the problems of over and under-inclusion, and adopt it uniformly in all labour laws, thus fulfilling the goal of standardisation.

**HARMONISE THE WAGE  
CEILING LIMITS FOR VARIOUS  
SOCIAL SECURITY STATUTES  
UNDER LABOUR LAWS SO THAT  
SIMILAR BENEFITS ARE MADE  
APPLICABLE IN A UNIFORM  
MANNER.**

### IMPLEMENTATION AND IMPACT

The following steps are necessary in order to standardise definitions of the aforementioned terms:

- The principal definition of ‘workman’ under the Industrial Disputes Act should be redrafted to ensure that the protections under the Act are made available to the intended categories of employees. The redrafted definition

must then be used uniformly through all applicable labour laws by reference to the Industrial Disputes Act. A similar exercise must be carried out for the term ‘employee’.

- Similar terms such as ‘employee’ and ‘employed person’ must be amended to introduce a single term that is used across all relevant laws.
- Wage limits under different laws must be standardised so that benefits are simpler to access, and are equally available. Further, wage limits must be made alterable by notification so that the Act does not have to be amended every time wage limits need to be revised.

While the reform of labour laws in India encompasses many more dimensions, making definitions uniform can prove to be a first step for reform in a neglected area of law that is generally thought to be an impediment to the economic development of the country.

## 6

# REFORM THE CORPORATE INSOLVENCY SYSTEM

Introducing institutional and substantive changes to the corporate insolvency regime in India to promote economic growth and entrepreneurship

## ISSUES

Insolvency of a company may be defined in terms of 'economic' or 'financial' distress. While the former relates to the company's ability to efficiently produce and sell goods and services, the latter signifies its capacity to service debts. It is widely recognised that as long as a failing company remains economically viable, it should be first subject to reorganisation, and not liquidation. Unlike liquidation, where the company is closed down, 'reorganisation' or 'corporate rescue' is a process of 'organisational rebirth' where the debts are renegotiated and every effort is made to enable the company to return to commercially viable operations.

The most recent Doing Business report (a joint project of the World Bank and the International Finance Corporation) ranks India 121 out of 189 countries for resolving insolvencies. It notes that resolving insolvencies in India takes 4.3 years on an average (which is greater than the time taken for resolving insolvencies in even Pakistan and Bangladesh). This estimate actually appears conservative compared with many anecdotal reports of delays. In spite of being structurally similar to some efficiently functioning insolvency regimes of the world, the Indian regime has not proved to be very effective in practice.

Moreover, the law in its present form appears unusual in permitting secured (institutional) creditors to wholly escape the application of the moratorium in corporate rescue procedures in certain circumstances. The ability of secured creditors to prevent the commencement of a corporate rescue procedure, or to

close a pending rescue procedure, will necessarily limit the extent to which this procedure can be used to ameliorate the potential inefficiencies of piecemeal asset sales. Further, recent corporate collapses in India indicate that the directors and management may often underestimate the risks of their actions and overestimate their own ability to save a failing business. In such instances, there is significant scope for the law to step in and protect other stakeholders before a company goes beyond redemption.

## SOLUTION

In terms of institutional changes, as and when the National Company Law Tribunal gets operationalised, caution must be exercised to ensure that proceedings are completed within well-defined time limits, leaving no room for extensions. Introduction of a dedicated 'Insolvency Practitioners' profession (with licensing requirements) for appointing administrators and liquidators should be considered. The selection and appointment mechanism for administrators and liquidators should also be prompt. Appropriate training programs should also be introduced for all insolvency officials, including judges.

Substantively, Indian law permits the debtor or the managers to have very

little control in the insolvency process and provides excessive protection to secured creditors. Such provisions need closer examination and other alternatives need to be explored for making the system balanced. Out-of-court rescue mechanisms like 'pre-packaged' administrations could be very useful in the Indian context, where many businesses operate through closely held companies and have a limited number of creditors. Pre-packaged administration is a practice where a sale of all or part of the company's business and/or assets is arranged before formal entry into a corporate insolvency procedure. The actual sale is then effected on the date of the commencement of proceedings. Further, liability for wrongful trading (personal liability for the directors if they fail to take reasonable steps to minimise the potential loss to the creditors) also needs to be considered for companies bordering on insolvency.

## IMPLEMENTATION AND IMPACT

The government should consider implementing the above by introducing amendments to the Companies Act, 2013. A robust corporate insolvency regime can help foster growth and innovation by enabling efficient allocation of resources from failing or failed companies to efficient companies, and promote entrepreneurship by providing an indication of the maximum downside risks and costs that the promoters and investors expose themselves to at the time of starting a venture. Further, if the rights of all creditors are better protected in the event of insolvency, it could go a long way in developing a much needed corporate bond market in India.

**INTRODUCE PRE-PACKAGED  
ADMINISTRATION FOR  
RESOLVING INSOLVENCIES  
WITHIN THE EXISTING  
FRAMEWORK.**





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**REGULATE THE  
NEW INDIA**

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## SIMPLIFY NUCLEAR LIABILITY

Revisiting the nuclear liability regime to spur the growth of nuclear power in India

### ISSUES

The recently introduced Civil Liability for Nuclear Damage Act, 2010 is widely perceived to be a significant obstacle to nuclear trade and consequently the growth of nuclear energy in India. There are two key concerns which have been expressed: *first*, the possibility of suppliers being held liable for patent or latent defects in supply and sub-standard services, by operators exercising their right of recourse [Section 17(b)]; *second*, the scope and extent to which suppliers are amenable to tort liability claims in Indian domestic courts [Sections 35 and 46]. All three sections, products of a hard-earned bipartisan consensus amongst several parties in the Indian Parliament, are controversial for two reasons: they are argued to be out-of-line with comparative provisions in other jurisdictions and the Annex to the Convention on Supplementary Compensation for Nuclear Damage, 1997 ('CSC'), to which India is a signatory; further, by foisting suppliers with additional liability, they make the supply of nuclear technology prohibitively expensive, perhaps even unfeasible. It is necessary to address both these concerns.

