Towards the Rule of Law

25 Legal Reforms for India

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This Briefing Book 'Towards the Rule of Law: 25 Legal Reforms for India' is an organisation-wide publication of the Vidhi Centre for Legal Policy.

Vidhi Centre for Legal Policy is an independent think-tank doing legal research and assisting government in making better laws.

Introduction

The Constitution of India commits India to the path of the rule of law. However, the journey towards a society based on the rule of law is a long and arduous one. For 70 years after the coming into force of the Constitution of the United States, the practice of slavery was common, brought to a brutal end by a Civil War which ripped the nation asunder. 67 years after the coming into force of our Constitution, India faces no such catastrophe. Yet, the rule of law is an ideal that is more a promise than reality.

What do we need to do to decisively push India along towards being a state where the rule of law, rather than the rule of men, is predominant? In 2014, the Vidhi Centre for Legal Policy released its first Briefing Book on this subject, suggesting 25 structural legal reforms that the then newly elected Government of India needed to undertake in its first 100 days in power. 3 years later, some of the reforms we recommended have been taken forward—corporate and personal insolvency have new legal regimes, net neutrality has been protected, a new anti-trafficking legislation is on the cards and renewable energy promoted.

However, much remains to be done. In our fourth Briefing Book, we revisit the theme of 25 legal reforms for India. We urge that basic institutions of our democracy, such as the judiciary, key government wings and political parties are revitalised; enforcement of laws disentangled from thorny bureaucratic procedures; and a modern and inclusive India be built on the foundation of our technological prowess, our civilisational values and human rights.

These are lofty objectives. But by breaking down each of these objectives into 25 achievable deliverables, our Briefing Book shows how they can be achieved in a systematic, step-by-step fashion. These will go some way to protecting the rule of law, if not wholly, then very substantially. As a legal policy think-tank, the rule of law is our lodestar and careful research our compass. We hope to undertake this task of publishing a Briefing Book every year, to ensure that slowly, but surely, the rule of law is a living reality for every Indian.

Contents

Ministry-wise Reforms

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

Renew Basic Institutions

i	*Restructure* the Supreme Court
ii	*Rethink* Drug Regulation
iii	*Rebuild* the Micro Insurance Industry
iv	*Reform* the Seventh Schedule
v	*Evaluate* the Higher Judiciary
vi	*Strengthen* Political Party Accountability

Restructure the Supreme Court

ISSUES

The standard response of the judiciary and governments to worsening delays in the Supreme Court has been to increase the number of judges. Judge strength has been increased five times—from the original 8 judges to 11 in 1956, 14 in 1960, 17 in 1977, 26 in 1986 and 31 in 2008. As a result of such increase, the Supreme Court now ordinarily sits in Division Benches of 2 judges. This has created two critical problems—inconsistency in decision-making and dereliction in dealing with questions of constitutional importance. Answering similar questions differently is the exact antithesis of the rule of law, while dereliction of critical matters of constitutional importance defeats the *raison d'être* of the establishment of the Supreme Court—to authoritatively determine legal questions of widespread import.

The gravity of the problem can be demonstrated through an example. The increased number of judges combined with mandatory appeals to the Supreme Court when the death penalty has been awarded has meant that such appeals have gone before different 2-Judge benches. As Yug Chaudhry has shown in his analysis, whereas Pasayat J. imposed the death sentence in 14 of 30 cases applying the "rarest of rare case" standard, around the same time, Sinha J. refused to apply it in any of the 16 cases before him. Discounting the remote possibility that the sentences were correctly awarded in all these cases, it is clear that inconsistency can have a severe impact on litigants. At the same time, 39 judgments on cases of constitutional importance are pending, some of them for over a decade. This includes critical questions ranging from the constitutional status of Delhi to the constitutionality of Section 377 of the Indian Penal Code.

SOLUTION

The solution for this inconsistency and the only way to expedite constitutional cases is to reorganise the Supreme Court into three divisions based on two criteria: the nature of the case and the stage which it has reached. These divisions will be Admission, Constitution and Appellate.

The Admission Division will replace the Monday–Friday oral hearings for admission of Special Leave Petitions. Instead of the perfunctory two-minute hearings before two judges that take place on these days, decisions on admission will be by circulation before a permanent division of five judges.

The Constitution Division will be a permanent Bench of the five senior most judges led by the Chief Justice of India. They will only hear matters that involve a substantial question of interpretation of the Constitution or resolve inconsistencies between Division Benches or presidential references under Article 143. This will ensure that constitutional adjudication, one of the key rationales for the establishment of the Supreme Court, is given its due importance.

Finally, the Appellate Division will hear regular appellate matters referred to it by the Admission Division and where appeals lie as a matter of right. It will consist of the remaining 21 judges sitting in Benches of three judges. Reducing the number of benches and increasing the number of judges on each Bench will thus mitigate inconsistency considerably.

IMPLEMENTATION

These changes will require enactment of the Supreme Court (Reform of Procedure) Act in the exercise of Parliament's power under Article 246 read with Entry 77 of List I of the Seventh Schedule of the Constitution of India. Necessary changes to the Rules of the Supreme Court will have to follow.

Undertaking such reforms will have three salutary impacts: First, it will provide a nuanced response to the problem of docket explosion. Since the critical problem of an expanded docket stems from the number of cases filed, an Admission Division will reduce the tendency of litigants to take a chance before a suitable Bench in SLPs. Second, the Constitution Division will ensure that constitutional cases are resolved quickly and carefully. Third, it will change the discourse from increasing judge strength to serious structural reform as the key intervention to reforming the Supreme Court.

Rethink Drug Regulation

ISSUES

The Drugs and Cosmetics Act, 1940 ("Act") is ill-equipped to deal both with basic issues of drug regulation like drug recall, as well as modern developments like medical devices and biosimilars. Instead, these are regulated through subordinate legislation, executive orders and guidelines of uncertain legal validity that are frequently amended, thereby discouraging vital clinical research and adversely affecting patient safety. The regulatory body, the Central Drugs Standard Control Organisation ("CDSCO"), remains one of the few authorities of its kind without statutory standing and lacking financial or functional autonomy.

Further, the unclear division of power between the central and state authorities has led to the inconsistent implementation of the Act across the country. Major problems include the varying competencies of drug inspectors across states and the lack of a uniform procedure for the suspension and cancellation of drug licenses, visible in the confused roll-out of the CDSCO's March 2016 ban on 344 Fixed Dose Combination drugs.

The Act also fails the standards endorsed by the World Health Organisation for drug regulatory legislation in several respects—there are no provisions regarding a National Essential Medicines List, generic drugs, pharmacovigilance or graded civil penalties. India's drug regulatory architecture not only lags behind sophisticated systems like the United States and the European Union, but also its neighbour, Pakistan, which enacted a comprehensive drug regulatory law in 2012.

SOLUTION

The existing Act needs a comprehensive overhaul. In 2016, the Ministry of Health and Family Welfare announced its intention to conduct this exercise, but has continued to regulate in piecemeal fashion. A new Drugs and Cosmetics Act, is not in itself, a novel reform. However, there has been very little thinking around its specific components. It is proposed that the new Act contain the following elements, at a minimum:

- Provisions for the creation of new central and state drug regulatory authorities, including processes for transparent appointment of competent members, as well as their removal;
- Well-defined powers and functions for these authorities, with the central authority possessing the power to frame regulations

like the Food Safety and Standards Authority of India and the Telecom Regulatory Authority of India;
- Information-sharing mechanisms between central and state authorities to coordinate regulatory action across states, such as the grant, suspension and cancellation of licenses.

IMPLEMENTATION

The Act requires to be re-drafted completely, and the process of drafting a new Act ought to begin with a public consultation, preferably around a Green Paper that will invite comments on key questions, such as the composition of the proposed drug regulatory authorities, the division of powers between the Centre and the states, functional differentiation for licensing, inspection and enforcement functions, the type and severity of the penalties and punishments proposed, and measures to introduce transparency. Some of the more specific suggestions that could be considered as part of this exercise include:

- Transferring monitoring and enforcement functions from the states to the existing Zonal Offices of the CDSCO.
- Creating specialised wings within the central authority to deal with clinical trials, new drug approvals, manufacturing and sale, and pharmacovigilance.
- Imposing statutory requirements on drug regulatory authorities to make reasoned decisions available in the public domain.
- Categorisation of violations on the basis of the risk presented to public health, the use of 'naming and shaming', and the imposition of civil penalties.

Another part of the process of re-drafting the Act should also include a thorough review of rules, regulations, orders and guidelines passed by the CDSCO. This should involve:

- Identifying provisions that are either vague, contradictory or ought to be transposed to the parent Act.
- Streamlining and re-enacting most of this body of subordinate legislation and orders as regulations emanating from the central authority.

India will be the sixth largest drug market in the world in terms of absolute size by 2020. Its regulatory regime must keep up with this growth to ensure continued innovation and the highest standards of health.

Rebuild the Micro Insurance Industry

ISSUES

A key component of financial inclusion across the world is to extend protection to economically vulnerable persons against specific perils, through micro insurance. In India, micro insurance is governed by the Micro Insurance Regulations, 2015 ("Regulations") with the Insurance Regulatory and Development Authority of India ("Authority") as the nodal regulator. These Regulations fail at a conceptual level because they prescribe requirements similar to conventional insurance products. For instance, they prescribe the same code of conduct for micro insurance agents as other insurance agents and have the same lock-in period for micro-insurance products (the life span for which is considerably shorter) and other insurance products.

