V | D H | Centre for Legal Policy

From Rule by Law

to the Rule of Law

25 Reforms to Decolonise India's Legal System

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BRIEFING BOOK 2022

FROM RULE BY LAW TO THE RULE OF LAW

25 REFORMS TO DECOLONISE INDIA'S LEGAL SYSTEM

25

This briefing book is an organisation-wide publication of the Vidhi Centre for Legal Policy. Vidhi Centre for Legal Policy is an independent think-tank doing legal research to make better laws and improve governance for the public good.

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Foreword

by **Justice Gita Mittal** (Retd.)

Colonial rule in India epitomised State dominance in most public and private affairs. It was marked by the oppression of individual liberties and a strict policing regime. Law became the tool to establish this colonial hegemony and citizens became subjected to rule by law.

The year 1949 historically sealed the departure of the country from such a legal regime. Free India gave itself a Constitution that would ensure that the State existed to serve its citizens. The democratically elected Parliament became the voice of the people in ensuring the legitimacy of the law. On our part, the members of the judiciary always made conscious efforts to develop local jurisprudence and expand these constitutional values. We have strived to ensure that 'rule of law' remains a reality rather than a theoretical concept.

However, even today, we as a country have been unable to shed our colonial clothing in its entirety. Despite the evolution of our society, we have been predisposed to certain behaviours and thoughts due to our past which compel us to accept certain habits subconsciously. It is no wonder then that the statute book contains provisions which are discriminatory and run contrary to fundamental rights. The courts themselves carry practices which manifest their colonial legacy. These have remained unspoken of for far too long.

This aptly titled book is a reminder that we cannot take 'rule of law' for granted. Instead, what we need is a deliberate reflection on our current legal system and to critique the law where it falls short of constitutional values. It highlights 25 laws and institutions having colonial roots which need to be subjected to democratic scrutiny. It calls for the revision of these laws to ensure that principles of access to justice, fairness and inclusivity remain supreme. It is particularly commendable that the Book adopts an objective and forward looking approach and even comments on the laws which, although introduced in the colonial era, have actually contributed to the administration of the country but have become outdated in the present time. I congratulate the Vidhi Centre for Legal Policy for putting together these thought provoking essays. Vidhi has once again shown itself to be a pioneer in advancing the discourse on legal reforms in India.

I hope that the ideas presented in this Book are discussed and debated in public forums. Any conversation on removing colonial symbols is incomplete without a thorough examination of the legal system. I look forward to seeing these ideas being implemented in the near future.

(**Gita Mittal**
Former Chief Justice, Jammu and Kashmir High Court)

Introduction

Does decolonisation hold any relevance for a sovereign democratic nation seventy five years after it became independent? Surely three quarters of a century is enough for India to remove the vestiges of colonial rule from its legal system. The unfortunate truth is that even after all these years, and despite India having given itself a modern and progressive Constitution, traces of colonial rule remain embedded in the legal system. As law students, we encountered this in the archaic legal language that we were made to use while learning to draft pleadings. "Sheweth" seems like a word that should have been retired before the Magna Carta was signed but it still features in court pleadings, instead of the simpler, less arcane "submits" or "shows".

This is only a minor example. Visible and invisible vestiges of colonial rule are all around us. While significant progress has been made in reforming colonial era laws and institutions, much more remains to be done and this is what Vidhi's Briefing Book wishes to highlight. Some of the laws and institutions we have identified are inextricably linked with colonial rule and have no place in a free, democratic republic. Surveillance under the Telegraph Act, 1885 and the prohibition on sedition under the Indian Penal Code, 1860 were passed with a view to limit freedoms and further colonial rule. Even institutions which we take for granted, such as the office of the Governor and the police, were intended to suppress the legitimate democratic aspirations of Indian peoples. Today, they wear a veneer of constitutional legitimacy, but real world experience shows that their core needs complete reform.

Then there are those laws and institutions that date back to the colonial era which have, through the passage of time, simply become irrelevant in the modern world. Even as the world grapples with changing gender norms and identities, the General Clauses Act, 1871 still insists that laws should assume a man is the default subject for lawmaking. An institution which feels increasingly out of touch with modern developments in the context of administration and procedures is India's judiciary. Whether in removing the vestiges of colonial rule in language and symbols or in ensuring accessibility to all litigants, the judicial system has much baggage to shed.

The project of decolonisation however, is not like uninstalling a

defective version of an operating system where the previous version simply stands "restored". Laws and legal systems are perennially a work in progress, changing to meet the changing needs in a society. There was never a "perfect" set of laws or legal systems in India and decolonisation should not mean simply removing whatever was introduced during colonial rule. As Jawaharlal Nehru famously noted in "Discovery of India", India is "an ancient palimpsest on which layer upon layer of thought and reverie had been inscribed, and yet no succeeding layer had completely hidden or erased what had been written previously".

To apply the metaphor, decolonizing the law is about acknowledging the complicated history of India's laws and rewriting them with a view to making them compatible with India's constitutional goals and status as a modern, liberal democracy. The idea is to neither "erase" nor "restore" but reimagine and reform through four key values-liberty, inclusivity, accountability of institutions, and relevance in a changing world.

To this end, the solutions that we have proposed also fall into four broad categories - safeguarding freedoms, making the law inclusive, ensuring accountability and upgrading the law. This, in some cases, may involve a simple repeal of the problematic provision, for instance, the criminal prohibition on sedition. In others, this might mean a larger set of legislative and institutional changes as might be necessary for the Indian Forests Act, 1927 or the Law Commission of India. Finally, there are those which require a complete reimagination of the purpose of the law and the institution itself. In this category belong the need to rethink anti-beggary laws in States and the role of the District Collector in land administration.

In the seventy-fifth year of India's independence from colonial rule, we believe this is the right moment to restart the conversation about the need to decolonise India's laws and institutions. This Briefing Book looks to take the discourse forward and provide actionable suggestions to the relevant institutions-Union government, State governments, and the judiciary. We hope that these ideas for reform will provoke not just thought but action to bring about the needed legal and institutional change.

TABLE OF CONTENTS

SAFEGUARD FREEDOMS

16 **Invigorate Democracy through Peaceful Assembly**

Section 144 is a colonial vestige that continues to be used by the State to curb citizens' rights to assemble and protest peacefully.

18 **Abolish Criminal Prohibitions on Sedition**

Section 124A has been used to quell public participation and undercut constitutionally guaranteed freedom of speech.

20 **Reduce Biases in Policing Habitual Offenders**

Habitual Offenders Acts continue to be used to unfairly target members of denotified tribes due to police and societal bias.

22 **Restrain Surveillance with Privacy Protection**

The Telegraph Act, 1885 gives unfettered discretion to the executive to determine whether grounds exist for interception of communications.

24 **Eliminate Caste-based Discrimination in Prisons**

Prison Manuals often rely on ideals of purity and impurity ingrained in caste hierarchy and divide prison labour on the basis of caste identity.

26 **Humanise Public Health Delivery**

The Tamil Nadu Public Health Act, 1939 adopts a policing approach to public health which is incompatible with the modern day framework.

28 **Abolish Beggary Laws**

The Bombay Prevention of Begging Act, 1959, on which other beggary laws are based, presumes potential criminality of the ostensibly poor, harming their dignity.

TABLE OF CONTENTS

ENSURE ACCOUNTABILITY

32 **Empower Local Governments to Administer Land**

The existing system of land administration has origins in the colonial administration's policy of revenue extraction, creating a top-down approach to governance unresponsive to local needs.

34 **Reimagine the Role of the District Collector**

The continued recognition of the office of the District Collector as the prime mover of governance impedes the growth of any other local authority.