### SOLUTION

Section 35 of the Act currently purports to oust jurisdiction of civil courts. It is essential to provide teeth to this provision. To this end, the opening words of Section 35, 'save as otherwise provided in Section 46', ought to be deleted. The unintended effect of these words is to save the jurisdiction of the civil court even in matters for which the special mechanism for speedy compensation has been set up by this Act. Deletion of this provision is necessary, not

merely to prevent tortious liability claims against suppliers, but in order to maintain the sanctity of the principle of legal channelling of liability to the operator, the fundamental principle of this Act. In addition to this deletion, the government should also seek the opinion of the Attorney-General on the scope of Section 46. Given the suggested deletion, the ambit of Section 46 ought to be limited only to criminal liability for operators, a view the Attorney-General's opinion ought to clarify.

On the contrary, no statutory or regulatory amendment is necessary in Section 17(b), or in the right to recourse against suppliers more generally, despite vehement demands to this effect. Three reasons justify this: *first*, though the principle of fault-based liability for suppliers is out-of-line with comparative laws governing nuclear liability, it is a reaffirmation of India's public policy that those at fault must pay for damage caused. *Secondly*, such a principle has a robust economic justification — the threat of liability incentivises suppliers to take adequate care regarding the safety of their supplies, an incentive which would be wholly missing if their liability was transferred to the operator. *Finally*, it can be plausibly argued that the provision as it stands is compliant with Article 10 of the Annex to the CSC, which gives countries sufficient latitude in drafting their own domestic law, as evidenced by the use of the permissive words 'National law may provide' which prefaces the provisions relating to recourse.

### IMPLEMENTATION AND IMPACT

The calibrated reform suggested above is recommended both by

**SEEK AN OPINION FROM THE ATTORNEY-GENERAL AS TO WHETHER SECTION 46 OF THE ACT IS LIMITED TO CRIMINAL LIABILITY FOR OPERATORS ALONE, THEREBY ASSUAGING CONCERNS OF INDIAN AND FOREIGN SUPPLIERS.**

pragmatic energy considerations and *realpolitik*. India today is one of the most attractive destinations for nuclear power, being a massive buyers' market, at a time that the nuclear industry is in the doldrums. In this context, genuine concerns of suppliers, both Indian and foreign, regarding tortious liability must be assuaged. At the same time excessive complaints by suppliers about recourse liability must be resisted. The fundamentals of India's legal liability regime are strong: reasserting our stated position while making a small concession to suppliers will be the spur that nuclear energy in India needs, setting a global precedent on an equitable model liability law.

## PROMOTE RENEWABLE ENERGY

Legislating on renewable energy use to enhance energy efficiency

### ISSUES

India is ranked among the top countries in the world in terms of renewable energy capacity, especially wind and solar. Unfortunately, this capacity is not utilised effectively.

There are a few overarching reasons for this. *First*, in spite of several policies addressing the challenges of energy access and sustainability, existing legal provisions can be found only in the Energy Conservation Act, 2001 and a few provisions of the Electricity Act, 2003. These Acts mention renewable energy only peripherally when dealing with subjects like institutional arrangements and tariff-setting. Further, these impose no mandatory obligations. Thus, the lack of a strong compliance mechanism in law for an otherwise effective programme has been one of the biggest barriers to its implementation. *Second*, the lack of harmonisation among state policies has made investments in various states contingent on attractive policies rather than energy potential.

As a result, despite India's energy subsidies representing a significant portion of its budget, electricity reaches a privileged few. According to the 2011 Census data, one third of all Indian households have no access to electricity. For those who do, electricity tariffs keep rising. Indian renewable energy policy is believed to have delivered renewable energy generation at very high costs because of low operational efficiency. Given the finiteness of conventional energy, the country needs to become more reliant on renewable energies for a more sustainable future.

### SOLUTION

The first step towards facilitating efficient renewable energy usage is legislating on it at the Union level, penalising providers for non-conformity with purchase obligations and targets set. This legislation must take into account the legal framework with respect to coal, petroleum, and electricity from conventional sources.

Such legislation must be all-encompassing, taking care of basic legal and regulatory preconditions, as well as institutional and administrative efficiency. Issues such as grid connection and integration, resource use, financial incentives, and allocation of permits and rights must be regulated. Existing government schemes that have proved effective should also be enforced through the law, such as registration of renewable energy producers and purchase obligations from these producers.

To ensure that a combination of regulatory mechanisms does not lead to inefficiency, they must be considered and legislated upon simultaneously.

### IMPLEMENTATION AND IMPACT

For achieving the objectives mentioned above, the following legislative steps are suggested:

- Enact a law solely addressing the management of renewable energy and its use in power generation. This law should override discretionary and enabling provisions in other laws.
- In such a law, include provisions on registration of renewable energy

**ENACT A COMPREHENSIVE RENEWABLE ENERGY LAW WITH MANDATORY TARGETS, AND PENALTIES FOR NON-COMPLIANCE.**

producers, requirement of purchase of renewable energy solely from such producers, subsidies and financial incentives such as feed-in-tariffs and tax benefits.

- It is also important for such a law to set targets, as already set in existing policies, and lay down penalties for non-fulfilment, as well as incentives for compliance.

## ENSURE SAFER CLINICAL TRIALS

Regulating clinical trials to promote safety and efficacy

### ISSUES

An affidavit by the Ministry of Health and Family Welfare, Government of India ('MOHFW') stated that 2868 deaths occurred during clinical trials between 2005 and 2012. Of these, 89 deaths were directly attributable to defects in the clinical trial process. Recently, 254 women who were part of a control group in a trial for a cervical cancer screening method died.

It is not only the number of deaths during clinical trials that is alarming. More crucially, several such deaths can be attributed to a dysfunctional regulatory framework, an under-equipped regulator, lack of standard care and lax ethical approval processes. Three detrimental consequences have ensued. *First*, the safety of clinical trial patients remains in jeopardy. *Secondly*, as a result of the first, the MOHFW has issued stringent guidelines making it extremely onerous on sponsors and investigators to conduct trials in India, while the Supreme Court has intervened stopping 157 trials in which due processes were not followed. The combined effect of the two is an over-regulation of the sector. *Finally*, resulting from the first two consequences, the clinical trials industry in India, estimated to be around Rs. 3000 crore in 2014, generating large-scale employment and making new medicines available for Indian patients, has shrunk significantly.