Further, contrary to international practices, the Regulations do not take into account existing informal insurance services provided by non-governmental organisations or community-based groups. As regards grievances, India does not have a dedicated authority or legislation, unlike many other countries. The responsibility for grievances lies with the insurer and then the Authority, without any responsibility or training prescribed for the micro insurance agents.

SOLUTION

A six-pronged approach is recommended. First, regulations for micro insurance and general insurance must be clearly differentiated, with the former focusing on simplified disclosures, intermediation and market conduct regulations, dispute resolution, compulsory audits and a 'treat your customer fairly' regime.

Second, it is imperative that informal insurance products and schemes already in existence are recognised and regulated, while explicitly providing for more tailored consumer protection. In this regard, entry barriers must be reduced to create sustainable incentives, including

lower minimum paid up capital, and compliance requirements to encourage wider market participation.

Third, instead of crafting a list of micro insurance products, the aim should be to define a micro insurance product category, and its risk category, allowing the market to be creative on this front. Inclusive approaches usually include innovations in product design, coverage and service delivery as well as product sizes. Fourth, financial literacy initiatives need to be strengthened and simplified by laying down the information that must be disclosed and documents which must be submitted by the agents at different stages, for example, at the pre-contractual stage and also during the term of the contract. This will allow consumers to make more informed choices.

Fifth, separate conduct guidelines for micro insurance agents must be developed. Performance standards for agents need to be enhanced, coupled with increased penalties for frauds and consumer protection failures. Finally, the grievance redressal mechanism can be made more accessible by making the agents the first point of contact for consumers instead of the insurers, thereby building market capacity to support ground level supervision in low risk areas.

IMPLEMENTATION

- Amend the Regulations to factor in aspects relevant from a micro insurance perspective, provide for recognition and regulation of informal insurance products, encourage innovative micro insurance products and financial literacy regarding such products, and create a robust grievance redressal mechanism.
- Issue a separate Code of Conduct for micro insurance agents.

A robust micro insurance regime will facilitate higher penetration of micro insurance in the economy, providing the economically vulnerable an assurance of being appropriately insured.

Reform the Seventh Schedule

ISSUES

The Seventh Schedule of the Constitution categorises law-making entries into the Union, State and Concurrent lists. States can legislate on State and Concurrent list subjects; Parliament on Union subjects, Concurrent subjects and all residuary subjects not covered by any specific entry. The entries in the Seventh Schedule thus provide the legal framework for the operation of federalism in India. This framework has its roots in Partition and is consequently imbued with heavy centralising tendencies to prevent secession. Such fears are remote today and with the advent of radically evolved technologies, governance priorities have expanded, necessitating a reworking of the Schedule itself.

The Schedule presents two substantive concerns and one structural concern. Substantively, it vests control over a subject to the authority that can best govern it. However, the changing redistribution of powers among different tiers of government means that the subjects in the Schedule are no longer necessarily allocated to the most appropriate government. For example, with the 73rd and 74th Amendment and the creation of the third tier of local self-government, cremation and burial grounds, a State List item, needs to be transferred to local governments. Similarly, mining, national highways and other infrastructural matters, which are currently Union List items, need to be reassessed, since states have a considerable interest in policy formulation and implementation. At the same time, entries need to be updated in sync with current law-making concerns. Several contemporary governance challenges revolve around the internet—be it data protection and privacy or surveillance. The current Schedule does not account for these new subjects.

Structurally, there are two devices used in the Schedule to resolve conflicts—one peremptory and another doctrinal. As a peremptory rule, any law made by the Union on a Concurrent List item prevails over a law made by a state on the same item (doctrine of occupied field). This is excessively centralising and ill-fitting in a polity that proclaims to practice cooperative federalism.

Doctrinally, any conflict between a central and state law is resolved by

applying the principles of repugnancy by the Supreme Court with the emphasis being on saving both laws. This is *ex-post* and consequently time-consuming as a first-tier method for dispute resolution.

SOLUTION

In relation to the substantive concerns, a comprehensive reassessment of subject matters in the Seventh Schedule and addition of new matters must be undertaken. The best suited governments for different subjects must be determined by studying each field of legislation to identify comparative advantages in allocation of powers of legislation to the Union or the states.

The GST Council provides an institutional solution to structural issues of conflict resolution. On all Concurrent List subjects (like the GST), there ought to be subject-specific councils which will recommend the appropriate passage of law either to the Parliament or the state legislature. Thus, no question of ouster of state jurisdiction will arise if the matter is part of an occupied field by the Centre and the possibility of downstream disputes will be mitigated significantly.

IMPLEMENTATION

- The entire set of entries in the Seventh Schedule must be revisited to re-allocate entries, include newer fields of legislations and weed out obsolete entries. An amalgamation of the Seventh with the Eleventh and Twelfth Schedules, vesting local self-governments with core legislative powers, may also be considered. To this end, the Ministry of Law and Justice must set up a commission to study legislative relations between the Union and states with specific emphasis on the Seventh Schedule.
- Part XI and the Seventh Schedule of the Constitution must be extensively amended to provide for the institutional mechanism of subject specific Inter-State Councils with binding recommendatory powers on laws to be made in the Concurrent List.

Re-working the Seventh Schedule of the Constitution will ensure that India's federal structure is aligned both with its law-making needs as well as its political priority of ensuring cooperative federalism.

Evaluate the Higher Judiciary

ISSUES

The quality and ability of judges in India has attracted much criticism over the years, and the need for transparency and accountability in the judiciary has been repeatedly emphasised. Despite this, the practice of systematically and periodically evaluating judges, especially judges of the higher judiciary, has not evolved much in the Indian context. In advanced judiciaries the world over, Judicial Performance Evaluation ("JPE") has become ubiquitous, being increasingly adopted to promote transparency and accountability in justice systems, and to encourage better performance of judges. However, attempts at introducing performance evaluation systems to assess the competence of members of the higher judiciary have faced severe resistance in India. Most recently, while negotiating the revised memorandum of procedure for appointment of judges to the higher judiciary, the collegium rejected the introduction of a clause on performance appraisal.

The absence of an internal performance appraisal mechanism for the higher judiciary, whether it is the Supreme Court or the High Courts, demonstrates the higher judiciary's disinclination to subject itself to assessments. In contrast, the performance of subordinate court judges is periodically subject to evaluation through a system of Annual Confidential Reports ("ACRs"). ACRs track the work, conduct and capabilities of judicial officers, and are a useful example of an indigenous evaluation system within the judiciary itself. Regardless, this method of JPE is also rife with problems and must be reformed to ensure uniformity, objectivity and standardization in judicial evaluations.

SOLUTION

For any judicial system to continuously evolve and ensure effective delivery of justice to litigants, it is crucial to build monitoring and evaluation systems that will identify areas for improvement, both at an institutional and an individual level. The presence of the ACR system for subordinate court judges proves that a JPE mechanism can

be sustainably adopted in the Indian context. Learning from this, a comprehensive, internal performance evaluation mechanism for judges of the higher judiciary, which sets measurable performance targets, must be evolved at the earliest.

For judges to become comfortable placing their own judicial performance under scrutiny, the JPE mechanism should improve upon the existing ACR mechanism by ensuring that objective metrics are preferred over subjective ones, as the latter cannot be properly measured. Further, clear outcomes from evaluation must be defined in a manner that incentivises better performance. Poor performing judges must be given additional training and consistent poor performance must lead to their removal from the judicial cadre.

IMPLEMENTATION

- To preserve the independence of the judiciary and insulate it from political interference, a mechanism to appraise higher court judges must be evolved and administered wholly by the judiciary.
- Guidelines must be evolved to assist in the marking of subjective criteria for evaluation, such as quality of judgments and behaviour in the courtroom.
- As the objectives of evaluating judges of the Supreme Court and the High Courts may differ, different evaluation programmes can be evolved for judges at these two levels of the judiciary.
- To the extent possible, collection of information for evaluation must be automated and professional managers must be engaged to coordinate the process.

The JPE mechanism for the higher judiciary will increase the incentive for better performance and will be a step towards dispelling public apprehensions about judicial accountability, efficiency and efficacy. Further, assessments made as part of JPE programs may also help understand the state of functioning of the judiciary and aid the development of individual judges.

Strengthen Political Party Accountability

ISSUES

The law relating to elections is contained primarily in the Representation of the People Act, 1951. This statute inadequately addresses the crucial role that political parties play in the democratic process and instead addresses candidates as the unit of electoral accountability. Despite a 1989 amendment regarding registration of parties and a number of judgments of the Supreme Court, there continues to be a lack of rules addressing regulation of party con-duct. This substantially hampers the effective superintendence of elections by the Election Commission of India ("Commission"). Various *ad hoc* reforms introduced by courts and the Commission in this field either do not have legislative backing or any clear mandate for enforcement by an independent body.

The recent introduction of electoral bonds was aimed at bringing more financial transparency, by capturing the identity of the donor. However, various design flaws mean that they do not entirely achieve this end—although the identity is captured, it is not revealed to the public or to the party. Additionally, they do not allow for the effective oversight of party spending such as on paid news or advertisements. Furthermore, while the government has accepted the recommendation in the 255th Report of the Law Commission on lowering the limit for anonymous cash donations to Rs. 2000, it has not implemented the second part of that recommendation which was to cap anonymous donations at Rs. 20 crore or 20% of total party funding, whichever is lower. Rather than piecemeal reform, a more holistic approach is the need of the hour.

SOLUTION

There is need for a comprehensive reform to address the conduct of political parties and their financial accountability. Such reform should incorporate the law on declarations (that has been mandated by the Supreme Court), a model code of conduct, and also address the issues relating to the media that are increasingly being faced by the Commission.