36 **Make Policing Citizen-Centric**

The administration of police under the Police Act, 1861 and other State-specific laws adopts a top-down control which inhibits accountability from within and fails to be community-centric.

38 **Establish Legislative Oversight of the Intelligence Bureau**

A framework prescribing limits for the Intelligence Bureau's actions or an institutional mechanism for holding it accountable has remained absent since 1887.

40 **Make the Office of the Governor Independent**

There is witnessed undemocratic partisanship in the way Governors have carried out their role in appointing Ministers, summoning legislatures, assenting to Bills, and calling for President's Rule in States.

42 **Create a Central Drugs Regulator**

The Drugs and Cosmetics Act, 1940 lays down a fragmented approach, failing to establish a sound regulatory framework at the Central and State levels .

TABLE OF CONTENTS

MAKE THE LAW INCLUSIVE

46 **Eliminate Discriminatory Langauge on Impaired Capacity**

The majority of Indian laws still rely on stigmatising terms like "sound or unsound mind", "idiot" and "lunatic".

48 **Make Punishment Reformatory and Rehabilitative**

The Indian penal system continues to rely solely on deterrence by custodial sentences, even for petty offences which more often than not are excessively punitive.

50 **Facilitate Access to Court Decisions**

There are still several barriers to accessing Court documents, many of them inherited from the Colonial judicial system such as mandatory use of English and classification of judgements as reportable and non-reportable.

52 **Make Courts Non-Hierarchical**

The iconology in courtrooms perpetuate mystique and intimidate an ordinary supplicant seeking justice.

54 **Adopt Plain Language Drafting**

Laws in India continue to be drafted in complex English mixed with archaic legalese. A colonial legacy, this is intended primarily to obfuscate and exploit.

56 **Protect Traditional Cultural Expressions**

Even in evident cases of plagiarism or appropriation the indigenous communities or tribes are unable to avail protection for their Traditional Cultural Expressions under the Copyright Act, 1957 and GI Act, 1999.

58 **Decentralise Forest Management**

The continuity of the Indian Forest Act, 1927 post-independence has condoned the treatment of forests as economic resources rather than natural ecosystems.

TABLE OF CONTENTS

UPGRADE THE LAW

62 **Revamp the Law Commission of India**

The Law Commission has failed in its objective to decolonise Indian laws, instead suggesting hyper-technical reforms with remote connections to the Indian citizen.

64 **Facilitate Online Registration of Documents**

The Registration Act, 1908 does not account for technological advancements since its enactment, such as legal recognition of electronic records and signatures, and online payments.

66 **Repurpose Usurious Lending Laws**

The Usurious Loans Act, 1918 offers no real protection to borrowers, especially indigent persons, who cannot afford legal representation.

68 **Harmonise State Primary Education Laws with the Right to Education**

In several State laws, primary education is not recognised as a right of the child, and the onus for educating the child is placed on parents rather than the government.

70 **Modernise the Sale of Goods Act, 1930**

The Sale of Goods Act is inadequate to keep pace with the rise of e-commerce, the emergence of consumer protection as a policy concern, and other technological and jurisprudential developments

72 | **Ministry Index**

73 | **State Departments Index**

73 | **Courts Index**

74 | **References**

81 | **Acknowledgements**

Safeguard Freedoms

16
Invigorate Democracy through Peaceful Assembly

18
Abolish Criminal Prohibitions on Sedition

20
Reduce Biases in Policing Habitual Offenders

22
Restrain Surveillance with Privacy Protection

24
Eliminate Caste-based Discrimination in Prisons

26
Humanise Public Health Delivery

28
Abolish Beggary Laws

Invigorate Democracy through Peaceful Assembly

ATTENTION:
Ministry of Law and Justice,
Ministry of Home Affairs

PROBLEM

Indian citizens are guaranteed the fundamental right to assemble peacefully and without arms under Article 19(1)(b) of the Constitution. However, like all other fundamental rights, the right may be restricted by the State in order to: (i) protect the sovereignty of India, (ii) protect the integrity of India; and (iii) preserve public order. This is operationalised by way of invoking the Indian Penal Code, 1860 ("**IPC**"), the Code of Criminal Procedure, 1973 ("**CrPC**"), and the Police Act, 1861 ("**Police Act**"). These laws afford the executive and the police overwhelming power to restrict a constitutionally guaranteed right, without parallelly providing safeguards to prevent misuse.

Section 144 of the CrPC grants a class of Magistrates, the power to issue orders banning or disbanding assemblies of citizens if they have an apprehension of "triggers'", namely a public assembly causing obstruction, annoyance or injury, danger to health, safety, disturbance to public tranquillity, riot, or affray. Drafted in 1861 to curb nationalist protests in Baroda, the provision has retained the same form for more than 160 years and continues to be arguably the most notorious tool utilised by the government to curb protests. Most orders prohibiting assemblies both before and after independence have been passed under this section, due to the wide berth of powers (often applied arbitrarily) granted under it. Consequently, the provision has undergone immense judicial scrutiny both during and after colonial rule. Recently used as a prohibitive order during the farmers' protests and the anti-Citizenship Amendment Act/National Register of Citizens protests, the repressive nature of the section is a colonial vestige which continues to be applied by the State to curb citizens' rights to assemble and protest peacefully.

Being broadly worded, the section does not outline any standard procedures on the basis of which restrictive orders prohibiting assemblies are passed. It has not advanced with judicial interpretation of the individual "triggers" listed under the section. As a result, magistrates have unbridled discretion to pass orders—free from mechanisms or tests which can help determine when cases are indeed urgent and require immediate action. Orders are repeatedly passed without an internal or external audit. Moreover, as per section 188 of the IPC, any disobedience of the orders results in monetary fines and imprisonment up to one month. Though orders can be examined by the High Court, by the time the court reaches

its conclusions, the right to freedom of assembly is already violated.

APPROACH

As a mature democracy, the precarious balance between public order and the right to freely assemble needs to be maintained. However, checks on arbitrary use of power by the executive is and continues to be the first tenet of the rule of law. History confirms the imperviousness of the section to the narrowing of its scope by judicial review. To counter this obduracy, a constitutionally tenable system of accountability based on reasonableness, proportionality and necessity should be added to the text of the provision.

The constitutional transition of people from "subjects to "citizens" led to the evolution and recognition of a new range of rights but did not see a parallel reorientation and sensitisation of the State machinery and its agents to said rights.

SOLUTION

- Amend section 144 of the CrPC to require magistrates to conduct prior inquiry before passing any order under the provision to indicate clear and present danger. The duration of the order should be reduced. Any extension or repetition of the order must be approved by an independently constituted reviewing body. The order when passed must be justified through a speaking/reasoned order mandate.
- Undertake a comprehensive examination of other provisions such as sections 141-160 of the IPC, sections 129-149 of the CrPC and the Police Acts (including State Model Laws) to assess their interconnection in circumscribing freedom of assembly.
- Enact a separate legislation to provide greater detail on offences such as riot, violent disorder, affray, fear or provocation of violence, harassment, alarm, or distress, including conditions for operationalisation and nature of powers of the executive. Specific protection should be provided to members of peaceful assemblies for non-violent participation and from prosecution under anti-terror and sedition laws. An approach similar to the United Kingdom's Public Orders framework may be adopted to balance the right to peaceful protest with the State's duty to stop disruptive protests.

A separate legislation to regulate assemblies may be developed based on the presumption of peaceful nature of assemblies along with measures that ensure that freedom of assembly is not obstructed or interrupted unreasonably.