### SOLUTION

An Expert Committee appointed by the MOHFW under the Chairmanship of Dr. Ranjit Roy Chaudhury ('Committee') formulated policy

**FINALISE CDSO DRAFT GUIDELINES ON AUDIO-VISUAL RECORDING OF INFORMED CONSENT PROCESS IN CLINICAL TRIAL ISSUED ON JANUARY 9, 2014 MAKING VIDEO-TAPING MANDATORY SUBJECT TO PATIENT WAIVER.**

and guidelines for clinical trials in a comprehensive report with 25 recommendations in July 2013. After appropriate revisions, three of its recommendations need to be implemented without delay. *First*, video-taping the process of securing informed consent and its safe storage for a specified time period must be made mandatory. Exceptions must be made only in cases where the patient, to maintain his privacy, waives his right to be video-taped. *Secondly*, all trials must appoint a grievance redressal officer to address patient concerns. Key amongst the officer's responsibilities must be to ensure speedy payment of compensation in case of trial-related injury or death on the basis of the draft formula for compensation prepared by the RK Jain Committee on 1 May 2014. *Thirdly*, the responsible authority and the process for approval of clinical trials needs to be streamlined. As per the Committee's recommendation a Technical Review Committee comprising experts must be set up to approve all clinical trials in the country. However, this is not sufficient — complete transparency in the process of approval or rejection along with strict timelines must be maintained, to revitalise the sagging clinical trials

industry, while placing maximum premium on safety of trial participants.

### IMPLEMENTATION AND IMPACT

International best practices suggest that clinical trials should be regulated by a dedicated, standalone legal instrument. Consequently, it is recommended that a new set of rules be brought in under the Drugs and Cosmetics Act, 1940, consolidating extant provisions regulating clinical trials in the same Act, Schedule Y of the Drugs and Cosmetics Rules, 1945 and various regulations and notifications issued by the MOHFW. The new rules will also contain the above recommendations replacing the law currently governing these issues.

Such a change will have the immediate impact of dispelling the incoherence that currently characterises the regulatory framework. Thus, it has significant potential to spur the clinical trials industry, notwithstanding the stringent provisions of compensation and informed consent that have been recommended. Unlike in the past, industry growth will not come at the cost of patient safety but will instead be founded on patient consent and autonomy.



## CREATE A TWO-TIER PATENT SYSTEM

Introducing a Utility Model Law to catalyse innovation growth in India

### ISSUES

In India, innovations which use local resources and technical know-how to adapt existing inventions to local needs using frugal innovation are often considered irrelevant in terms of intellectual property protection. However, there is a great need to promote the use of such low-cost and highly useful innovations which cannot be protected under the existing IP regime. The proper commercial application of such innovations depends on a robust IP system that protects such sub-patentable innovations. The National Innovation Foundation has documented over 1,00,000 ideas, innovations and traditional knowledge practices such as the clay refrigerator and the automatic onion seed transplanter which have originated in rural India, have commercial potential and yet cannot be protected under the current IP regime due to the prevailing inventive step standard.

The utility model system is a way of fulfilling this need. The purpose of a utility model system is to establish a second-tier system of patent protection which requires a lower standard of inventive step than that under current patent law. Also known as ‘petty patents’, the utility model law (‘UM law’) establishes a system of short-term protection for technical advancements that may be incremental in nature but advantageous to the nation, or the subject matter of which may be barred from patentability under existing patent law.

### SOLUTION

A UM law should be introduced in sectors where increase in innovation

will help solve problems faced by the large informal economy of India. Innovations in agricultural methods and processes, as well as mechanical innovations are areas where UM law would perhaps reap the most benefits. However, it has been seen in other nations that the effectiveness of a UM law diminishes as a nation enters a post-globalised period where the informal economy only has a minority share of the total economy. Also, it is important to empirically gauge whether UM protection has a positive effect in that particular sector and whether the SMEs and small-scale innovators are indeed being benefited. Keeping these considerations in mind, the law should undergo a periodic review to analyse its relevance and efficacy. It should also provide for strong safeguards against its misuse by big corporations against SMEs and small-scale innovators.

**INTRODUCE A SECOND-TIER SYSTEM OF PATENT PROTECTION FOR INCREMENTAL INNOVATIONS.**

### IMPLEMENTATION AND IMPACT

A legislative framework independent of the current Patents Act, 1970 is needed to introduce the UM law framework in India, since the law will only be effective if it works as a fundamentally different application procedure to the patent protection system. The law should be based on the following core principles –

- A very low standard of inventive step with a focus on novelty and utility.
- Expedious processing of applications, preferably within a six-

month period, handled by a dedicated UM Office.

- An incentive to commercialise the invention by conditional extension to the initial period of protection. For example, if the period of protection granted was four years, it may be extended for another four years if the invention has been commercialised.
- A mandatory periodic review of the need to keep the law in place.

Around the world, UM law regimes have succeeded in encouraging small-scale innovators to positively contribute to the economy by securing short-term protection for incremental innovations. One of the major contributions of this law would be to generate a huge pool of incremental innovations that may go on to trigger new inventions and create a fertile innovation ecosystem. Such a system also becomes an inexpensive source of IP protection which makes commercialising such products cheaper and easier. India has much to gain from a utility model legislation and if carefully enacted, it will serve as a catalyst for an innovation boom.

## PROTECT NET NEUTRALITY

Introducing net neutrality regulation to protect a free and open internet

### ISSUES

The beauty of the internet lies in the structure of the network. A truly democratic network, the internet has been one of the greatest achievements of our age, and its success is due to a key principle it was born with – equality.

This principle of equality is at the core of the net neutrality debate. Simply put, net neutrality is the principle that internet service providers (“ISPs”) and governments should treat all data on the internet equally, not discriminating or charging differentially by user, content, site, platform, application, type of attached equipment and modes of communication. Due to a worldwide movement to protect a neutral internet, the European Union, Norway, Netherlands and many other countries have already enacted laws to ensure net neutrality in their respective jurisdictions.