All these reforms will need expansion and restructuring of the Commission, and its dispute resolution and enforcement mechanisms, to deal with complaints and violations within the timelines of an election schedule. Independent auditing and maintenance of party accounts as well as publication of the resulting annual financial reports must also be a central piece of this reform. It is also necessary to ensure sufficient legislative backing to the Commission by explicitly providing for the power to de-recognise and suspend political parties in the event of non-compliance.

IMPLEMENTATION

- A comprehensive code for political parties could either be in the form of a separate legislation or as a complete overhaul of Part IVA of the Representation of the People Act, 1951.
- An important constitutional institution like the Commission must be strengthened by giving it legislative teeth which would strengthen and empower it.

These reforms would ensure a 'real' levelling of the playing field between political parties, and empower the Commission to face the challenges created by technological advances.

Clear the Thorns

i	*Unlock* Public Wealth
ii	*Clean Up* Contaminated Sites
iii	*Strengthen* Enforcement of the Right to Education
iv	*Bolster* Soft Enforcement of Corporate Offences
v	*Remedy* Excessive Government Litigation
vi	*Reduce* Arbitrariness in Sentencing

Unlock Public Wealth

ISSUES

Governments own a valuable portfolio of public assets such as bank holdings, pension funds, real estate, roads and other infrastructure. Effective management of public assets can yield several macro-economic benefits such as increased public revenue, increase in GDP, reduction in the cost of acquiring loans, and enhancement in the living standards in the country. However, these assets are often mismanaged leading to social losses.

In the Indian context, two important concerns arise in relation to public asset management. First, there is lack of information regarding commercial public assets held by the government. This makes it difficult to make a fair estimate of the potential of these assets for the economy, which in turn makes it difficult to manage them. Second, the lack of operational autonomy is widely regarded as a source of inefficiency of public sector enterprises. Extensive vigilance and oversight requirements of such enterprises put them at a disadvantage when compared to competing private sector organisations. To improve the efficiency in public asset management in India, both these problems require immediate redressal.

SOLUTION

First, a mechanism should be created to consolidate and provide information regarding public assets held by the government. This could be done through a national register for such assets held by the Central Government, Central Public-Sector Enterprises ("CPSEs") and Public-Sector Banks ("PSBs"), which may be overseen by a national registration authority. This will create accountability and help in better enforcement of the policy. The authority may be given the power to assess if the assets are being utilised efficiently (according to market parameters) and present its findings to the Central Government, CPSEs or PSBs holding the asset.

Second, to ensure that public sector enterprises are managed efficiently, there is a need for a radical reorientation of the role of

the government in CPSEs and PSBs from an owner to that of an investor. One of the ways in which this can be achieved is through the transfer of government shareholding of CPSEs and PSBs to independent holding entities ("Holding Entities").
The Holding Entities should be professionally managed, and empowered to take decisions relating to their functioning and should not be subject to the influence of different ministries. The creation of such Holding Entities would be consistent with global best practices.

IMPLEMENTATION

To create a repository of information of public assets held by government:

- There should be a central legislation that establishes a registration authority and empowers it to carry out data collection, reporting, valuation and advisory functions.
- Guidelines may be prescribed in relation to nature of assets to be included/excluded in the register and methods of valuation.
- This project may be implemented in stages, providing adequate oversight and authority to the creation and maintenance of an asset register, that remains publicly accessible at all times.

To improve management of public sector enterprises:

- There should be a central legislation to establish a professionally managed Holding Entity. The legislation may provide for the functions, powers and duties of the Holding Entity.
- All laws and guidelines that constrain the independent and efficient functioning of CPSEs and PSBs should either be repealed or amended. For instance, the parent acts setting up the CPSEs and guidelines issued by the Central Government on capital restricting or managing investment will require being examined.

Managing public assets in an organised manner, under a statute, will help unlock the potential of public wealth and will go a long way in inculcating a disciplined approach towards public asset management.

Clean Up Contaminated Sites

ISSUES

Contaminated sites are areas where toxic and hazardous substances are created by humans in quantities and conditions that present an imminent threat to human health and the environment. When the presence of such substances has not been scientifically proven, but is likely to pose significant health and environmental risks, sites are classified as 'probably contaminated'. In India, 320 sites have been identified as 'probably contaminated', a conservative estimate by any count. These include orphan sites (where the polluters are unknown) or sites with legacy pollutants that stay in the environment much longer after they were first produced. Examples include Ranipet in Tamil Nadu and the Noor Mohammed Lake in Andhra Pradesh, with Ranipet appearing in a list of the world's top 10 polluted cities in 2007. The clean-up of these sites becomes nobody's problem and communities living around these sites are either left to long-drawn litigation or are at the mercy of international funding like the World Bank sponsored clean-up of Noor Mohammed Lake.

Perhaps the most egregious example of such sites is the Union Carbide factory in Bhopal and its problems are symptomatic of the grave danger posed by contaminated sites everywhere in India. Despite more than 300 tonnes of hazardous waste lying at the factory site 33 years after the gas leak disaster, no money has been allotted for its removal, although the Supreme Court has been monitoring clean-up since 2012. The Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2016 and the Chemical Accidents (Emergency Planning, Preparedness and Response) Rules, 1996 (both of which were enacted in response to the Bhopal disaster) have two weaknesses: first, they only deal with prospective liability for environmental damage, not historic pollution, and second, they provide only for the levy of penalties by State Pollution Control Boards ("PCBs"), but do not create a definitive duty to clean-up contaminated sites.

SOLUTION

Other countries have developed legal mechanisms to fix liability for historic pollution, where it is difficult to trace past polluters. Similarly, Indian legislators must guarantee legal certainty and impose clear

duties on authorities to ensure clean-up of contaminated sites, with consequences for non-performance. However, as experience with the functioning of PCBs in India demonstrates, creating legal requirements is simply not enough to ensure compliance. Environmental enforcement authorities also need information, finances and technology to tackle contaminated sites. Experience from other jurisdictions demonstrates that two other conditions are integral to a successful clean-up action.

Authorities must readily have access to funds for remediation and restoration that are not dependent on the judicial determination of liability and compensation. The success of the United States Comprehensive Environmental Response, Compensation and Liability Act through the establishment of the Superfund—a trust fund made up principally through taxes on industry—is worth studying.

There should also be an institutionalised mechanism to identify and rank hazardous sites according to the risk they present and to monitor clean-up actions.

IMPLEMENTATION

In 2010, the Ministry of Environment, Forest and Climate Change proposed a National Programme for Rehabilitation of Polluted Sites ("Programme") along the lines of the Superfund. However, the plan of action proposed by the Programme remains in draft form, and the legal, financial and institutional mechanisms to set it in motion have not been adopted. The Programme should be strengthened by:

- Framing new rules under the Environment (Protection) Act, 1986 to impose clean-up duties on authorities and to set timelines for clean-up.
- Amending the Public Liability Insurance Act, 1991 to expand the use of the Environmental Relief Fund established under it to the clean-up of contaminated sites.
- Conferring powers on local authorities like Gram Panchayats and municipal corporations to monitor clean-up actions.

The victims of the Bhopal disaster and the generations following them have not succeeded in obtaining justice from courts. These legislative steps will go some way towards redressing them and the thousands of other Bhopals across the country.

Strengthen Enforcement of the Right to Education

ISSUES

The intention behind enacting the Right of Children to Free and Compulsory Education Act, 2009 ("Act") was to create a code-like statute which could deal with all issues related to elementary education. The sheer number of authorities under the Act gives the impression that there is a robust mechanism for monitoring, enforcement and grievance redressal under the Act. In reality, however, effective enforcement of the Act remains largely unfulfilled and grievance redressal remains desultory.

The Act recognises commissions set up at the national and state level under the Commissions for Protection of Child Rights Act, 2005 which can *inter alia* make recommendations for effective implementation and inquire into complaints. Local authorities such as Municipal Corporations, Zila Parishads, Panchayats, etc. can be approached by any person with a grievance relating to violation of a child's right. However, both commissions and local authorities have failed to be effective in addressing grievances.

The first reason is that their areas of functioning overlap significantly, leading to duplication with no significant benefit. Second, they both face the problem of lack of independence. For instance, local authorities are the arbiters even in complaints made against schools controlled or owned by them. The last and most significant reason is that their enforcement powers are largely toothless. The Act is silent on what happens if a party fails to adhere to the decision of the Local Authority or if the government fails to act on a commission's recommendation to prosecute a defaulting party. In such circumstances, the only recourse so far for aggrieved persons has been the state High Courts, which remain inaccessible to a majority of people.

SOLUTION

There is an urgent need to create a comprehensive enforcement framework, taking into account existing capacities, which will:

- Independently and effectively hear complaints against all sorts of schools;
- Pass enforceable directions to defaulting schools and other authorities; and
- Impose civil penalties for non-compliance.

To this end, an independent body should be set up or recognised at the district level to be the first port of call for any complaint under the Act along the lines of the District Level Education Regulatory Authority, notified as the Local Authority in the state of Karnataka. This body will comprise persons independent of the local authority or the state government and include those with experience in the field of education. After hearing all the concerned parties, the District Level body may pass an order issuing directions for compliance or imposing civil penalties. It may also issue directions for the de-recognition of an unaided school, in the event of the school failing to comply with the directions issued.

IMPLEMENTATION

Some of the amendments that can be introduced in the Act to bring this into effect include:

- Creation or recognition of a District Level body which will have the power to take up matters *suo motu* or on the basis of a complaint.
- Removal of grievance redressal powers of the Local Authority and vesting them in the District Level body so that there is one procedure for grievance redressal for all schools covered under the Act.
- Enhancing powers of the commissions to include the power to issue enforceable directions, de-recognise defaulting schools and impose civil penalties on non-complying parties.
- Vesting commissions with powers to seek action-taken reports from the government on the status of recommendations made by them.