Abolish Criminal Prohibitions on Sedition

ATTENTION:
Ministry of Home Affairs
Ministry of Law and Justice

PROBLEM

In 1870, the British colonial administration introduced section 124A in the Indian Penal Code, 1860 ("**IPC**") criminalising activities it deemed seditious. By design, it served to curb criticism of the British administration and public participation in the Indian freedom movement. This was evident in the wording of the provision itself, which criminalised bringing or attempting to bring into hatred or contempt, or exciting or attempting to excite disaffection towards the government. In practice, even holding negative feelings against colonial rule was deemed seditious.

The United Kingdom abolished sedition as a criminal offence in 2009, given its incompatibility with the right to freedom of expression, but India has not done away with this colonial relic yet. In its current form, section 124A allows a life sentence to be imposed on anyone who commits sedition. This is a prime example of the post-colonial Indian Government not only co-opting a repressive tool from the colonial era, but giving it more teeth by making it a cognisable offence.

Data from the National Crime Records Bureau shows that cases registered for sedition have increased from 47 in 2014 to 76 in 2021, while the conviction rate has gone from 25% in 2014 to 0% in 2021. Frequent arrests and case pendency before courts touching 97% in 2021 shows how section 124A has been used to quell public participation and undercut constitutionally guaranteed freedom of speech. Since sedition is a non-bailable offence, people criticising the government can be detained for an indeterminate amount of time.

The ambiguity around the scope of the provision and the police excesses associated with it have a chilling effect on citizens' rights. Cases have been filed against citizens for organising school plays to raise awareness about controversial laws, for criticising political leaders and for reporting on rape cases. Article-14's Sedition Database finds that since 2010, over 400 people were charged with sedition for making 'critical' and 'derogatory' remarks against the Prime Minister and the Chief Minister of Uttar Pradesh. Such flagrant misuse

of sedition law has led to an ever looming fear of prosecution and harassment at the hands of the police, making an effective realisation of constitutional rights an elusive reality.

APPROACH

Article 19(1) of the Constitution guarantees the right to freedom of speech and expression, but provides that reasonable restrictions can be imposed on the exercise of such a right in the interest of sovereignty and integrity of India, public order, decency, morality etc. Sedition has not been categorised as a reasonable restriction. In fact, it was dropped from an earlier draft of Article 19 which had categorised it as one of the grounds on which free speech can be restricted. However, it continued to be categorised as an offence under the IPC.

Over the years, the judiciary has attempted to limit the scope of the provision by underlining that for acts to constitute sedition, they must create law and order problems or intend to incite people to create disorder. A constitution bench of the Supreme Court in 2016 observed that criticising the government "in strong terms" is not an offence. However, this has not been enough. Frequent misuse of the law has ensured that it subsists as a constant source of chilling effect on free speech and expression.

Section 124A as a whole is obsolete as it suggests that rights of citizens can at times compromise the integrity of a nation. It pits individual and State interests against each other. A progressive approach, consistent with democratic values, must avoid doing that. It is critical for Indian democracy that all such barriers to effective realisation of the right to free speech and expression are removed.

Section 124A as a whole is obsolete as it suggests that rights of citizens can at times compromise the integrity of a nation.

SOLUTION

- Repeal section 124A of the IPC.
- Review penal provisions such as sections 153A and 295A of the IPC which are equally vague, ambiguous, prone to misuse and may prevent effective realisation of the right to free speech and expression.

Reduce Biases in Policing Habitual Offenders

ATTENTION:
Ministry of Social Justice and Empowerment

PROBLEM

First enacted in 1871, the Criminal Tribes Act ("**CTA**") sought to categorise certain tribes as being 'addicted to the systematic commission' of crimes, subjecting them to constant surveillance. The Act was rooted in colonial and casteist attitudes, which viewed certain communities as hereditarily and habitually engaging in crime.

The CTA was repealed in 1952 and was replaced by the Habitual Offenders' Model Bill released by the Union Government, which led to the adoption of Habitual Offenders Acts ("**HOAs**") in 10 states and one Union Territory. Tribes denotified from being deemed "criminal" are now called denotified tribes ("**DNTs**").

The first technology-related problem with HOAs is one of disproportionate targeting. HOAs no longer target specific tribes in letter. Habitual offenders ("**HOs**") are generally defined according to the number of consecutive crimes committed. However, HOAs are still used to unfairly target members of DNTs due to police and societal bias. Members of DNTs are subjected to headcounts and wrongful arrests by virtue of their membership of these tribes. DNTs are still stigmatised as crime-prone. Such stigma has, even post-independence, manifested as mob lynching, police harassment, and neglect. There have been recent cases where HOs have faced custodial deaths due to police torture. Women members of DNTs are often subjected to sexual harassment by the police.

The second problem is that the HOAs allow the District Magistrate or any other appointed officer to collect biometric and other data from HOs without any data protection rights. This represents a technological extension of the colonial approach to now-denotified tribes.

HOs have no right to reject the collection of their biometric data. HOAs state that people can be arrested without a warrant and imprisoned for refusing to provide such biometric data (eg., section 17 of the Bombay Habitual Offenders Act, 1959). There are three problems with these provisions. They put an unreasonable burden on HOs, one that is higher than the data collection burden on other convicted persons, without proper justification. Secondly, unfettered data collection of HOs normalises the often unnecessary collection of biometric data from everyone who finds themselves in the criminal justice system, creating

high risks to privacy and violating the proportionality principle.

Thirdly, this biased data collection affects society at large, because it is used to develop biased surveillance technology used on all people. Data from HOs is digitised and incorporated into the Crime and Criminal Tracking Network and Systems ("**CCTNS**"). This data is used to build predictive policing tools. Such technology can reflect the biases inherent in its data, especially if it overrepresents persons from marginalised sections of society. The use of technology for law enforcement based on data collected in this discriminatory manner can also potentially violate the right to equality under the law.

Further, HOAs impose unjust restrictions on the movement of HOs. Courts are barred from questioning the validity of orders passed under HOAs, and legal proceedings cannot be initiated against a State in relation to the HOA. HOAs also allow State governments to set up "corrective training settlements" where HOs can be detained for "reformation" and even for the prevention of a crime.

In effect, the disproportionate targeting of DNTs through HOAs is combined with broad data collection powers in their ambit. This leads to discrimination and coercion against DNTs. It also creates and enhances bias in policing technology. This data extraction and surveillance harkens back to colonial discrimination and suppression that members of tribes deemed "criminal" were subjected to. It must similarly be relegated to history.

APPROACH

Rules or laws in relation to re-offence should be based on modern theories of criminology as well as evidence. The United Nations standards and norms in crime prevention and criminal justice provide a good example of such an approach. These norms choose the approach of restorative justice to promote effective and fair criminal justice systems. Compulsory registration, over-surveillance, and forced collection of biometric data of persons who have served their sentence, have no place in an independent, democratic, constitutional republic.

Besides, any data collected for the CCTNS should not be based on biased data collection methods in order to prevent downstream biasing of policing technology.

Compulsory registration, over-surveillance, and forced collection of biometric data of persons who have served their sentence, have no place in an independent, democratic, constitutional republic.

SOLUTION

The National Human Rights Commission, the National Commission for Denotified, Nomadic and Semi-nomadic Tribes, and the United Nations Committee on the Elimination of Racial Discrimination have all recommended repealing all HOAs. Given the colonial approach of the HOAs, and the particular impact on policing technology, the following measures are recommended:

- Repeal all State HOAs.
- Withdraw the Union Government's model HOA.

Restrain Surveillance with Privacy Protection

ATTENTION:
Ministry of Communications

PROBLEM

The Telegraph Act, 1885 forms one of the mainstays of the regulatory framework on telecommunications in India. This legislation was enacted as a refurbished version of the Indian Telegraph Act, 1876 that came in the context of a slew of other laws like the Gagging Act, 1857 and the Vernacular Press Act, 1878. These were intended to give the government greater power over information flows in India post the first war of independence against the British in 1857. The Telegraph Act, 1885 gave the government the power to intercept messages on the occurrence of any public emergency or in the interest of public safety, if it believes it to be "necessary or expedient to do so".