By removing equality on the internet, content providers with deep pockets will be able to afford faster content delivery, leading to a monopolisation of all content on the internet in the hands of a few companies. On the consumer side, the willingness to pay will determine the quality of access to the internet. In India, little is known of how ISPs manage internet traffic. In the absence of laws to the contrary, many ISPs have repeatedly indulged in interfering with the flow of data on the internet. For instance, during the Indian Premier League in 2010, an ISP promised faster access to watch live cricket.

### SOLUTION

Due to the lack of any ISP transparency regulation in India, the

**INTRODUCE ISP  
TRANSPARENCY REGULATION  
TO KEEP A CHECK ON  
NETWORK MANAGEMENT  
PRACTICES EMPLOYED BY  
ISPS.**

Government and consumers are kept in the dark about traffic management practices in use by ISPs. Therefore, the first step in addressing the issue of net neutrality is to make the system more transparent.

The second step would be to introduce substantive net neutrality rules. In December 2006, the Telecom Regulatory Authority of India (“TRAI”) released a Consultation Paper titled ‘Review of Internet Services’ which discussed the issue of net neutrality. So far, no further public initiative has been taken by TRAI to examine the issue in detail and enact regulations to protect a neutral internet. The time is ripe for TRAI to take the next step, invite views from all stakeholders, and move towards enacting a regulation to address this issue.

### IMPLEMENTATION AND IMPACT

TRAI should enact a net neutrality and ISP transparency regulation based on the following core principles –

- No filtration or blockage of internet traffic as long as the data is being used for legal purposes.
- No discriminatory treatment for users by either speeding up or slowing down data packets of any particular content except for the purposes of network congestion management.

- Disclosure of traffic management policies by ISPs in a periodic report.
- Prohibition on ISPs entering into agreements with content providers to influence the flow of data on their network.
- Strict penalties for ISPs in the regulations for violation of net neutrality norms.

India has one of the fastest growing numbers of internet users in the world. An internet based on the principle of net neutrality is key to the growth of India’s internet economy by ensuring equality, innovation and competition.

## 6

# ALLOW CROWDFUNDING OF SMALL BUSINESSES

Crowdfunding ventures through issuance of securities for kick-starting small businesses

## ISSUES

Traditional methods of raising finance, like issuing shares to the public in the primary markets, private placements to institutional and venture capital investors and debt finance are not easily accessible to most small companies and new ventures. The eligibility requirements for raising finance through an initial public offer ('IPO') are very high and most start-ups may not be in a position to meet those requirements in the early years of their operations. Venture capital investors are usually very selective and not approachable for many small businesses.

In this backdrop, crowdfunding provides a useful alternative for ventures with viable business plans but no reasonable access to traditional modes of financing. Crowdfunding allows entrepreneurs to raise capital through an open offer on the internet. Such funding is typically in the form of donation, pre-purchase of products or in return for equity participation or profit sharing. Raising funds through donation or a pre-purchase arrangement is not a very sustainable model for attracting people to invest in a venture. On the other hand, if the investors are allowed to participate in the venture's future cash flows through issuance of securities, it may be a more attractive proposition for them.

Indian corporate and securities laws impose several limitations on companies for offering securities to the public at large. For instance, an offer to issue securities to fifty or more people triggers the public-offer requirements (which include filing a prospectus with the regulator, etc.) under the company laws (subject to limited exceptions). Moreover, a private company is not allowed

to have more than two hundred shareholders. Given that a typical crowdfunding offer is made to the public at large, start-ups (which are generally incorporated as private companies) cannot resort to such a financing option under the present law.

## SOLUTION

The Government should consider enacting a law on the lines of the Jumpstart Our Business Startups Act, 2012 (the 'JOBS Act') introduced in the United States. Drawing from the Act, such law should (a) allow start-ups to raise finance by offering securities through licensed online portals and (b) permit exemptions from the law governing securities offerings in general. Such law should also prescribe well-defined

**ALLOW ISSUANCE OF  
SECURITIES THROUGH  
CROWDFUNDING IN CERTAIN  
SECTORS WITH DYNAMIC  
ENTREPRENEURIAL ACTIVITY  
ON A PILOT BASIS.**

eligibility requirements and set the maximum amount of funds that may be raised by a company and invested by any individual in a given year. The investment limits imposed on individuals should be linked to their annual income or net worth. Given that providing voting rights to crowdfunders may increase a company's transaction costs, crowdfunders may be given limited or no voting rights. Such a law should also emulate the JOBS Act for imposing investor-education related obligations on investors to ensure

that they understand the basics of investing and the risks associated with securities offerings.

The offerings may be made on an online platform through portals registered as intermediaries with the securities markets regulator. Initial and periodic disclosure obligations on the issuer company, including information about the business, financials, managers, the nature and pricing of securities, may also be imposed (to be communicated through the portals). The funding portals should be comprehensively regulated, entrusted with many responsibilities – conducting due diligence on issuers, arranging for transfer of funds, investor-education related obligations and enforcement functions – and prevented from offering investment advice on the offerings. Given the increase in securities related frauds in the recent past, such law should provide for strict safeguards and penalties to prevent frauds.

## IMPLEMENTATION AND IMPACT

In addition to enacting a new law to facilitate crowdfunding, appropriate exceptions will need to be introduced in the Companies Act, 2013, the Companies (Share Capital and Debenture) Rules, 2014 and the relevant SEBI regulations for enabling its implementation. Crowdfunding through Foreign Direct Investment ('FDI') may also be considered in sectors that do not require prior regulatory approvals (automatic route) as long as other FDI related requirements (relating to the nature of securities and valuation) are satisfied. Allowing small businesses to raise finance through crowdfunding will help them achieve their true potential and encourage entrepreneurial activity.





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**BUILD A  
POSSIBLE INDIA**

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## EXPAND RTE COVERAGE

Amending the Constitution to ensure quality primary education for all

### ISSUES

The Right to Education Act, 2009 ('RTE Act'), implementing Article 21A of the Constitution, was enacted with the aim of providing free and compulsory education to all children between the ages of six and fourteen years. The RTE Act imposes certain obligations on all schools, whether aided or unaided, government or private, to carry out the objectives of the Act. These schools have statutory obligations such as norms and standards to be maintained, school recognition, admission of students and qualifications of teachers.