Streamlining and strengthening enforcement mechanisms in this manner will ensure a truly meaningful right to education.

Bolster
Soft Enforcement of Corporate Offences

ISSUES

The absence of a well-formulated enforcement strategy can lead to compliance costs for businesses and is a strain on public resources. Recent trends indicate that Indian regulators are perceived to be 'trigger-happy' in case of corporate offences, thereby increasing regulatory compliances for businesses in India. However, relevant data also shows that conviction rates are very low. For instance, data released by the Ministry of Corporate Affairs ("MCA") indicates that in 2015–16, the conviction rate was 2%, and 30% in relation to investigations conducted by the Competition Commission of India ("CCI").

This is possibly because many cases that involve violations do not require hard enforcement measures. It might also be a result of lack of policy guidance on the underlying principles for investigation and enforcement of corporate offences. The absence of alternatives to prosecution has led to regulators adopting a 'one-size-fits-all' approach, burdening the prosecutorial arm with cases.

SOLUTION

An alternative to prosecution in the form of soft enforcement is urgently required. Regulators like the Securities Exchange Board of India ("SEBI"), CCI, MCA etc. can draw on various international best practices to create a regime that encourages compliance. The Prioritisation Principles followed by the Competition Markets Authority in the United Kingdom are useful. They lay down that only such complaints should be investigated which would directly or indirectly affect key objectives of the authority, or are strategically significant, or where there is likelihood of a successful outcome within available resources.

Taking a cue from the United States and the United Kingdom, deferred prosecution agreements ("DPAs") and negotiated compliance agreements ("CPAs") may be adopted. DPAs are agreements between regulators and the accused,

to suspend criminal proceedings for a specific period, in return for the accused paying a penalty and signing up to a supervised compliance programme. CPAs are similar agreements for civil proceedings. These help to achieve the aim of rehabilitation and sanction without the risks and expenses of prosecution.

Further, much can be learnt from SEBI which has incorporated soft enforcement measures into its regime, such as issuing warnings, making deficiency observations, sending advice letters, utilizing the settlement mechanism etc. This comprised around 40% of the total regulatory action taken in the year 2015–16. The CCI also has power to grant leniency. Other regulators can also adopt such measures.

IMPLEMENTATION

The following approach may be adopted for bolstering the soft enforcement regime for corporate offences in India:

- A coordination committee may be set up to ensure uniformity across regulators in the adoption of soft enforcement mechanisms.
- Under the supervision of the coordination committee, a detailed study must be conducted by each sectoral regulator to:
  - identify the nature of infringements that may be covered within the fold of soft enforcement;
  - analyse the types of soft enforcement mechanisms that can be implemented within its regulatory ambit;
  - set out guidelines and principles to be followed for investigations.
- The findings will then require incorporations through amendments to parent legislations and/or delegated legislation.

A robust soft enforcement regime will reinforce a culture of compliance amongst private players and will ensure optimum utilization of public resources.

Remedy Excessive Government Litigation

ISSUES

Litigation started by the government is a unique phenomenon because governments, unlike conventional litigants, are also custodians of public wealth and resources. Thus, the government is expected to act as a model litigant, thus imposing upon it a higher standard of probity and integrity in conducting litigation. This higher standard would ensure that the government is efficient in handling its litigation work. However, government litigation in India has been anything but ideal. By the estimates of the Ministry of Law and Justice itself, 46% of all litigation includes the government, its ministries or departments, authorities, public sector undertakings, or other government-owned entities. Much of this litigation is poorly managed and adds to the existing burden on the judiciary, thereby resulting in further pendency and delay.

To make governments responsible and efficient with their litigation, Central and State Governments have drafted litigation policies, including a National Litigation Policy ("NLP") in 2010. However, most states have given effect to these policies only on paper. This is evident from the fact that different institutions prescribed to be set up under these policies, such as empowered committees, are either practically non-functional or have never been constituted. The failure of the implementation of the NLP suggests that there is a need for a different approach in remedying the problem of excessive government litigation. Institutional reforms targeting the different players involved in government litigation must be explored.

SOLUTION

To evolve such institutional reforms, a thorough analysis of the nature of government litigation needs to be undertaken. Preliminary research shows three primary concerns which must be addressed to remedy the

problem of government litigation: first, the quality of lawyers and government officials (bureaucrats) handling government litigation needs to be improved. Second, infrastructural changes such as better use of information and communication technology need to be introduced. Third, both lawyers and government officials need to be held strictly accountable for lapses resulting in excessive government litigation.

In order to implement these remedies, setting up a dedicated entity to handle all aspects involving government litigation will be critical. Moreover, such an approach, based on an understanding of the nature of government litigation, will help avoid mistakes committed during the implementation of the NLP.

IMPLEMENTATION

- Set up a dedicated entity in the form of a Department of Government Litigation under the Ministry of Law & Justice (at both Union and state level) to work towards reducing excessive litigation, and help streamline its management.
- Empower the entity to control the quality of government lawyers and officials by imposing qualifying criteria such as competitive examinations and legal training respectively, to enforce accountability standards, and to take policy decisions to improve the overall efficiency of government as a litigant.

The impact of a dedicated entity managing government litigation can be seen at two levels. First, it will help curtail the huge costs incurred by governments in legal fees etc., which is a significant burden on the exchequer. Second, reducing frivolous and avoidable government litigation will reduce the strain placed on judicial time and resources, improving judicial efficiency.

Reduce Arbitrariness in Sentencing

ISSUES

Sentencing is an integral part of the criminal justice-delivery system as it carries with it a symbolic, retributive and deterrent value. In addition, a just sentence also needs to be reformative rather than merely punitive. However, most criminal legislations in India provide little, if any, rationale or justification for the nature and quantum of punishment prescribed in the statute. In addition, there is also wide divergence in the minimum and maximum punishments prescribed in criminal legislations, leaving enough room for the vagaries of judicial discretion to affect the sentencing process.

A popular policy prescription to curb judicial discretion is mandatory minimum sentencing. Here, the legislature prescribes a minimum sentence for the offence thereby curtailing the discretionary power of judges. However, this too has its own set of problems. Mandatory minimum punishments are usually a result of a knee-jerk response to increasing rates of crimes or low conviction rates and therefore, are often excessively harsh. Further, they are not guided by any kind of discernable rationale.

SOLUTION

Many countries such as the United Kingdom, United States of America, Uganda, to name a few, have devoted considerable resources to coming up with a comprehensive policy on sentencing. In India, although we do not have any formal legislative or judicial guidelines for sentencing, the need for the same has been recognised since 2003, first in the Malimath Committee

Report and later in the Madhava Menon Committee Report in 2008. The Supreme Court too, in *State of Punjab v. Prem Sagar & Ors.*, recognised the need for comprehensive sentencing guidelines due to the disparity it noticed in sentencing patterns across states and offences.

It is therefore essential to have in place guidelines regulating how punishments in legislations are determined. These guidelines should set out principles to regulate judicial discretion in sentencing, thus reducing sentencing disparity. They will also provide a clear rationale to be applied to the drafting of criminal statutes. The guidelines should emphasise the importance of rehabilitative and restorative approaches to justice over criminalisation and penalization. In doing so, mandatory minimum sentences should be avoided.

IMPLEMENTATION

- A committee should be set up to draft comprehensive sentencing guidelines, which should involve stakeholder consultation.
- The guidelines should serve as a constitutional document for all judges to determine the nature and length of a sentence and for the legislature to draft or amend criminal laws such that the sentencing provisions are in sync with the intent of the legislation.
- Training modules based on the guidelines should be created for judges, and for persons responsible for legislative drafting.

Comprehensive sentencing guidelines will help ensure fairness and consistency in sentencing.

Build a Modern India

i	*Harness* Artificial Intelligence
ii	*Craft* a National Space Law
iii	*Modernise* Land Records
iv	*Legalise* Drones
v	*Adopt* Plain Language Drafting
vi	*Regulate* Virtual Currencies
vii	*Digitise* Legal Aid

Harness Artificial Intelligence

ISSUES

The rapid development of Artificial Intelligence ("AI") and its manifold applications have attracted the attention of regulators and lawmakers across the globe. Some of the AI applications that are currently being regulated include self-driving cars, use of robotic arms in manufacturing and for surgical purposes, and automated computer systems being used in accounting, finance and securities trading. In India, some of these applications are already being used albeit at a smaller scale. For instance, AI is being used by e-commerce websites, cab aggregator applications, business intelligence agencies, advertisement agencies, applications offering chat-bot services etc. However, AI applications are being used without a regulatory or legal framework that addresses issues of liability, data protection, privacy and technological and safety standards.

A key concern regarding the proliferation of AI in the abovementioned industries is the processing of consumer data. For instance, AI applications are being used to analyse big data to predict consumer behaviour and analyse patterns of human responses in different scenarios ranging from online shopping to voting. In many of these instances, personal data is being used for predictive analytics without the knowledge or consent of the individuals.

Given that the development of AI is still at a nascent stage, the dilemma is to identify an appropriate legal response. There are two schools of thought on developing a responsive regulatory framework for AI. On one hand, it is believed that static ex-ante regulations through traditional tools of regulation such as product licensing, innovation and development oversight, and tortious liability for AI would not be able to adequately regulate a fast-developing technology like the AI. On the other hand, it is believed that laying the foundations of a dynamic regulatory framework while the technology is still largely dependent on humans will address safety, ethical and accountability concerns, and will not pose significant threats to the innovation and expansion of AI.