While the exercise of surveillance powers is integral for governments to ensure security of the state, the manner of its exercise can have a significant impact on the fundamental rights of citizens. The Telegraph Act, 1885 gives unfettered discretion to the executive to determine whether grounds exist for interception of communications. This absolute discretion was compounded by the lack of any procedural safeguards in the exercise of such surveillance, for nearly 120 years of its operation. Its continued abuse post independence was highlighted by the Shah Commission Report and the Second Press Commission that documented its extensive use against journalists. With the expansion of the definitional scope of "telegraph", this power of interception only increased to newer forms of telecommunications. It was only in 2007, in the aftermath of the Supreme Court's directions that the government introduced Rule 419A of the Indian Telegraph Rules, 1951 that provided some semblance of procedural safeguards in the exercise of these powers.

However, a number of issues exist with the existing surveillance architecture. First, the varying levels of authority under this framework are populated by the executive and lack any judicial element. Second, given the sheer volume of orders issued under section 5, it is highly improbable that there is adequate application of mind by the requisite authority in the issuance of these orders. Third, the procedure lacks transparency. Rule 419(19) requires that directions for interception should be destroyed periodically and "extreme secrecy" in the process is to be maintained. This lack of transparency preempts an individual subjected

to such surveillance from any recourse against wrongful infringement of their fundamental rights under Articles 19(1)(a) and 21 of the Constitution. Fourth, the effectiveness of the oversight mechanism i.e. the review committee is limited.

APPROACH

In recent years, jurisprudence on lawful access to personal information has significantly evolved. With the right to privacy being recognised as a fundamental right, there is an urgent need to revisit the framework based on the Supreme Court guidelines issued in *PUCL v Union of India* in 1996. The current framework falls short of the three-pronged test laid down by the Supreme Court in *Justice KS Puttaswamy (Retd.) v Union of India (Puttaswamy-I)* of legality, reasonableness and proportionality.

Moreover, Rule 419A drew from the Interception of Communications Act, 1985 of the United Kingdom that permitted telephone tapping by the government. This has since been repealed and replaced with a framework that provides for oversight akin to judicial review. This has also been recognised by the Supreme Court in *Justice KS Puttaswamy (Retd.) v Union of India (Puttaswamy-II)*, where the majority opinion held that a judicial officer should be included in any process involving the disclosure of citizens' personal data to law enforcement.

It is essential to move away from the existing framework for surveillance of personal communications given that it falls foul of the current jurisprudence and violates the fundamental rights of citizens.

It is essential to move away from the existing framework for surveillance of personal communications given that it falls foul of the current jurisprudence and violates the fundamental rights of citizens.

SOLUTION

While an attempt to rehaul the general telecommunications regulatory framework has been made through the Indian Telecommunications Bill, 2022, the current draft mimics the provisions of the Telegraph Act, 1885 and does not make an attempt to incorporate the evolution of law since. Instead.

- Enact a new framework that first satisfies the test of "necessity and proportionality" with respect to the exercise of surveillance.
- Incorporate data protection principles in the processing of citizens' personal communications data.
- Provide for judicial review and remedies to persons illegally subjected to such surveillance.

Eliminate Caste-Based Discrimination in Prisons

ATTENTION:
Home Departments,
State Governments

PROBLEM

Today's Indian prison system continues to observe the systems put in place by the colonial administration in the late 19th and early 20th century. Prisons are within the legislative competence of State Governments under the Indian Constitution, but many State Prison Manuals have not been updated since they were first put in place by the British. One egregious aspect of these Prison Manuals is the use of caste-based rules and systems to govern life within prisons, in line with the general propensity of the colonial administration to rely on the laws of caste to maintain order in Indian society.

These outdated Prison Manuals relied heavily on ideas of purity and impurity ingrained in caste hierarchy and divided prison labour on the basis of the caste identity of the individual. Inmates from backward castes were to sweep, clean and engage in degrading activities such as manual scavenging. The Manuals reserved activities like cooking meals for savarna Hindus (forward castes) to avoid giving offence. For example, section 636 of the Punjab Jail Manual requires sweepers to be of mehtar or other backward castes. Similarly, section 741 of the West Bengal Jail Code prescribes that the food be cooked and carried to the cells by prisoner-cooks of suitable castes. Prisoners cannot protest against such discrimination--section 45 of the Prisons Act, 1894, criminalises insubordination and there is no grievance redressal mechanism that prisoners can use.

Caste-based discrimination against inmates violates their fundamental rights under Articles 15 and 17 of the Indian Constitution. Additionally, such repeated, pervasive discrimination harms the physical and psychological well-being of inmates and hinders their reformation and social rehabilitation, a key function of modern prisons.

APPROACH

Domestic and international law show the path forward in ending such caste-based discrimination. In India, in addition to the Protection of Civil Rights Act, 1955, and the Scheduled Castes and

Scheduled Tribes (Prevention of Atrocities) Act, 1989, The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013 imposes a total prohibition on manual scavenging, a degrading activity which is often forced upon persons belonging to backward castes. However, the last Act has not deterred manual scavenging and the caste-discrimination attached to it in prisons. This is because sections 2(a) and (f) of the Act do not include prison authorities in their definitions of "local authorities" or "agency", on whom the Act imposes obligations directed at the prohibition on manual scavenging. In international law, Rule 2 of the United Nations Standard Minimum Rules for the Treatment of Prisoners, revised in 2015 (Nelson Mandela Rules), and unanimously adopted by the UN General Assembly, states that there shall be no discrimination in prisons. Rule 97 further directs that prison labour should not be afflictive. In 2016, the Ministry of Home Affairs drafted the Model Prison Manual to incorporate the government's commitment to the Mandela Rules, but most State Governments have not adopted it yet.

In light of this, caste-based discrimination and the allocation of labour on the basis of caste-identities has no place in a modern Indian prison system..

Caste-based discrimination and the allocation of labour on the basis of caste-identities has no place in a modern Indian prison system.

SOLUTION

While the law alone cannot change social reality, at the very least, it should not further discrimination. To this end:

- Amend all outdated State Prison Manuals on the lines of the Model Prison Manual, 2016.
- Implement sensitisation programmes for prison authorities and conduct awareness-generating campaigns for all prisoners.
- Introduce a redressal system for prisoners to lodge grievances, especially against prison authorities along the lines of section 80 of the Kerala Prisons and Correctional Services (Management) Act, 2010.

Humanise Public Health Delivery

ATTENTION:
Health & Family Welfare Department, Government of Tamil Nadu

PROBLEM

The Tamil Nadu Public Health Act, 1939 considers the interconnectedness of health, sanitation, housing, and access to water – and also envisages powers and functions for controlling disease. However, it infringes upon personal rights and liberties of people with certain diseases by prohibiting their access to public spaces and libraries. Moreover, it gives undefined powers to the State, does not adopt a rights-based or people-centric approach, and provides for community participation in a limited manner.

The law's treatment of persons with notified diseases requires immediate revision. Currently, there are numerous embargoes on their use of public conveyances and public space in general (such as public libraries), as per sections 69 and 73. Violation of the law is punishable by fine and even imprisonment in some cases. Apart from the indiscriminate nature of such embargoes, it is important to note that diseases such as leprosy and cholera, which are not air-borne, are also included in the list of notified diseases. Thus, such provisions are not in alignment with current scientific knowledge. Instead of promoting health, they end up increasing stigma and shame around such health conditions, and discourage access to health services and support.