However, by virtue of the Supreme Court's judgment in *Pramati Educational and Cultural Trust v. Union of India* [Writ Petition (C.) No. 416 of 2012], minority schools, both aided and unaided, have been exempted from the purview of the entire statute. As a result, there are several minority schools not providing primarily religious education or language-based training that are now exempted from the purview of the RTE Act. This exemption is clearly over-inclusive.

One of the objectives of this Act was to ensure that schools be socially inclusive, representative of a diverse India. The term 'minority' has been judicially interpreted to mean linguistic and religious minorities within a particular state. Thus, for example, a school established and managed by a Gujarati speaking community would be a minority school in Karnataka. Exempting minority schools, as the judgment does, excludes a significant section of educational institutions, many of which have been imparting quality education for several years. Further, this exemption has given rise to the pernicious practice of schools seeking minority status even if they

### AMEND THE CONSTITUTION TO BRING AIDED MINORITY SCHOOLS WITHIN THE PURVIEW OF THE RTE ACT.

had not been established as such. Since procedures governing grant of minority status to educational institutions are opaque and non-standard across states, there is widespread misuse of the minority exemption as it exists currently. This is a great setback to the attainment of the goal of universal elementary education, almost defeating the purpose of the RTE Act.

### SOLUTION

The obligation under Article 21A being an obligation of the government should certainly extend to government aided schools, even 'minority schools'. A distinction between aided and unaided minority schools is envisaged in the Constitution, as evident from Article 29(2), which protects the right of all citizens to admission in government aided minority educational institutions, without discrimination.

The *Pramati* judgment was based on the Court's interpretation of Article 30(1) of the Constitution, which codifies the fundamental right of all minorities to establish and administer educational institutions of their choice. The right under Article 21A is also a fundamental right, and neither was subordinate to the other, until *Pramati*. Thus, the right under Article 30(1) needs to be made subject to the right under Article 21A, so that laws

made pursuant to Article 21A are not subject to the right under Article 30(1). This should nullify the judgment in *Pramati*, without affecting unaided minority schools and schools primarily imparting religious instruction.

### IMPLEMENTATION AND IMPACT

The above solution can only be implemented by way of a Constitutional amendment. Specifically, a further clause needs to be inserted after Article 30(1), stating that: "The right guaranteed under clause (1) to educational institutions receiving aid out of State funds, except Madrasas, Vedic Pathshalas and those educational institutions primarily imparting religious instruction, shall be subject to Article 21A."

This will extend the applicability of the RTE Act far beyond what currently exists, and will truly achieve the goal of free and compulsory elementary education for all.

## BOLSTER FREE SPEECH

Circumscribing criminal prosecution for literary works to bolster free speech in India

### ISSUES

Literary works, often academic scholarship on religion and history, have frequently been the subject of criminal prosecution in India. Several books like *Shivaji: Hindu King in Islamic India*, and *Great Soul: Mahatma Gandhi and his Struggle with India* have been banned on the ground that they outrage religious feelings, promote enmity between religious groups or contain assertions prejudicial to national integration. In some cases, the authors or publishers of such books are also sought to be criminally prosecuted on this ground or for defamation. Forfeiture (banning) of offensive material and criminal prosecution of its author or publisher are permissible under section 95 of the Code of Criminal Procedure ('CrPC') and under sections 153A, 153B and 295A of the Indian Penal Code ('IPC') respectively. However experience suggests that such provisions, while necessary, are prone to misuse. At the same time, the criminal penalty of defamation under sections 499 and 500 IPC is arguably unconstitutional, an argument made elsewhere (Bhatia, 2014). Taken together, a better balance thus needs to be struck between respect for religious feelings of groups and protection of scholarly and historical work.

### SOLUTION

An analysis of judicial precedent in this context reveals an anomaly. While free speech jurisprudence in India is progressive, its fruits are available only pursuant to appellate litigation. This causes considerable prior hardship to authors and publishers against whom cases are registered and prosecution commenced. To offset this, a two-pronged approach is suggested. *First*, statutory amendments need to be

effected to sections 95 and 96 of the CrPC making banning more onerous and making first instance review by the High Court, currently provided for, considerably stricter. *Secondly*, guidelines need to be issued to the authority (usually the District Magistrate) who is responsible under section 196 of the CrPC for granting sanction for prosecution under sections 153A, 153B and 295A of the IPC. These guidelines must outline considerations to be mandatorily taken into account while proceeding against the authors or publishers of scholarly works.

### IMPLEMENTATION AND IMPACT

- Section 95 of the CrPC must be amended in a suitable way to ensure that:

**ISSUE MANDATORY  
GUIDELINES TO BE FOLLOWED  
BY SANCTIONING AUTHORITIES  
BEFORE PROSECUTION  
UNDER SECTIONS 153A,  
153B OR 295A IPC CAN BE  
COMMENCED.**

- o An order forfeiting a work mandatorily discloses the grounds of forfeiture;
- o The grounds necessarily describe the effect of the matters contained in the offending publication;
- o Forfeiture is a necessary and proportionate response to the effect of the offending publication.

- Section 96 of the CrPC must be amended in a suitable way to

ensure that the High Court tests the offensiveness of the material in the light of the following principles:

- o Material is to be deemed offensive only when the offensiveness is intended;
- o The intentions of the author have to be gathered only from the language, contents and import of the offending material;
- o The nature of the work, its intended audience and the extent of circulation are relevant considerations for determining its offensiveness.

- The following guidelines may be issued to sanctioning authorities under section 196 of the CrPC:
  - o The sanctioning authority must before granting the sanction ensure that the ingredients of the alleged offence are *prima facie* made out from the material available on record;
  - o The authority must give due consideration to the following factors: the nature of the work, its intended audience and the extent of circulation before determining the necessity of prosecution; and
  - o The sanctioning authority must give due regard to the investigation report filed by the police. If no such report is filed before it, the sanctioning authority must order a preliminary investigation into the matter before determining the question of sanction.