SOLUTION

India should pro-actively rather than reactively regulate AI. A regulatory sandbox approach, which allows interested parties and the regulator to experiment temporarily, will provide a good empirical foundation on which to build a regulatory regime. Additionally, given the widespread use of AI in data processing, its implications for the right to privacy must be considered. Finally, the 'personhood' of AI and its implications for civil and criminal liability, as well as legal capacity to enter into contracts must be considered.

IMPLEMENTATION

At this stage, it is difficult to decide between *ex-ante* and dynamic regulation-making for AI.

However, India should lean towards pro-actively regulating AI in the following manner:

- Identify sectors for which AI might have implications, designate relevant nodal authorities and advise the adoption of a regulatory sandbox.
- Privacy concerns posed by AI should be addressed in the bill on data protection that is currently being framed.
- Undertake a comprehensive analysis of all laws to which AI can be applied to examine the need for amendment or reinterpretation of existing laws or the enactment of new ones, especially to address the question of liability. Examples include the applicability of Sections 304-A, 337 and 338 of the Indian Penal Code, 1860 to robotic arms in medical surgeries. These provisions deal with death or harm to the human body through negligence and are used to impose criminal liability on medical practitioners. Similarly, deficiency in the provision of medical services under the Consumer Protection Act, 1986 might need re-examination.

A proactive regulatory approach towards AI will encourage harnessing of AI, and at the same time, ensure protection of the rights of citizens in terms of privacy and liability.

Craft a National Space Law

ISSUES

India is one of the few countries that has a robust space programme despite the absence of a national space law. For decades, a law in this area was viewed as unnecessary as India's space programme was a government monopoly, with the government being both the operator and regulator of all space-related activities. Till recently, private players could assist only with component manufacture of satellites, and the government would be responsible for their assembly and launch. This is set to change as the Indian Space Research Organisation ("ISRO") and the Department of Space ("DOS") have decided to permit private companies to undertake end-to-end realisation of satellite manufacture and launch. Allowing private sector participation in manufacturing and allied activities could raise issues relating to safety standards, contractual disputes relating to satellite launches, technology transfers and licensing. Further, as ISRO and DOS are regulators as well as service providers, this could raise issues of conflict of interest.

Developments in the Indian space sector are part of a global trend towards the NewSpace movement, which encourages private entrepreneurs to work towards better and cheaper access to space, and spaceflight technologies. It challenges the traditional ways of space exploration which are perceived to be expensive, time-consuming and do not sufficiently encourage inventive risk-taking. Currently, there is a legal and regulatory vacuum which, if not addressed, will make it difficult for India to have a relevant foothold in the emerging NewSpace industry. Countries across the globe have been quick in enacting national space laws to address the issues that arise with respect to space exploration.

SOLUTION

The legal and regulatory vacuum must be remedied by incorporating the following aspects: First, there should be a licensing regime for private players based on compliance with relevant safety and environmental standards. Second, there should be clarity on the apportionment of liability in case of accidents, and capping the liability may be considered as an incentive for continued private player participation. Third, there should be concrete commitments on reduction of space debris, and last, there should be an independent body to issue operating licenses to private players, as this would de-link the regulatory and operator functions of ISRO.

IMPLEMENTATION

- A comprehensive study of the global best practices of space laws should be undertaken, to prepare a blueprint for a national space policy for India.
- Based on the national space policy, a comprehensive and visionary national space law for India should be put in place addressing issues relating to licensing and liability, among other things.

A national space policy and law will not only help attract greater private player participation but also codify baseline principles for further innovation and development of more specific laws for commercial satellite launches, communication and navigation. Such measures will support and nurture a NewSpace ecosystem in India which could be vital in creating lower cost and innovative space products and services with the potential to capture a larger market-share of the 323-billion-dollar global space industry.

Modernise Land Records

ISSUES

For close to a decade now, states in India have been attempting to improve land titling systems under the stewardship of the Central Government under the Digital India Land Record Management Program ("DILRMP"), earlier the National Land Record Management Program, launched in 2008.

While policy makers and commentators are in agreement on the creation of accurate modern land records, there is no clarity or consensus on the ultimate goal of the project. The DILRMP currently sees a conclusive land titling system as its final outcome. The key feature of a conclusive titling system is that the register of titles becomes the source of the title, which is then guaranteed by the state. Theoretically, state-guaranteed clear title to land undoubtedly has benefits such as easier access to credit. However, major questions have been raised whether the DILRMP will ever achieve these efficiencies for mainly two reasons.

First, the shift to a conclusive titling system which may eventually guarantee these benefits is a monumental task. There are varying estimates of inaccurate land records and disputed titles in India. One study even placed the figure close to 90%. The shift to conclusive titling thus involves resurveying vast swathes of land, creating accurate land records, resolving title disputes and thereafter guaranteeing title. While pursuing certainty in land titling, given the current state of land records, this process itself could be the source of fresh uncertainties. Second, the policy choice to shift to a conclusive system has been made in the face of insufficient information. The DILRMP has incorrectly front-loaded this choice and then commenced experiments with modernization of land records in various pockets across India.

The lack of clarity in the underlying policy has affected the actions of states attempting to implement these reforms. States have developed varying notions of the land titling system contemplated under the policy. For instance, Rajasthan has passed a law ostensibly implementing conclusive titling without the legislation offering a state-guaranteed title.

SOLUTION

The choice of whether there should be a shift to a system of conclusive land titling is a question which is to be answered by the outcomes of experiments in modernization. Thus, these experiments must begin by altering the legal framework of recording land rights under land revenue laws or other local laws rather than creating new land titling systems. The focus must be to ensure that there is an accurate, modern system of recording land rights. The process of registration under the Registration Act, 1908 must also be integrated within the same system.

The experiments in modernisation must follow broadly the same pattern across states, which to some extent the DILRMP currently attempts to achieve. There must be a minimum level of uniformity across states in these experiments. In other words, as administrative control is in the hands of states, the structure must be such that the data obtained and the modernization achieved after these experiments must be readily comparable.

IMPLEMENTATION

- The DILRMP must drop the pre-determined goal of conclusive land titling and must adopt modernization of land records as its primary goal. Legal reform for the time being must focus on provisions of state Land Revenue Acts or other local laws which provide for recording of titles. Attempts to pass conclusive titling legislations at the outset must be discouraged.
- The DILRMP must be revised on the basis of the outcomes of the experiments so far. A new clear policy document must be framed which sets out the basis for further modernization of land records. The policy document must set out the administrative goals of the project while leaving the choice of methods of implementation to the states.

Therefore, modernization of land records will aid in providing clarity on land titles and may be more feasible than aiming for a system of conclusive land titling in the first instance.

Legalise Drones

ISSUES

In 2014, the Director General of Civil Aviation ("DGCA") imposed a ban on civilian use of unmanned aerial vehicles or drones. The DGCA then released draft guidelines outlining its proposed regulatory approach towards drones. Since the guidelines were only in draft form and were never implemented, the ban on the use of drones continues.

Such a ban is undesirable and also ineffective as widespread use of drones in India continues despite it. A blanket ban impedes any possibility of deploying drones for improving the productivity and efficiency of several sectors of the economy. Drones, for example, can be employed for military purposes to patrol borders, maintain law and order and oversee sensitive installations such as nuclear plants. They are touted to be a transformative tool in various other areas such as for inspecting crops, surveying under-construction sites, transporting blood or equipment during medical emergencies and gathering news and reporting. They may also be used for recreational purposes such as photography. Fully autonomous drones are contemplated to be used as public transport in countries such as Dubai and United States. They are also being widely used as drone-related technology is improving, and they are getting cheaper and more accessible. However, they are being operated without being certified for safety and therefore, the likelihood of causing accidents, injuries or otherwise endangering domestic airspace in the absence of any well-defined regulations is increasing. The effectiveness of the ban on drones therefore needs assessment.

SOLUTION

The ban on the use of drones should be overturned and instead, they should be regulated by the DGCA. The regulation by the DGCA could extend to several aspects: First, laying down licensing requirements such as the criteria and eligibility for obtaining a drone operating license. Second, fixing the liability of drone operators in case of drone crashes or any injuries to persons and property. Third, defining protection of the right to privacy by strictly regulating the use of camera, microphone, thermal imaging or video-equipped drones. With respect to fully autonomous drones, a regulatory sandbox approach may be preferable that allows assessment of their viability as the next generation public transport system.

IMPLEMENTATION

- Instead of imposing a ban on the use of drones, a special legal framework for drones should be designed to cover safety and usage-related aspects, coupled with a regulatory sandbox approach.
- Since drones fall within the definition of an aircraft under Section 2(1) of the Aircraft Act, 1934, the possibility of creating a separate division in the DGCA for their regulation may be considered.

The regulation of drones will permit interested parties to reap the advantage of their tremendous potential in commercial, recreational, and state-related functions. It will simultaneously ensure that they are used in accordance with the prescribed safety and licensing requirements.

Adopt Plain Language Drafting

ISSUES

Legal writing has often been criticised for being unintelligible and inaccessible to laypersons, and to members of the legal profession themselves. For centuries, lawyers have been ridiculed for their use of archaic words, and unnecessarily complicated language. The main purpose of any writing is to communicate effectively, keeping the audience in mind. Lawyers no longer communicate only to other lawyers and parliamentary counsel no longer write only for a small educated elite. Therefore, there is an increasing intolerance towards unnecessarily complex legal language.