The above issue stems from the law's inadequate focus on health as a right, disregard to scientific advancement, and unbridled empowerment of the State - encouraging coercive as opposed to rights-based approaches. An example of the coercive power of the State is seen in section 76, which empowers the Collector/ relevant officer to make vaccination compulsory for all categories of people, unless it can be shown to be injurious to one's health in specific cases. Such blanket powers may not be desirable, especially without a corresponding duty on the part of the State to provide transparent information regarding the safety and side-effects of the vaccine, and provide accessible vaccination services and trust-building initiatives.

APPROACH

According to the Approach Paper on Public Health Act by The Task Force on Public Health Act, 2012, an ideal public health Act must be able to modernise/ amend laws in consonance with scientific developments and rights-based approaches. It must also provide clarity on implementation agencies and their duties, powers,

limitations, capacities, and resources. Further, the Principles of Ethical Practice of Public Health emphasise the importance of people-centric approaches and community participation in sound implementation of the goals of public health.

While a law focusing on public health need not state all current components of health rights, it should mention the ones that are closely related - such as access to public health facilities and allied rights. This Act approaches public health more from the perspective of administrative management, which implies that regard for individual rights and liberties is lower than that for administrative ease.

Community participation is not included procedurally (through inclusion in decision-making bodies such as the Public Health Board) or substantively through community surveys or feedback mechanisms. Notably, section 48 states that while assessing nuisance, due regard shall be paid to the social and religious usages of residents of the premises, but ultimately leaves too much to the individual discretion of an officer.

Ideally, this law should be amended and implemented with a scientific, people-centric, and rights-based approach.

An ideal public health Act must be scientific, people-centric and rights-based.

SOLUTION

This Act is similar in design to its contemporary British counterpart, namely the Public Health Act of 1936. While this indicates that the issues in the Tamil Nadu Act are likely to be colonial by design rather than by intent, it is important to note that multiple amendments have been made since then to modernise public health law in the United Kingdom. The current Public Health (Control of Disease) Act of 1984 has repealed provisions relating to access to public places by persons with mentioned diseases, and other coercive powers of the State. Similar amendments are necessary for the Tamil Nadu Act.

The following changes would resolve some of the issues mentioned above:

- Using a balanced duty-power-restraint approach, providing reasonable limits to State power while also clarifying State duties and consequences of their non-fulfillment
- Remove outdated concepts surrounding contagion and associated stigma, in line with current scientific knowledge.
- Increase focus on encouraging trust, increasing accessibility, and promoting health-seeking behaviour, instead of relying upon fear and stigma.
- Make the language of the law clearer, with appropriate interconnections with related laws and schemes for compatibility.

Abolish Beggary Laws

ATTENTION:
Social Welfare Departments, State Governments

PROBLEM

Begging is legally prohibited in most States and Union Territories in India. The Bombay Prevention of Begging Act, 1959 acts as the model anti-beggary law. The colonial history of the law dates back to the 1800s when begging was first criminalised to subjugate certain nomadic communities by imputing hereditary criminality to them under the Criminal Tribes Act, 1871. Although the Criminal Tribes Act was repealed in the 1950s, other similar colonial laws such as the Habitual Offenders Act, the vagrancy statutes, and the anti-beggary legislation continued to exist, reflecting systemic discrimination by the British. These colonial laws viewed beggars as a problem for the "image" of the State, a health hazard for the population of the ruling class and as people with innate criminal tendencies that needed to be curbed. This attitude was reflected in post-independence legislation. Even though the Bombay government, while passing the Bombay Beggars Act (later amended into the Bombay Prevention of Begging Act, 1959) claimed that the law was of a reformative character, incidents over the years have proven otherwise.

The definition of begging and what constitutes begging is vague and arbitrary. It indicates that the law not only prohibits begging per se, but also prohibits vagrancy, i.e. people who "wander" without any visible means of subsistence. It also prohibits individuals like traditional street performers from earning their livelihood by performing in public places. In this way, it creates an "economic other" and criminalises a way of life, exposing the classist undertones of the legislation. The beggar, who is seen as an "offender" has to make an unreasonable choice between committing a crime for his subsistence or not committing a crime and starving, which is completely antithetical to the constitutional spirit. The law presumes potential criminality of the ostensibly poor, harming their dignity. It is in conflict with the Universal Declaration of Human Rights, 1948 and the International Covenant on Economic, Social and Cultural Rights, 1966, which recognise the right to work and the right to freely choose the form of work.

Many African countries like Kenya, Zimbabwe and Rwanda which inherited laws criminalising beggary from the erstwhile British Empire have now taken

steps to repeal them, moving from a punitive to a rehabilitative approach. Assessing the viability of such laws, courts in Africa held that vagrancy laws were illegal and that countries had a positive obligation to repeal such laws. The Vagrancy Act, 1824 which makes it an offence to sleep rough or beg in England and Wales has been repealed in its entirety by the passing of the Police, Crime, Sentencing Courts Act in 2022.

APPROACH

Criminalising beggary has made beggars targets, without addressing the root cause: poverty. Poverty is a complex human condition characterised by sustained or chronic deprivation of resources, capabilities, choices and the ability to enjoy an adequate standard of life. Criminalization of begging is the outcome of prejudiced social constructs of presumption of criminality against the impoverished. Resorting to beggary reflects that the person has been failed by the welfare State and has fallen through its social security net.

The State, by implementing policies that expose the marginalised to penal prosecutions and punishment for beggary, only makes it clear that it has failed to achieve social and economic justice for all its citizens and the right to life under Article 21 of the Constitution. Anti-beggary laws are unconstitutional as criminalising begging violates the fundamental rights of some of the most vulnerable sections of society. They cannot be social benefit legislation as they do not serve the object and spirit of the welfare State, but instead, target the most marginalised.

Criminalisation of begging is the outcome of prejudiced social constructs of presumption of criminality against the impoverished.

SOLUTION

Only Delhi and Jammu and Kashmir have struck down anti-beggary laws through judicial verdicts. This exercise must be extended across all States. Hence, these acts must be repealed. Poverty ipso facto can never be a crime. Beggary has to be viewed in the larger social context of destitution, homelessness and vagrancy, which need affirmative State action and policies. In this light:

- Repeal all anti-beggary acts that continue to remain on the statute books.
- Formulate welfare schemes to focus on the integration of the most vulnerable and marginalised into society.

Ensure Accountability

32
Empower Local Governments to Administer Land

34
Reimagine the Role of the District Collector

36
Make Policing Citizen-Centric

38
Establish Legislative Oversight of the Intelligence Bureau

40
Make the Office of the Governor Independent

42
Create a Central Drugs Regulator

Empower Local Governments to Administer Land

ATTENTION:
Revenue Department, State Governments

PROBLEM

The present system of land administration in India finds its origins in the British colonial government's 'Permanent Settlement' policy that centred on revenue extraction. Revenue collectors in each district were made responsible for settling and collecting land revenue. This system was built on the premise of centralisation and coercive extraction and failed to cover other necessary land administration measures, such as ensuring security of tenure or suitable identification of land for preservation or developmental activities.

Even though the colonial land revenue systems were abolished in the 1950s, land administration, including revenue collection and its utilisation remains centralised with State administrations, for example, through district collectors appointed by State governments. Most State laws such as the Karnataka Land Revenue Act, 1964, the Madhya Pradesh Land Revenue Code, 1959, the Punjab Land Revenue Act, 1967 exhibit a heavy reliance on the District Collectorate for determining revenue rates, obtaining permissions for land-use conversion, conduct of surveys, land grants etc, indicating a very top-down approach to governance. This over-centralisation has resulted in an inefficient administration which is non-responsive to local conditions and requirements.