Implementation of the above suggestions is necessary to ensure the freedom of responsible scholarship in India. Specifically it ensures that the benefits of India's progressive free speech jurisprudence inures to scholars at the stage of publication itself and not appellate litigation, as is the case today.

## DRAFT A NEW ANTI-TRAFFICKING LAW

Proposing a new comprehensive anti-trafficking law to better combat human trafficking

### ISSUES

Trafficking in India encompasses many dimensions – from the forced labour of millions to the commercial sexual exploitation of vulnerable women and children. There is little reliable data on the extent of trafficking in India, but according to the Trafficking in Persons Report of the US State Department, 20 to 65 million Indians have fallen prey to trafficking. In contrast, the 2012 National Crime Records Bureau Report mentions only 3,554 reported cases of human trafficking in that year. There is clearly a huge gap between the extent of trafficking in India and the corresponding reach of the law.

Numerous laws and initiatives are used to tackle the problem, but these are fragmented in nature and often overlooked. While a recent amendment to the Indian Penal Code ('IPC') adapted the internationally accepted definition of trafficking as an offence, the Immoral Trafficking (Prevention) Act, 1956 ('ITPA') conflates the issues of trafficking and sex-work, and results in the harassment of the sex-worker more than the traffickers and pimps.

### SOLUTION

There have been numerous calls for a comprehensive law dealing with trafficking in India. While in 2006 a set of amendments to the ITPA was introduced in Parliament, differences of opinion on whether clients of prostitutes ought to be penalised led to the demise of the proposed amendments.

What is needed, in the face of these developments, is not a set of amendments to the existing ITPA,

**AMEND THE ITPA TO REMOVE SECTIONS THAT PENALISE THE SEX-WORKER, SUCH AS SECTION 8 ON SOLICITATION.**

which was based on a British law intended to regulate prostitution rather than combat trafficking, but rather a completely new law to replace the ITPA, one that battles the crime of human trafficking directly.

### IMPLEMENTATION AND IMPACT

A new law to combat trafficking must incorporate the five-fold framework detailed below, to ensure both effective prosecution of offenders and rescue and rehabilitation of trafficked persons:

- **Penalisation of the offence of human trafficking:** The new law should reflect the newly amended section 370 of the IPC, and directly punish acts that promote trafficking, such as false advertisement.
- **Decriminalisation of the sex-worker:** While anti-trafficking groups, public health activists and sex-workers' collectives are divided on the issue of the extent of decriminalisation of clients and pimps, there is broad agreement that a new law must decriminalise the sex-worker entirely, unlike the present Act.
- **Protection for sex-workers:** The law must give adequate protection to sex-workers who wish to continue with this livelihood, particularly in the shape of recourse to women who face violence in the course of sex-work.
- **Effective rehabilitation and reintegration of sex workers who**

wish to leave sex work: The aim of rehabilitative measures must be the effective reintegration of sex-workers. For this, measures such as shelters for the welfare, healthcare and education of sex workers and their children is necessary. Work done by NGOs in this regard must also be given due recognition and support.

- **Special provisions for minors:** Trafficking in minors must receive special attention in the new law. Some of the crucial steps in this regard are adoption of a single definition of the term 'minor' as under the age of 18, and better integration with the Juvenile Justice Act in all steps of the new anti-trafficking law.

A new law based on the proposed framework will be more effective in ensuring prosecution of the actual perpetrators of trafficking, while reducing the harassment and penalisation of sex-workers that is perpetuated by the present Act.



## STRENGTHEN ABORTION LAWS

Strengthening the PC&PNDT & MTP Acts to increase prosecutions for sex-selective abortions

### ISSUES

The practice of abortion of the female foetus is one of India's biggest tragedies, one that shows no signs of abating. The child sex ratio in the 2011 provisional census was 914 girls per 1000 boys. With the advance in technology making sex-determination a simple task, the problem has taken on alarming proportions.

Abortion in India is legal only if it is in compliance with the conditions laid down in section 3 of the Medical Termination of Pregnancy Act, 1971 ('MTP Act'). Since the sex of the foetus is not one of the permissible grounds for abortion, sex-selective abortion is illegal. What is also penalised is the determination of the sex of the foetus through prenatal diagnostic techniques, as outlined in the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 ('PC&PNDT Act'). Thus the balance between women's reproductive rights, and the need to curb sex-selective abortions ('SSA') is sought to be maintained.

While the design of the PC&PNDT Act is sound, the law contains certain loopholes and omissions that detract from its effectiveness and result in under-use. This is evidenced by the fact that only 83 convictions under the Act have occurred as of 2011, with a number of states not reporting a single conviction. When contrasted with the huge gap in the child sex ratio, the low number of convictions clearly indicate the failure of the Act. A major reason for this is that the law does not require linking of the sex-determination test with the actual SSA. The chain of referral and documentation linking these two aspects is broken, and needs to be connected. (Expert Interview, Asmita Basu).

### SOLUTION

Three sets of provisions contribute to the disconnect between sex-determination and sex-selective abortion, that must be corrected. *First*, the onus of documentation must be placed on the registered medical practitioners or other medical professionals carrying out the procedures, completing the chain of referral. *Second*, the regulatory mechanisms under the MTP and the PC&PNDT Acts are currently separate, and do not reference each other, contributing to the disjunct between the two – this must be rectified. *Third*, compliance with the documentation requirements is currently difficult, and must be simplified in order to make the paper trail more easily traceable.

**SIMPLIFY THE CATEGORIES UNDER WHICH DIAGNOSTIC ESTABLISHMENTS ARE SUPPOSED TO REGISTER THEMSELVES UNDER THE PC&PNDT ACT TO FACILITATE COMPLIANCE.**

### IMPLEMENTATION AND IMPACT

The following steps are necessary to implement the above:

- Documentation requirements under the MTP Act should include details of diagnostic tests performed prior to the procedure, thus making the connection between a sex-determination test and a subsequent abortion traceable.

- The regulatory mechanisms under the MTP and the PC&PNDT Acts at the District level should be unified, so that the responsibility of implementing both these laws should rest on the same Appropriate Authority. In this way, the explicit connection between sex determination and sex selection can be made more easily.