Discontent with legalese witnessed the birth of the "plain English" movement in the 1970s. The objective was to make legal documents, especially those used commonly used by laypersons (such as lease agreements and insurance policies) easily understandable. Several judgments in India have also criticised the current practices of legislative drafting. For example, *Aluminium Corporation of India v. Union of India* held that "*incomprehensible law annoys the Administration and estranges the citizen when quick justice and less sterile litigation are the desiderata.*" Similarly, it was also held that "*a good legislation is that the text of which is plain, simple, unambiguous, precise and there is no repetition of words or usage of superfluous language.*"

The most crucial reason for modifying the manner in which we draft legislations is because it has a deep meaning in a democracy. The principle of the rule of law presupposes that those who are affected by a law should also be in a position to ascertain its meaning and effect. The purpose of the law is not to limit its access to only a few who can understand its implications. Therefore, there is a democratic ideal behind making simple and clear laws, which are accessible to all.

SOLUTION

India should initiate a movement toward "plain language drafting".

The principles on plain language drafting should aim to achieve the following: first, they should make the law more accessible to citizens and communicate legal principles effectively. Drafting (or re-drafting) laws in plain language would ensure that the law is presented in an intelligible manner to the widest possible audience. Second, they should reduce disputes by making documents more easily understood by the parties concerned as well as clarifying the intended meaning of statutes. Third, they should ensure that India keeps abreast with the growing "plain language movement" which is revamping legislative drafting practices and business practices in a large number of countries, such as the USA, the UK, Australia, New Zealand and Germany.

Further, the principles should provide for: (i) the structure of the law to follow a logical progression (for example, chapters with substantive clauses precede those with procedural clauses); (ii) use of clear and precise definitions; (iii) the law to be gender-neutral (iv) the language used to be clear and simple; (v) avoidance of certain drafting practices which do not improve user readability (such as the use of provisos, archaic language and foreign words).

IMPLEMENTATION

- Uniform standards of legislative drafting in the form of a drafting manual could be issued by the Ministry of Law and Justice, setting out certain basic principles to be followed by legislative drafters.
- Legal and drafting support must be provided across government departments to ensure that the plain language principles are integrated from the very first stage of conceptualisation and the drafting process of a new legislation. This will ensure that all laws satisfy the conditions in the drafting manual.

Adopting a plain language approach will improve user readability and compliance with the law.

Regulate Virtual Currencies

ISSUES

Indians are increasingly using virtual currencies as a form of investment and payment. Virtual currencies allow peer-to-peer transactions to take place without centralised clearing-houses and banks. At present, there is no legal framework for virtual currencies such as Bitcoins in India, and with the increasing usage, it becomes necessary to develop a regulatory framework within which such transactions can take place. That there is a pressing social need for regulatory and taxation clarity while using virtual currencies is well known. However, this problem is compounded by the fact that regulators around the world are unsure of the best way forward.

For instance, in the United Kingdom, the Bank of England is of the view that virtual currencies do not fulfil the functions of fiat currencies or e-money, and is thus in the process of developing a regulatory framework accordingly. In the United States, virtual currencies are treated as property for taxation purposes. Australia follows a similar model. According to a Guidance Paper issued by the Australian Taxation Office in 2014, Bitcoin transactions are treated akin to "barter transactions with similar taxation consequences". In Japan, virtual currency is construed as a payment system, and is thus treated as an asset and not as a legal currency. The differing legal stance on the treatment of virtual currency across the globe poses a challenge to its regulation.

SOLUTION

Several countries have enacted new laws while others have re-interpreted their existing laws in order to regulate virtual currencies. India should adopt the latter approach as that will be sufficient to create an enabling legal framework with respect to virtual currencies. Enacting a dedicated and standalone legislation for virtual

currencies may not be advisable or necessary at this stage.

For the purpose of regulation, virtual currencies should be treated as capital assets under tax laws, so that it is a legal obligation on the assessee to disclose the purchase of virtual currencies while filing tax returns. Further, virtual currency exchanges should be regulated by the Securities and Exchange Board of India ("SEBI") as a security. This could be achieved by regulations imposing Know Your Customer norms, reporting requirements and other compliances on virtual currency exchanges (perhaps by designating them as reporting entities under the Prevention of Money Laundering Act, 2002).

IMPLEMENTATION

Two steps are required as part of this regulatory approach:

- As a first step, currencies should be considered to be capital assets under Section 2(14)(a) of the Income Tax Act, 1961 for the limited purpose of taxation. A circular (or other instrument) clarifying this position should be released.
- As a second step, to promote the advantages of transparency, it is preferable that the SEBI regulates virtual currency exchanges in India. To achieve this, virtual currencies would need to be recognised as 'security' under Section 2(h) of the Securities Contract Regulation Act, 1956. A declaration to this effect should be issued by the government under Section 2(h)(ii)(a) of the SCRA. Thereafter, specific regulations should be formulated by SEBI on virtual currencies.

The implementation of this two-step solution will create legal certainty for individuals and entities dealing in virtual currencies, and enhance transparency for transactions involving them.

Digitise Legal Aid

ISSUES

The Indian state has a constitutional mandate to provide free legal aid to all its citizens, and to fulfil this, it set up Legal Service Authorities ("LSAs") at the national, state, and district level in 1987. But decades hence, LSAs suffer from many systemic issues, ranging from severe underutilisation of funds to inadequate staffing and infrastructure. While issues concerning the quality of legal aid have still received some attention, less effort has been spent on eliminating barriers to access LSAs. The extent of these barriers is made clear by the fact that "the general population is unaware of LSAs." A majority of respondents in a 2012 survey neither knew what LSAs did, nor how they could approach LSAs for help. Clearly, LSAs are failing to conduct adequate outreach to inform people of the recourses available to them.

SOLUTION

Incorporating technological tools at all levels of LSAs is one important strategy that can quickly increase access to LSAs many times over. Two such easily-deployable tools which do not even need internet access are using basic mobile and SMS-based services and setting up voice-based kiosks.

Since SMS-based mobile networks are spread across a vast geographic area, using these eliminates the need for smart gadgets and internet access. Voice-based kiosks also do not require internet for functioning, and thus can penetrate in areas where internet technology is not available. Success stories deploying SMS-based tools to spread legal aid awareness have been recorded in Kenya, Uganda, South Africa and the United States of America. For instance, the 'UmNyango Project' in South Africa targeted women in areas with paralegal centres, sending them SMSs with legal information on their rights pertaining to children, domestic violence, land and labour issues. As a result, attendance at paralegal workshops increased, as did the reporting of gender-based violence and land discrimination.

With regards to voice-based kiosks, 50 NyayaPath or legal information voice-based kiosks have already been installed in Chhattisgarh and Jharkhand, under a collaboration between the Department of Justice ("DoJ") and the United Nations Development Programme. These kiosks provide legal information on matters related to women, child labour, senior citizens, Dalits and Scheduled Tribes, MGNREGA etc. Despite low literacy and legal awareness levels, and a high tribal population with limited access to infrastructure, both these states have succeeded in implementing a key measure to improve access to justice. In the long-term, if these kiosks are equipped with resources on legal rights and easy-to-understand instructions on legal documents and procedures, they can encourage a culture of self-representation and lower reliance on lawyers for quasi-legal tasks. They can also significantly impact pendency and backlog in courts, by pre-assessing legal claims and then directing users to the most suitable option available.

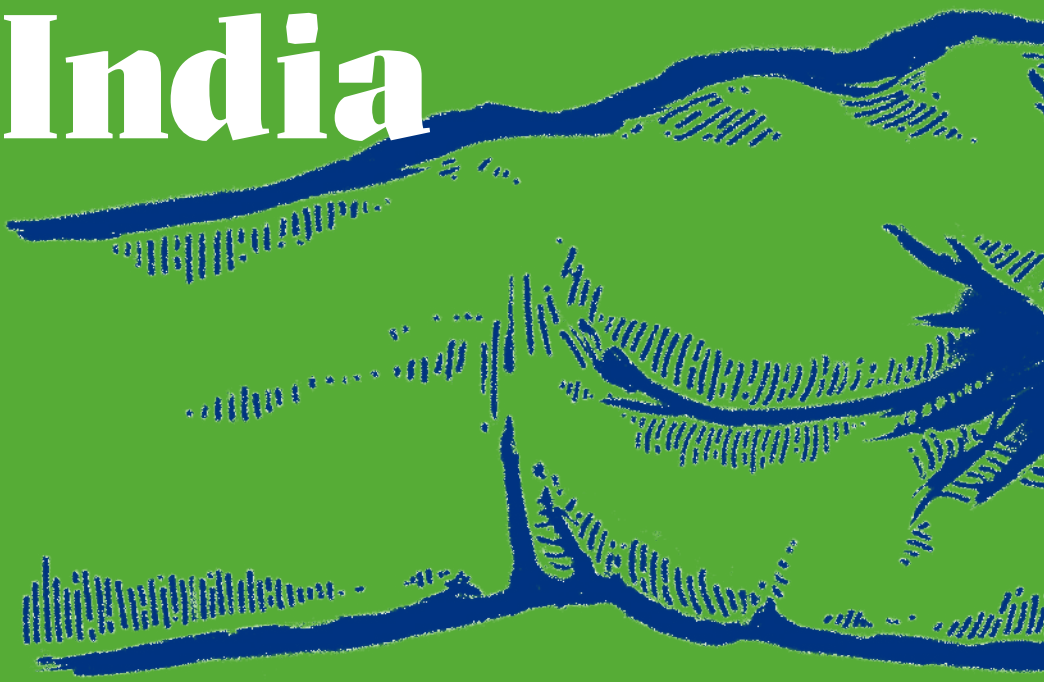
IMPLEMENTATION

A specific policy mandating the usage of technological tools for creating legal aid awareness, by LSAs and by the relevant stakeholders, should be put in place. This could cover the following:

- Usage of platforms which enable government officials and others to send out mass SMSs for free, through an online interface, to update the general population with easily understandable and pertinent legal information;
- Replication en masse of the structure for legal information voice-based kiosks for all levels of LSAs.