APPROACH

At independence, and more so after the 73rd and 74th Constitutional Amendments, India gave constitutional status to local self-government, in the interests of adopting a more federal and decentralised model of administration. However, this is yet to be reflected in land administration. For example, in respect of panchayats, the functions entrusted to them under the 11th Schedule of the Constitution cover the implementation of land reforms and land consolidation. However, as per a data-based study in 2019, only in 18 States were a few of these functions devolved by states to panchayats. A renewed approach to land administration should place urban local bodies and panchayats in charge of land administration, instead of the district collectorate, as they are closer to, and better versed with ground-level needs and realities.

Given the specific needs and issues of each district or sub-locality, local self-governments are better placed to conduct land administration that is effective and accountable to its people. Proximity will help in identifying land reform measures, such as the clear identification of land holdings and their occupants and protection against unfair ejection of tenants. It will also help them efficiently administer land, by ensuring timely surveys of land and maintaining accurate and readily verifiable land records to protect them from unnecessary legal challenge.

A renewed and holistic approach to land administration should also acknowledge that revenue collection can no longer be its foundational principle. Today, with the decline of revenue from land, the Union and State governments' focus on rural land administration has also diminished. For e.g. Karnataka's budget estimate for land revenue is expected to be only Rs. 271 crores for FY 2021-22 with other heads such as State GST and registration fees acting as major revenue sources with budget estimates of Rs. 45,947 crores and Rs. 12,655 crores, respectively. The decline in reliance on land revenue collection also provides an impetus for the government to reevaluate the continued existence of a centralised system focused on revenue collection.

A renewed approach to land administration should place urban local bodies and panchayats in charge of land administration, instead of the District Collectorate.

SOLUTION

The system of land revenue administration should be redesigned to align with the goals of the 73rd and 74th Constitutional Amendments to ensure accessibility to the local people, coupled with increased transparency and efficiency. To this end:

- Revise land administration frameworks to create procedures to determine the collection and utilisation of land revenue, and facilitate administration of land within the local context by empowering panchayats and urban local bodies.
- Actively devolve land administration powers to local self-governments, except in those areas where the Fifth and Sixth Schedules of the Constitution apply.
- Empower local self-governments with revenue generating capacity and autonomy, as recognised by Finance Commission Reports to lead to better ownership and accountability.

Reimagine the Role of the District Collector

ATTENTION:
Attention: State Revenue Departments

PROBLEM

The post of District Collector was introduced in the Judicial Plan of 1772. After the Government of India Act, 1858, the designation of Collector cum District Magistrate was deemed to be held by a member of the Indian Administrative Service cadre, who was charged with supervising general administration in the district. The fact that the office is associated with different names is a colonial construction of how there were varying administrative systems in British India. Post-independence, the different names have continued even though the role and powers of the District Collector remain almost the same. The services at the district level and the considerable accumulation of power in the hands of the District Officer was a key innovation of the British administration of India and the continued reliance on this functionary is the biggest vestige of colonial administration in the services at present. This fact, coupled with the recognition of this institution in the public mind as the prime mover of governance at the district level impedes the growth of any other local authority at that level.

The most significant phase in the history of the development of local government in India commenced with Lord Ripon's Resolution of 18 May, 1882. However, this resolution met with little success and was considered an unnecessary intervention in the unlimited powers of the ruling elites. Although governance was not entirely centralised during British colonial rule and the importance of local administration was recognised, the actual development and growth of local bodies during British rule was highly limited. The system of local governments then, was a failure largely because the provincial government of civil servants circumscribed the democratic feature of Ripon's model by keeping possession of uninhibited control. Therefore, governance was in many ways a democratic facade to an autocratic structure, with the actual conduct of business carried out by district officials, leaving the rest as mere spectators. The lack of an appropriate district government, to some extent, has colonial antecedents.

It was only in the 1990s that local government bodies were constitutionally recognised in urban and rural areas through the 73rd and 74th Constitutional Amendments. Although these Amendments were the first steps to extend

democracy as the bulwark of governance in the country, the colonial administrative structure retained its hold over governance. Panchayats, even today, are basically run as agencies of the State government, implementing rigid schemes through officers nominally posted at that level who owe allegiance to higher bureaucratic channels than to the elected representatives. As opposed to popular democracy that is envisaged in the Indian Constitution, State laws promote 'Collector Raj'. The lack of devolution of powers and responsibilities to local governing bodies is an indication of the vested interest in mystifying governance.

APPROACH

While there are claims that the introduction of Panchayati Raj Institutions ("**PRIs**") in a large number of States has reduced the role of the District Collectors to that of providing guidance and advice, there is scope to create greater accountability of this office to PRIs themselves. While most of the functions of these civil servants are given effect through their interactions with local governments under the new Panchayati Raj structure, it is the Centre and the States that heavily influence their actions. Excessive involvement of the Centre and States could be diminished were local governments conferred greater powers to hold District Collectors accountable in their jurisdictions.

The 73rd and 74th Constitutional Amendments have many pitfalls and structural challenges, with the necessity for devolution of finances, functions and functionaries to local bodies to deepen democratic and administrative decentralisation. The third tier of government today exists as mere agents of the State, under the oversight of high-level bureaucrats. All of this requires a wholesale restructuring of the administrative machinery at the district level.

SOLUTION

The office of the District Collector remains even today the linchpin of the administrative system in India more than two hundred years after the creation of this institution by the British. This institution has posed significant challenges to independent India's public administration system.

Excessive involvement of the Centre and States could be diminished were local governments conferred greater powers to hold District Collectors accountable in their jurisdictions.

The gradual empowerment of local governments ought to have changed the role played by the District Collector in matters of local development, but this has not been the case. For decentralisation to realise its true potential, the following reforms need to be considered:

- Reconfigure the role of district collector as a district-level land revenue functionary by devolving their powers to responsible to local bodies.
- Empower representative local bodies while continuing to utilise the administrative skills of the district collector.
- Rework relevant land revenue laws at the State level as well as the laws that empower PRIs, so that they can function more effectively as units of local self-government.

Make Policing Citizen-Centric

ATTENTION:
Ministry of Home Affairs

PROBLEM

The legal and institutional framework governing police matters in India was inherited from the British. The Police Act, 1861 ("**Act**") was enacted pursuant to the 1857 sepoy mutiny with the objective of suppressing dissent and perpetuating British rule through the obedience of the police force to the executive. This is evident from section 23 of the Act, where all warrants and orders of the "competent authority" must be promptly obeyed and executed.

Even after seventy-five years of independence, the structural and institutional design of the police force in India has not undergone a transformation to align with modern liberal democratic values. Despite multiple reform proposals and directions by courts, advanced policing practices such as community-centric policing and procedural fairness in action have not been incorporated in India.

The existing legal framework for the administration of police under the Act and other State-specific laws is deficient in three aspects: (i) accountability for policing functions; (ii) transparency in administration; and (iii) a citizen-centric focus, thereby inhibiting the development of an alternative model of 'good policing' in India. Existing State Police Complaints Authorities have proved ineffective at curbing misconduct by police officers. The vesting of control over appointments and transfers with the political executive has subordinated the police leadership to the whims of the political class. Thus, the governance framework for the Indian police retains its colonial character and design.

APPROACH

The Indian police operates under a model of crime-control designed to preserve 'order' using coercion to deter criminal behaviour. The institutional design of the police is that of top-down control which inhibits accountability from within. A holistic reform of policing in India will require the adoption of an alternative model which can strengthen people's normative commitment to legal authority.

Research demonstrates that when institutions act according to principles of procedural fairness, it strengthens the ability of legal authorities to encourage self-regulation amongst citizens, rather

than coerce their obedience. The Indian police must shift to a model of 'legitimacy-based policing', premised on the perception of procedural fairness and legitimacy amongst the citizenry.