- Compliance under the PC&PNDT Act should be made easier by replacing the confusing categories of establishments permitted to perform tests with categories that better reflect ground realities. Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics are confusing terms as ultrasounds are no longer performed for only 'genetic' reasons. Instead, terms such as 'Ultrasound Clinics', 'Imaging Centres' and 'Nursing Homes' should be employed which are familiar to practitioners and users alike (Lawyers Collective, Women's Rights Initiative, 2007).

These steps will assist authorities and anti-SSA activists to track and prosecute practitioners and establishments, driving up convictions and creating a deterrent effect.

## MANAGE REFUGEE INFLUX

Amending the Foreigners Act to regularise refugees in India

### ISSUES

According to data collected by the United Nations High Commission for Refugees (UNHCR), India has close to 2 lakh refugees living within its territory with the number constantly rising. However, unofficial reports place the figure at above 4.5 lakh. Currently, the only law specifically governing refugees in India is through judicial decisions regulating specific situations. There are also ad hoc administrative advisories by the Ministry of Home Affairs, regulating specific situations concerning refugees, such as the Advisory on preventing and combating human trafficking in India, dated 1 May 2012.

In the absence of specific legislation pertaining to refugees, the general law applicable to foreigners, the Foreigners Act, 1946, applies to refugees as well. The status of refugees is determined by UNHCR, but it has limited reach and resources. These ad hoc, case-specific measures lead to a two-fold problem.

*First*, India's national security interests are hampered by the absence of a coherent legal structure to ensure that all non-citizens resident in India are properly documented and have a legitimate reason for their presence in India. *Second*, the lack of a law providing certain basic rights to refugees violates India's obligations under customary international law, which it is subject to, notwithstanding its non-ratification of the 1951 Refugee Convention.

### SOLUTION

The foremost requirement in the Indian legal framework is a definition of the

#### INSTITUTIONALISE REFUGEE STATUS DETERMINATION AT THE INDIAN BORDER.

term 'refugee'. This is essential for any legislation making any provision for refugees, since the term is not easily defined. Second, the single most important principle relating to refugees in international law needs to be recognised in Indian law – that of *non-refoulement*, or non-return to country of origin. The Foreigners Act penalises those who enter the country without valid identity documents, or may prohibit entry of such persons into India. This implies that refugee-seekers are liable to be returned to the country they are fleeing from. A legal solution needs to be worked out to prevent this.

As a consequence of accepting refugee-seekers at the border, a structured system must be put in place for refugee status-determination. Moreover, a procedure with such critical security implications should be controlled and carried out entirely by the government. As a result of this procedure, once a person is admitted into the country as a refugee, he needs to be issued a permit, either in form of a long-term visa or a refugee permit. This will serve as an identity document, and assist the government in maintaining records.

### IMPLEMENTATION AND IMPACT

The following amendments are required in the Foreigners Act, 1946, to implement the above:

- The term 'refugee' needs to be defined as a person who, owing to

well-founded fear of persecution based on race, religion, nationality, membership of a particular social group or political opinion, is outside his country of nationality, or if having no nationality, is outside his country of habitual residence and is unable or, owing to such fear, unwilling to avail himself of that country's protection.

- Exceptions must be carved out for refugees, codifying the principle of *non-refoulement*, wherever the Act prohibits or imposes penalties for being present in India without valid documents.
- A new section should be inserted in the Act, requiring status determination of refugees at the border, along with providing an identification document; provision for rules outlining criteria for status determination as well as officials responsible for the same.

These changes in the Foreigners Act will be the first key steps towards legal recognition of refugees in India.

## 6

# CONSOLIDATE ANTI-CORRUPTION LEGISLATION

Tackling graft through a consolidated and updated corruption legislation

## ISSUES

At present corruption is being tackled through four separate statutes and two pending Bills, namely the Prevention of Corruption Amendment Bill and the Prevention of Bribery of Foreign Public Officials Bill ('the Bills'). The Prevention of Corruption Amendment Bill introduces new definitions of corrupt acts and attempts to provide better tools of enforcement and investigation. The Prevention of Bribery of Foreign Officials Bill seeks to fulfil India's obligations under the United Nations Convention Against Corruption to investigate and punish cross border corruption.

The Bills suffer from some serious defects in drafting and introduce some needless changes to the existing statutory mechanism that muddle existing jurisprudence developed by Courts. Broadly, the issues faced in these Bills can be classified into three kinds of problems:

- Those relating to uncertainty of application – Although ostensibly dealing with the same offence of corruption, the two Bills contain different definitions of the offence. This can lead to the interpretation that bribing a foreign official and bribing an Indian official are treated differently under the laws, contributing to uncertainty.
- Those relating to unwilling bribers – The present Bills seem to undo the limited protection given to unwilling bribers in the present Prevention of Corruption Act, 1988 and provide no mechanism for unwilling bribers to participate freely in an investigation and receive immunity.
- Those relating to conflict of institutional powers – The Lokpal and Lokayuktas Act, 2013 empowers the Lokpal in the context of the Central

Government. However, similar powers cannot be exercised at the state level in the context of State Government officials engaging in corruption. Further, the pending bills conflict with the provisions of the Lokpal Act and existing legislation in some states.

**WITHDRAW PENDING, INCOHERENT ANTI-CORRUPTION BILLS AND REPLACE WITH A FRESH DRAFT THAT CONSOLIDATES AND SIMPLIFIES THE PROPOSED REFORMS.**

## SOLUTION

In order to overcome the problems of uncertainty and lack of protection to unwilling bribers, the two Bills need to be consolidated to remove any uncertainties or discrepancies between them. Provisions also need to be introduced to ensure institutional coherence in tackling corruption, at both the Centre and State levels.

## IMPLEMENTATION AND IMPACT

- To overcome uncertainty, the consolidated legislation covering both Indian and foreign bribery should have a common definition of corruption as an offence, and also involve the same investigative agency for foreign and domestic corruption at the Centre.
- New provisions for protection of whistleblowers should be introduced. These will provide immunity for unwilling bribers if they participate in investigation.
- The Bill should also clarify the

powers of the Lokpal and the Lokayukta in respect of investigation and prosecution of corruption offences, bringing the Prevention of Corruption Act in harmony with the Lokpal Act and the state legislations.