As a DoJ study in 2012 outlined, formal justice mechanisms in India are very complex, expensive, and beyond the reach of most of the population, especially the marginalised. Building awareness regarding legal aid authorities at the national, state and district levels will be a significant step forward in improving access to justice for all.

Create an Inclusive India



i	*Make* Schools Inclusive
ii	*Make* the Law Transgender-Friendly
iii	*Revitalise* Unorganised Sector Pensions
iv	*Promote* Alternatives to Imprisonment
v	*Legalise* Advance Directives
vi	*Encourage* Social Impact Investment

Make Schools Inclusive

ISSUES

The need for inclusion of children with disabilities in mainstream education requires comprehensive policy changes. The Rights of Persons with Disabilities Act, 2016 ("RPWD Act") recognises that the government must endeavour to provide for inclusive education, defined under Section 2(m) as "*a system of education wherein students with and without disability learn together and the system of teaching and learning is suitably adapted to meet the learning needs of different types of students with disabilities.*" As per General Comment 4 of the UN Convention on Rights of Persons with Disabilities, this must be implemented with a view to facilitate equal participation in public and political life. However, the Act does not create a directly enforceable right and merely provides that the government shall endeavour to provide inclusive education. To this end, this Act needs to be harmonized with the Right of Children to Free and Compulsory Education Act, 2005 ("RTE Act") in order to create a comprehensive framework for inclusive education.

The challenges to ensure an effective framework are two-tiered. The primary level requires the conceptualisation of the right to education in a manner that can cater to differential needs with the necessary support system while maintaining minimum, uniform standards. The second level requires taking steps towards the realisation of this right. The challenge to implementation may be both a lack of state capacity and financial resources as well as a lack of will among schools. Schools may also be unwilling to admit children with disabilities due to preconceived notions of the competence of such children to obtain mainstream education.

SOLUTION

Education is not just a question of equal opportunity but also of integration. A lot of countries have specialized legislation for persons with disability, such as Australia and the US. However, considering the multiplicity of legislations in India which all define disability differently and the need for inclusion within the existing framework of the RTE Act, it is advisable for the government to frame a national policy to look at these questions and introduce appropriate amendments to existing legislations.

This national policy should consider specific guidance on the status of specialized schools for children with disabilities and home-based education, arriving at measures of learning outcomes that may be reasonably adopted to cater to different levels of disability and creating an exhaustive list of measures to ensure non-discriminatory access to education in all institutions. Further, it must address the question of implementation keeping in mind capacity-building issues as well as the need for supervisory authorities with specialized functions.

IMPLEMENTATION

In addition to this national policy, the RTE Act will require amendment based on a process of public consultations, especially with stakeholders working in special education. This amendment must involve:

- Identification of a uniform definition of "child with disability" by adopting the framework of the RPWD Act and identifying elements necessary for meaningful inclusion of children with disability, and amendment to the Schedule to the RTE Act to reflect the same.
- Review of the provisions that allow for home-based education for certain categories, and of the possibility of phasing out segregated special schools. This must involve considerations of equal access to education, compatibility with the idea of social inclusion, infrastructure needed to accommodate children with high support needs and studies of learning outcomes that may justify segregated education in some cases.
- Review of curriculum by the academic authority under Section 23 of the RTE Act to allow adequate flexibility to accommodate diverse learning outcomes in a classroom and revising teacher training course modules to include elementary training on accommodating classroom diversity.
- Creation of facilities for vocational studies and life skills for children with severe learning disabilities in addition to regular schooling.
- Empowering the commissions recognised under the RTE Act to entertain complaints of failure to provide inclusive education or denial of admission.

The inclusion of provisions within the RTE Act will create a statutory basis for meaningful equal access to education.

Make the Law Transgender-Friendly

ISSUES

The landmark judgement of *NALSA vs. Union of India* which recognised that transgender persons have fundamental rights under the Constitution, was followed by the Transgender Persons (Protection of Rights) Bill, 2016 ("Bill") which was met with criticism for falling short of the NALSA judgement. The Bill not only reinforces harmful stereotypes about transgender persons, but is mostly a paper tiger since it does not have an enforceable anti-discrimination provision, and imposes tokenistic obligations on the government.

Further, while the Bill seeks to serve as an anti-discrimination and welfare legislation, it does not fulfill the duty of the state to ensure that transgender persons have equal civil and citizenship rights, which were recognised in the NALSA judgement.

The fundamental right to legal recognition of one's self-identified gender identity does not end at being allowed to choose the gender marker of your choice on an identity document. It means being able to access the legal regime at par with cis-gendered persons i.e. persons whose gender identity is the same as the sex assigned to them at birth.

The current framework denies transgender persons basic protections under the law. For instance, most criminal sexual offences are gendered. The implication of this was witnessed when a Pune court in 2017 acquitted four persons accused of raping a transgender person on the ground that since Section 376 or 377 of the Indian Penal Code ("IPC") used the terms man and woman, a transgender person cannot find relief under either provision. Similarly, certain laws discriminate against transgender persons by either criminalizing an aspect of their identity, such as Section 377 of the IPC, by continuing to be based on the binary such as the Special Marriage Act, 1954, or by denying them the right to self-identified gender identity such as the Passport Rules, 1980.

SOLUTION

An explicit and unqualified right to self-identified gender must be included in the Bill, since this is the

foundational measure for inclusivity of transgender persons. Additionally, the definition of transgender persons requires reworking, effective anti-discrimination and reservation mechanisms need to be introduced, and tangible obligations on stakeholders need to be imposed. Along with this, the legal implication of gender change on their rights, especially those which are connected to cis-gendered institutions such as marriage and inheritance, should be expressly specified.

The enforcement mechanisms in the Bill also need to be strengthened as they hold the key to effective implementation. Laws which have cis-gendered foundations or are discriminatory against transgender persons should be amended or repealed. Awareness regarding rights of transgenders should be created and government officials, judges and police personnel should be sensitized. Steps such as revamping pedagogy to promote inclusiveness, and undoing the implications of historical discrimination faced by transgender persons may also be taken.

IMPLEMENTATION

- The Bill should be revised in light of the Standing Committee report on the Bill, public comments, and the NALSA judgement.
- Relevant ministries should carry out a gender impact assessment of the laws under their ambit through extensive consultation, and engagement of transgender persons, experts and other stakeholders. Thereafter, the relevant law may be repealed or modified to ensure inclusivity of transgender persons.
- Administrative forms across all sectors should have to be amended to introduce the “third gender” option.
- A comprehensive policy may be formulated for sensitization, creating awareness regarding the rights of transgender persons, and providing benefits.

The above measures will ensure implementation of equality for transgender persons and provide mechanisms to eliminate discrimination.

Revitalise Unorganised Sector Pensions

ISSUES

With the rising growth rate of the elderly population in the country, the presence of a comprehensive pension system to absorb their financial needs is the need of the hour. Moreover, 86% of the Indian workforce falls within the unorganized sector, which in turn contributes 90% to the national GDP. Thus, pension schemes are the most critical component of the social security net for the unorganized sector, which is unable to access more sophisticated investment schemes.

The Unorganized Workers Social Security Act, 2008 pursuant to which the Swawalamban scheme was launched, later revamped as the Atal Pension Yojana, is a paper tiger due to several factors: (i) enrolment of less than 1% of the intended beneficiaries; (ii) very low promised returns; (iii) restrictive and conservative investment guidelines, especially in comparison to global standards; and (iv) lack of information about the pension schemes.

These shortcomings, coupled with an overall lack of skepticism in the formal financial system due to the high level of bureaucracy, necessitates the revamping of the pension regime in India to gain the confidence of the unorganised sector.

SOLUTION

A number of reforms may be made to the pension regime in the unorganised sector to make it holistic. Chile, which is often cited as one of the best examples of modern pension reform and has a demographic which is similar to India, presents an effective and workable model for pensions for the poorest sections of society. The hallmark feature of the reform is “soft compulsion” or an auto-enrollment system coupled with an additional solidarity pension system for the poorest segment of the population, which is conditional

on residency. This has led to a noticeable increase in coverage in pensions.

Second, to make pension schemes more attractive to the unorganized sector, higher promised returns are imperative. Third, hybrid life insurance and pension products for the unorganized sector should be considered as they may encourage people to invest in such schemes early on in life. Fourth, a number of countries (including developing nations) have relaxed their investment guidelines for pension funds, especially when it comes to investment in equity. India can implement similar reforms, eventually progressing to the prudent person approach rather than imposing blanket limitations on investment. Last, judicious use of technology, simplification of norms and making use of pre-existing networks like ASHA workers, post offices and local bank branches for facilitating inclusion and dissemination of information and imparting of training would go a long way in penetrating into the unorganized sector and increasing their faith in the system.

IMPLEMENTATION

- For implementation of these reforms, appropriate amendments to the Unorganized Workers Social Security Act and related regulations and guidelines are required to be made.
- This should be coupled with a shift in the policy approach to make the pension regime for unorganised sector more inclusive (possibly through soft enforcement), innovative, and attractive.

A simpler, stronger and forward-looking pension system will absorb the economic pressures of the growing elderly population in the country, a large part of which lies in the unorganised sector, while providing the necessary financial protection.