The Police Act and other State-specific laws should be amended to establish independent and effective institutions, and create specific mandates to ensure citizen-centric policing in India. This includes the establishment of robust State Police Complaints Authorities; a transparent procedure for appointment of State-level Police leadership and clear legal provisions governing transfers and promotions; and a legally binding charter of duties for police officers governing their interactions with the public.

SOLUTIONS

The following measures can help disperse the opaque, top-down administration of the police. They can serve as a starting point for shedding the colonial baggage of the Indian police and developing an institution that is aligned to the values of independent India.

- Create a robust State Police Complaints Authority for handling complaints and inquiries. These must be constituted and operated in a manner that gives them the necessary power to investigate allegations of police misconduct independently. Currently, they are staffed by serving police officers and civil servants, undermining the independence of these bodies. To promote accessibility, such authorities should also be established at multiple levels, including at the district-level. A well-defined procedure for operation, including that for hearing and addressing complaints should be created.
- Providing a minimum tenure for posts like the Director-General of Police, and other officers, along with clear legal provisions governing transfers and promotions to insulate the police's functioning from political interference. The appointment of the Director-General of Police, i.e., the chief of the police in a State, is crucial to the police's administration. The procedure for these appointments has been criticised for lacking in transparency and generating conflict between the Union and State Governments. There is a need to devise a transparent and merit-based procedure for such appointments.

The Indian police must shift to a model of 'legitimacy-based policing', premised on the perception of procedural fairness and legitimacy amongst the citizenry.

- Introduce a legally binding Charter of Duties to be observed by police personnel in the Act to guide interactions with the public and engender confidence in the police. At the general level, the police should be entrusted with the duty of not just resolving conflicts, but also promoting amity and ameliorating conditions for the commission of crimes.
- Incorporate provisions on sensitizing police officers to make the force more responsive to the needs of minority communities.

Establish Legislative Oversight of the Intelligence Bureau

ATTENTION:
Ministry of Home Affairs

PROBLEM

The purchase of the Israeli spyware software Pegasus by the Indian government, partly for surveillance of political leaders, was a grim reminder of the absence of any accountability framework for Indian intelligence agencies. The Intelligence Bureau ("**IB**") remains India's oldest internal security and counter-intelligence agency. While it is said to have existed in its various embodiments since the early 1800s, the IB, as it is currently known, originated in 1887. Tasked with collecting 'secret and political intelligence', its origins can be traced to an order of Her Majesty's Secretary of State for India.

Administratively, the IB now falls under the Ministry of Home Affairs and can, therefore, be held accountable before the Home Secretary. However, a constitutional or legislative framework prescribing limits for the IB's actions or an institutional mechanism for holding it accountable has remained absent since 1887. The Intelligence Organisations (Restriction of Rights) Act, 1985 establishes some norms in the nature of restrictions on certain freedoms (concerning speech and association), of the employees of the IB. Barring this, the IB retains control over its functioning and finances.

Post-independence, the remit of IB's activities have spanned inquiries into prospective appointees to the Supreme Court, opposition leaders and parties, and even NGOs. The IB's outsize political role, sometimes interfering with constitutionally guaranteed rights, has historical antecedents. As an instrument of the British government, its activities were geared towards quelling the nationalist struggle. The IB's role in containing revolutionary activities in Bengal and gathering intelligence during the Non-Cooperation and Civil Disobedience Movements has been documented. In a constitutional democracy, however, IB's actions must necessarily be limited by processes as well as institutions, respectful of individual rights and liberties.

APPROACH

India's intelligence capabilities have suffered failures in the recent as well as distant past. This could be attributed to the myriad internal security challenges, ranging from insurgency to money laundering, some of which did not exist in the colonial era. These failures get magnified in the

absence of a prescribed set of functions for the IB.

To offset this concern, it is imperative to first, streamline the powers and functions of the IB by delineating the kind of intelligence operations expected of it, and clarify what the IB can do (and by necessary implication, can or must not do). Secondly, the IB could benefit by recruiting specialist personnel (especially in emerging areas of technology). These personnel could be in addition to the largely generalist officers from the Indian Police Services that the IB currently remains staffed with.

Transparency is equally important to the IB's functioning. Holding intelligence agencies to account has remained vexed because of the centrality of secrecy to their practice. Several countries pin the accountability of intelligence agencies on their heads/chiefs through oversight authorities, primarily in the nature of legislative scrutiny bodies, inspectors general, or commissioners. In the UK, the expenditure, administration, policy and operations of the Security Service or 'MI 5', which is tasked with domestic counter-intelligence, is overseen by the Intelligence and Security Committee of the Parliament. This Committee draws its nine members from both houses of Parliament, and consultation with the Leader of the Opposition is mandatory before nominating any member to it. Legislative oversight of intelligence agencies which respects the sensitivity of intelligence operations has been the necessary first step.

Legislative oversight of intelligence agencies which respects the sensitivity of intelligence operations has been the necessary first step.

This should sit alongside judicial controls to adjudicate on the necessity and proportionality of the IB's actions. In cases where intelligence operations seek to access personal data of individuals and trigger privacy concerns, or where citizens' fundamental rights are at stake, judicial redress against the IB's actions is non-negotiable.

SOLUTION

A legal framework encompassing the following features could be the first step towards ridding the IB of the label of 'government's spy agency'.

- Subject the IB to a Parliamentary law empowering it to act only when completely necessary, and holding it accountable. It must provide for the IB's establishment and composition, including appointment of its senior officers. Clarity over its powers and functions would ensure greater accuracy in recruitment of specialist officers.
- Constitute a committee comprising members from both houses of Parliament, including Opposition members, drawing from a private member's bill to regulate the functioning of Indian intelligence agencies that was introduced in the Lok Sabha in 2019. This should hold the IB answerable for matters concerning administration, finances, and policy, while also steering clear of certain operational aspects.
- As a mode of grievance redressal, establish a tribunal to hear complaints against the IB's conduct.

Make the Office of the Governor Independent

ATTENTION:
Ministry of Home Affairs

PROBLEM

Though Governors during British rule directly represented colonial interests, the office was retained under the Indian Constitution. This choice has long been suspect. Even when the British began conceding limited autonomy to elected governments in India's Provinces, Governors continued to be their chief mechanism of control over them. Under the Government of India Act, 1935, Governors bore certain broadly framed "special responsibilities" related to peace and tranquillity, minority interests, the orders of the Governor General etc. in relation with which Ministers had the right to advise the Governor, though their advice could be ignored. In addition to these, Governors could exercise their "discretion" in a range of matters such as appointing Ministers, assenting to legislation, breakdown of constitutional machinery, crimes intended to overthrow the government, certain legislative procedures and powers etc. On these, Ministers had no right to advise at all. In this context, India's freedom fighters did not find the concessions granted under the 1935 Act adequate. One critic pointed out that provincial self-government was "buried in a pile of reservations, safeguards and discretion."

And yet, the Constituent Assembly chose to retain the office of the Governor. To adapt its role, the drafters eliminated broad swathes of power provided under the 1935 Act, including the "special responsibilities", but kept in place a narrowed area of "discretion" that is traditional for a formal head of State in a parliamentary form of government. Significantly, the Constitution granted the Union Government full and unbridled power to appoint and remove State Governors in quite the same way as the Crown had the power to appoint and remove British Governors. Successive Union Governments have not shied away from exercising this power, leaving the office under Delhi's shadow. This has translated into undemocratic partisanship in the way Governors have carried out their role in appointing Ministers, summoning legislatures, assenting to Bills, and calling for President's Rule in States.