An effective and certain anti-corruption law will deter corruption in the public sector and also encourage citizens and victims of corruption to approach the government to seek redress against corruption. The pending Bills must thus be withdrawn and new consolidated legislation passed speedily.

## REPEAL OBSTRUCTIONIST LAWS

Tackling archaic and obstructionist laws to remove impediments to development

### ISSUES

In a recent report by the Political and Economic Risk Consultancy, a Hong Kong based consultancy firm, India topped the list of the most 'over-regulated countries in the world'. The complexity of our regulations and the onerous burdens they impose contributed significantly to this ranking. Deregulation is clearly the need of the hour. The first step in this regard is identifying laws for repeal and creating systemic safeguards that allow such repeal to take place smoothly.

In the past, several bodies including the seminal PC Jain Commission on Review of Administrative Laws have undertaken the task of identifying laws for repeal. While those studies were largely limited to clearing the statute books, a more meaningful project in this area should identify those laws that are not only outdated, but also pose some kind of impediment to economic growth and human development.

As an example, under the R&D Cess Act, 1986, a Research and Development cess at the rate of 5% is levied on importers of foreign technology. This imposes a considerable burden on technology companies and has an unclear and outdated scope of application. It is out of sync with modern economic demands and ought to be repealed.

Another example is the Sarai Act, 1857. This Act, imposing unnecessary burdens such as requiring the Sarai keeper to employ the number of watchmen prescribed by the District Magistrate, is used largely to harass hotel owners. It is unnecessary since an adequate regulatory structure

**IDENTIFY AND ABOLISH THOSE RULES AND REGULATIONS THAT ARE ARCHAIC AND OBSTRUCTIONIST, AND THAT CAN BE REPEALED BY GOVERNMENT NOTIFICATIONS.**

exists for the operation of hotels in the country. Outdated laws such as these that only have potential for misuse are ripe for repeal.

### SOLUTION

A two-fold strategy is required to address this issue. *First*, a substantive exercise must be carried out of identifying those statutes and regulations that no longer serve a useful purpose, but are used for harassment or obstructionism. These must be repealed. *Secondly*, a strategy must be employed going forward to ensure this problem does not arise in the future. This requires the systematic use of drafting techniques like sunset and review clauses, and simplification of the procedure for repeal. A sunset clause results in automatic repeal after a specified period unless the law is expressly extended. A review clause mandates formal periodic review of the law, but does not result in automatic repeal. Simplification of procedures for repeal may involve allowing repeal by Parliamentary resolution, as is done in the United Kingdom.

### IMPLEMENTATION AND IMPACT

The following steps must be adopted

to address the problem of laws in disuse:

- Identify and repeal those laws, or provisions in laws, which are found to be unnecessary obstacles in the modern context. This must be carried out by a Committee whose mandate is not only limited to identification of the laws, but also extends to co-ordinating the execution of the actual repeals by acting as a Nodal Agency.
- Develop drafting guidelines for Ministries on the appropriate use of sunset and review clauses. Such guidelines may specify types of legal instruments and subject-areas where only review is appropriate, and others where both sunset and review are necessary.
- Consider ways of simplification of the repeal procedure, such as by introducing rules that allow repeals by Parliamentary resolutions approving of Executive Orders. Any such process must be accompanied by adequate safeguards such as submission of a time-bound report by a Standing Committee of Parliament on proposed repeals.

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# AFTERWORD: IMPLEMENTATION OF SUGGESTED REFORMS

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Suggestions for legal reforms made in this Briefing Book must be implemented through careful drafting of new law or amendments or repeal of existing provisions. We at Vidhi believe that five key steps must accompany legal drafting, irrespective of the area being legislated upon, in order to confront the challenges facing law-making today:

**Ensuring Constitutionality:** Provisions and laws are often drafted such that they are in conflict with the Constitution of India, or with relevant Supreme Court precedent. This makes litigation inevitable, where provisions are struck down after protracted judicial proceedings. This difficulty can be easily remedied by ensuring constitutionality at the time of drafting, not at the time of implementation, as is the case today.

**Ensuring Coherence:** Many laws are drafted without reference to or knowledge of other existing statutory enactments that cover a similar field. This leads to complications ranging from confusion and contradiction to the dilution of standards in specific instances. Cognizance of other relevant legislations at the time of drafting is essential for legislative coherence.

**Ensuring Compliance:** Another challenge facing law-making and reform in India is lack of compliance with international law. India is a party to several international instruments and is under an obligation to incorporate them into domestic law. However, Indian laws are often drafted in complete disregard of international law. It is thus necessary to ensure that the body of international law which India is obliged to comply with is understood while framing domestic legislation.

**Ensuring Clarity:** The endemic problem afflicting law-making in India is that of badly drafted legislation – provisions that are circular, contradictory, vague and unclear. This leads to deficient implementation and adverse judicial interpretations. There is a need to ensure that Indian laws are clear and specific in both form and substance.

**Ensuring Contemporaneity:** An increasingly globalised world gives us the opportunity to learn from the experiences of other similarly positioned countries. Foreign law and comparative domain expertise is being increasingly recognised as an important source of information. Indian law-making often does not benefit from progressive developments in other jurisdictions, and it is desirable that contemporary comparative developments are systematically factored into this process.

For more information on drafting work and other projects of the Vidhi Centre for Legal Policy, visit our website — [www.vidhilegalpolicy.in](http://www.vidhilegalpolicy.in) or contact us at: Vidhi Centre for Legal Policy, D-21 Jangpura Extension, New Delhi – 110014. Phone: (011) 43102767





*“Legal reforms are the basis for democratic evolution and change. The work undertaken by Vidhi in this Briefing Book can play an important role in the emergence of a strong government committed to good governance, fulfilling the expectations of the citizens of our country.”*

**- Dr. AS Ganguly,**  
Member of Parliament,  
Rajya Sabha

*“This Briefing Book provides a much-needed roadmap for legal reforms in the country, with a rare combination of wide-ranging topics with detailed and original research on each area of reform.”*

**- Mr. Sumit Bose,**  
Former Finance Secretary,  
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