Promote Alternatives to Imprisonment

ISSUES

In India, imprisonment is often adopted as the first form of punishment for all offences. Consequently, the country's prison institutions are burdened by a high occupancy rate of convicts and undertrials. In 2015, prisons in India recorded an occupancy rate of 114.4%. It is widely argued that imprisonment should be a form of punishment of the last resort, due to its long-term negative impact on prisoners and their families. Deplorable experiences during imprisonment, emanating from infrastructural constraints, prison violence and overcrowding, have been documented.

A total of 6,428 convicts and 43,148 undertrials were recorded as part of the 2015 prison population for petty offences such as theft, cheating etc. There are legal provisions that allow for diversion out of imprisonment for such petty offences, but we find people being continually incarcerated for them. In fact, the total number of convicts and undertrials for such offences constituted nearly 12% of the overall prison population in India that year. Further, prison expenditure is escalating, with a 20.5% increase in 2015–16 from the preceding year. Given all these reasons, it is imperative that alternate modes of punishment be explored.

SOLUTION

Non-custodial measures such as probation and community service can be an alternate mode of punishment. Provisions for reformative justice can be found in a few criminal laws of India. For instance, the Probation of Offenders Act, 1958 generally allows for probation for several offences such as theft, cheating, and others punishable with imprisonment for not more than two years, or fine, or both. Thus, the courts can release certain offenders on probation, considering the case at hand, character of the offender and previous conviction records proved against them. Similarly, provisions in the Narcotic Drugs and Psychotropic Substances Act, 1985 empower courts and prosecution officers to divert drug addicts towards de-addiction centres. However, the Indian Penal Code 1860 ("IPC"), which is the primary criminal law for the country, is devoid of any such provisions.

Prisons in India can be immediately de-congested by an effective application of the existing legal provisions. At present, probation as an alternative to imprisonment is not a popular approach, and the judiciary needs to be sensitised in this regard. First and foremost, judges should be educated on how to implement community programmes as an alternative. Their decision to divert an offender into a community programme should be based on a thorough, objective assessment of the person's individual needs, which would include assessing her/his background, education, age, maturity and support needs etc. and should enable the offender to choose desistance from crime.

In addition to creating awareness within the judiciary, it is imperative to build better interaction between the judiciary, probation officers and the prosecution department so as to build a culture of probation and community sanctions in place of imprisonment. There should be at least one probation officer attached to every police station and every magistrate's court, so that probation is not denied to offenders due to lack of access to probation officers. To ensure this, budgetary allocation for appointment of probation officers needs to be increased.

IMPLEMENTATION

- An action plan to promote probation as an alternative to imprisonment in the manner above should be formulated, and should contain guidelines on how the judges should use community service or other modes of reformative justice as an alternative to imprisonment.
- Section 53 of the IPC lists the punishments to which offenders are liable—death, imprisonment, forfeiture of property and fines. This provision should be amended to include community service as a possible form of punishment so as to firmly institutionalise this form of punishment within Indian criminal law.

Therefore, adopting alternatives to imprisonment as a form of punishment will go a long way in promoting a culture of restorative and rehabilitative justice.

Legalise Advance Directives

ISSUES

In its judgments in *Justice K.S. Puttaswamy v Union of India* ("Puttaswamy") and *Aruna Shanbaug v Union of India* ("Aruna Shanbaug"), the Supreme Court has recognised decision-making with respect to life-sustaining treatment as aspects of the right to privacy and patient autonomy, respectively. Giving effect to these rights means allowing persons to decide what forms of treatment are administered to them, and whether life-sustaining medical intervention should be withheld or withdrawn. Therefore, if patients of sound mind refuse to consent to treatment that would prolong their life-span, medical practitioners are under a duty to respect their wishes.

While the law now recognises the rights of 'competent' patients (i.e. patients who can weigh the pros and cons of a measure and make an informed decision about their treatment), this is not extended to 'incompetent' patients (this category would include patients who are unconscious, in a coma, or incapacitated due to advanced age). The recent draft Medical Treatment of Terminally-Ill Patients (Protection of Patients and Medical Practitioners) Bill ("MTTP Bill"), released by the Ministry of Health and Family Welfare, also states that only competent patients can make decisions regarding end-of-life care.

There are two major ways in which the decisional autonomy of incompetent patients can be actualised. These include living wills (where a person can specify in advance what kind of medical treatment should be administered to them in the event of their incapacitation) and through nominated representatives (who are appointed by the person in advance to make decisions on their behalf). These are collectively referred to as 'advance directives'. Currently, these do not have legal validity in India and the MTTP Bill states categorically that all such advance directives will be null and void. This is based on a Law Commission report that fears that such directives may be misused.

Not only does this violate the right to die with dignity, but potentially also violates Article 14 of the Constitution, which guarantees the right to equality. It creates an illogical distinction between 'competent' and 'incompetent' patients,

since there is no reason why a person cannot decide in advance what treatment they permit before they become incompetent to do so.

SOLUTION

It is imperative that advance directives be legally recognised as valid instruments through which persons can specify what forms of medical treatment should (or should not) be administered to them in the event of their incapacitation. A model for such recognition is the Mental Healthcare Act, 2017, which allows people with mental illness to draw up advance directives which come into effect if they cease to have the capacity to make decisions regarding mental healthcare or treatment. Suitable safeguards to protect against misuse must also be incorporated.

IMPLEMENTATION

The Ministry of Health and Family Welfare must revise the MTTP Bill to give legal recognition to advance directives after extensive consultations with experts and relevant stakeholders. The revised Bill must:

- Allow people with terminal illnesses to specify the forms of medical intervention acceptable to them and/or to nominate representatives who will take this decision, on their behalf, in the event of their incapacitation.
- Specify the form and content of such advance directives, and the situations in which they might be considered invalid.
- Contain safeguards to prevent misuse, which could include requiring at least two witnesses to attest the advance directive, and recognising only registered advance directives. Along with this, a simplified appeal process to challenge the validity of advance directives with minimal judicial interference may also be included.

Giving legal effect to advance directives will fulfil the positive obligation on the State to respect privacy (now recognised in Puttaswamy), will prevent unscrupulous private establishments from administering unnecessary treatments, and will also allow for a more rational use of health resources.

Encourage Social Impact Investment

ISSUES

Social spending is a crucial component to promote inclusive growth. In India, expenditure on social services, in proportion to the Gross Domestic Product ("GDP") is a mere 7%, which is in sharp contrast to the OECD countries which have, since 2009, spent on an average 21% of their total GDP on social services. Further, in India, due to the leaky bucket syndrome (corruption), the net effect of social spending is miniscule. Pursuant to the introduction of the provisions on Corporate Social Responsibility ("CSR") in the Companies Act, 2013, while CSR spending has risen, the compliance rate of mandatory CSR spending has not been satisfactory. One of the factors for this might be the absence of efficient avenues for spending. Further, while Social Venture Funds ("SVFs") structured as Alternative Investment Funds ("AIF") have been set up, the avenues where they can invest are also limited.

SOLUTION

Against this backdrop, there is a need to develop an instrument which provides tax-exempt competitive returns on social investments which can lure investors. Developing a new asset class of 'Social Impact Securities', which give returns based on social impact may be an attractive investment option. Social Impact Securities must be distinguished from the conventional Social Impact Bonds, as the former will be recognised as 'securities' under the Securities Contract Regulation Act, 1956 ("SCRA"), and not as pure contracts.

SVFs or other corporate ventures may issue Social Impact Securities and on subscription, contract with

social ventures to carry out the project which will be funded on a milestone basis from the pool of funds collected from investors. An independent monitoring agency may be established which can measure the 'social return' of each venture. Upon successful completion of such projects, the SVF will provide the investors with a financial return. The face value of each Social Impact Security may be kept reasonable so that retail investors can also invest. Social Impact Securities can offer the following benefits: (i) an avenue for investors to generate social returns coupled with financial returns; and (ii) achievement of targeted social goals under the aegis of an independent monitoring agency.

IMPLEMENTATION

- A separate legal framework will be required to provide statutory backing to Social Impact Securities, deal with the contractual relations between the issuer and investor, constitute an independent monitoring agency, prescribe its role and functions and provide tax exemptions. Necessary amendments to SCRA and SEBI AIF Regulations, 2012 will also be required.
- The Securities and Exchange Board of India should be empowered to regulate the issuance of Social Impact Securities and the related investor protection aspects.
- The government may tweak the CSR provisions in the Companies Act, 2013 to count investment in Social Impact Securities as CSR.

Creating an investment avenue through Social Impact Securities will go a long way in harnessing private finance for social impact projects and will ensure inclusive growth.

Afterword by Justice Ruma Pal

An afterword is generally seen as a concluding section for the contents of a book. I am particularly disadvantaged since I have neither the knowledge nor the expertise in respect of most of the 25 areas of legal reform discussed in this briefing book, which Vidhi has carefully researched and has suggested changing. I cannot, therefore, credibly speak on the areas which Vidhi has chosen for highlighting as needing reform, nor can I comment on the proposed solutions.

However it is clear that the work has placed an embarrassment of riches before legislative bodies

to choose from, for urgent reform. The lack of prioritisation amongst the 25 legal reforms suggests that ultimately the choice of intervention in any area of suggested reform by Parliament or the State Legislatures will be driven by immediate political will, though each of them is critical in its own right.

The subjects chosen should in any event give rise to public debate even if the deliberations around them are inadequate in the legislative fora. Perhaps that, or even judicial intervention, might provide the ultimate push for legislative bodies to take up the critical issues dealt with in this book.

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