APPROACH

Most attempts to reform the office of the Governor have focussed on limiting its discretionary

powers. In some areas, this has been through the intervention of courts. A key 1994 Supreme Court judgement allowed for scrutiny of President's Rule and imposed pre-conditions such as first allowing governments to prove that they have the support of a majority of the elected representatives in the legislature. Courts often have to step in to schedule such a 'floor test' and monitor it. However, Governors continue to decide who gets the first chance to face such a test, allowing them to favour certain political outfits. In a similar vein, a number of commissions have proposed reforms, but instead of addressing the underlying causes for problems, they have sought to analyse and provide guidance on the Governor's individual functions. Lastly, there have even been proposals on abolishing the office altogether.

This last alternative would not be viable because of the unique nature of the functions of the Governor. She is required to act as an impartial arbiter in the event of political transition, uncertainty and crisis. The Chief Minister cannot play this role given that the executive branch of government in India is already too powerful in relation to the legislative branch. Courts too cannot play this role as the political questions involved often cannot be resolved through legal rules. Even if they could, this would have the grave consequence of politicising the judiciary. Once we recognise the critical role of the Governor in resolving political crises and cautioning Ministers, a more promising approach becomes clear: bolstering the impartiality of the office while ensuring that constitutional governance and sovereignty do not suffer.

Bolster the impartiality of the office while ensuring that constitutional governance and sovereignty do not suffer.

SOLUTION

Governors can be more impartial if they enjoy greater independence from the Central Government, but they should remain accountable to a broader set of actors. The following targeted reforms can be considered to renew the ability of Governors to act as effective heads of State and federal links with the Union.

- Appoint Governors by a committee consisting of representatives from the ruling party and the opposition at both the Central and State levels, along with a judicial member. There should be an adequate 'cooling off' period before (re)joining politics.
- Introduce a removal mechanism for Governors through a formal impeachment process for defined grounds (like the violation of the Constitution). The removal mechanism should grant appropriate roles to the State Legislature, the Union Executive, and the Rajya Sabha.
- Give adequate transparency to the reasons for the Governor's decisions, to effectively allow for the Governor's communicative and advisory role.

Create a Central Drugs Regulator

ATTENTION:
Ministry of Health & Family Welfare

PROBLEM

India's drug regulatory structure, as set out in the pre-independence Drugs and Cosmetics Act, 1940 can be traced to the division of powers between the provincial and federal governments as demarcated in the Government of India Act, 1919 and later the Government of India Act, 1935. There was no separate legislative entry for "drugs". It was considered a part of "public health" and therefore under the exclusive legislative competence of provinces.

The effect of this could be seen in the first-ever Federal Bill on drug regulation introduced in 1937 to regulate only imported drugs. Domestically manufactured drugs were not regulated at all because this would have encroached on the legislative sphere of provinces. However, this Bill was revised and the 1940 Drugs Act regulated both imported and domestic drugs, pursuant to a resolution passed by provincial governments in this regard. This laid the foundation of today's regulatory architecture. However, due to the inherent leaning towards provincial autonomy, the 1940 Act empowered provincial governments to make rules relating to domestic drugs, including the power to grant manufacturing licences. This posed a barrier to uniformity in drug regulation in India and continues to compromise the safety and quality of medicines available across the country.

Despite a paradigm shift in the division of legislative powers between the Centre and States in the Indian Constitution and the addition of a separate entry on drugs to the Concurrent list, the existing Drugs and Cosmetics Act continues to have a fragmented regulatory approach at its core. While the rule-making power concerning the manufacture of drugs has returned to the Centre through post-independence reforms, the power to issue manufacturing licences still rests with States. Consequently, drug manufacturers in different States do not go through the same degree of regulatory checks and balances, eventually impacting drug quality.

Further, the regulatory powers at the Centre and States are performed by their agencies — the Central Drugs Standard Control Organisation ("**CDSCO**") and more than 37 drug regulators in States and Union Territories. These are non-statutory bodies that function in silos without

coordination with each other. The CDSCO does not have any supervisory control over State regulators either. As a result, regulatory standards are applied differently across different geographies, sometimes to promote industrial interests and investments. This means that people across the country are not well protected from unsafe and ineffective drugs.

APPROACH

Keeping in mind the existing constitutional scheme, and the failure of the current regulatory architecture, there is a need to move away from the colonial-era approach. A shift is needed towards a modern approach to drug regulation with the overarching objective of protection and promotion of public health. Drug regulatory architecture in India must be overhauled with the principles of independence, autonomy, uniformity, accountability and transparency at its forefront.

Drawing from other modern Indian laws like the Food Safety and Standards Act, 2006, an autonomous, central drugs regulatory body should be established under a statute, with State counterparts playing a role in enforcement and implementation. This will divide regulatory functions in the spirit of cooperative federalism while simultaneously ensuring uniformity in regulation.

Further, to ensure safe and effective drugs for all, there should be safeguards under the law for watching regulators and holding them accountable.

An autonomous, central drugs regulatory body should be established under a statute, with State counterparts playing a role in enforcement and implementation.

SOLUTION

The Ministry of Health and Family Welfare recently published the draft Drugs, Medical Devices and Cosmetics Bill, 2022. However, this missed the opportunity to introduce structural reforms. A more modern-era drug legislation needs to be enacted by the Centre with the following measures to address the existing fragmented regulatory scheme:

- Upgrade the CDSCO to a Central Drugs Regulatory Authority with clear duties, powers and functions laid down under the new law for it, as well as for its State counterparts. Establish oversight of this new central authority over State drug regulators.
- Centralise the process of issuing manufacturing licences.
- Make proactive disclosures mandatory for regulators to make publicly available the rationale behind their decision to grant licences or approvals.
- Create standard operating procedures for coordinated enforcement actions. The enforcement of the Act should be carried out by State regulators but with centralised standard operating procedures.

Make the law inclusive

46
Eliminate Discriminatory Langauge on Impaired Capacity
48
Make Punishment Reformatory and Rehabilitative
50
Facilitate Access to Court Decisions
52
Make Courts Non-Hierarchical
54
Adopt Plain Language Drafting
56
Protect Traditional Cultural Expressions
58
Decentralise Forest Management

Eliminate Discriminatory Language on Impaired Capacity

ATTENTION:
Ministry of Law and Justice

PROBLEM

The medical and legal terms used to describe various mental health issues, intellectual disabilities, and neurodevelopmental conditions, in 19th century Britain, made their way into Indian law through early colonial legislation such as the Indian Lunatic Asylums Act, 1858. These included terms such as 'lunatic', 'idiot', and the ubiquitous 'unsound mind'). Present day Britain has made strides towards abolishing antiquated and vague terminology in this area – for instance, certain 19th century Acts referencing 'unsoundness of mind' were amended to adopt more nuanced language through the Mental Capacity Act, 2005. However, India is yet to act decisively on this issue.

The majority of Indian laws still rely on the aforesaid 'sound' or 'unsound' mind, 'idiot', and 'lunatic' (for example: the Hindu Marriage Act, 1955 and Code of Civil Procedure, 1908), without properly explaining the parameters for their applicability. This perpetuates discrimination against, and the exclusion of, persons who, while affected by some temporary, situational, or long-term impairment, may, regardless, have the capacity to undertake various decisions, acts, or transactions contemplated under such laws. Thus, even today, legal and mental capacity are referenced through obscure and ambiguous terminology, with courts being left to interpret the intention behind a particular provision, when it comes up for adjudication.

Even prior to the above legislation, in Britain and consequently, in British India, the state (i.e., the monarch), was legally entitled to, and entrusted with, control over the person and property of those labelled 'lunatics' or 'idiots' – drawing from the paternalistic tradition of '*parens patriae*', dating back to medieval times. The 1858 and 1912 Indian 'lunacy' Acts have since been repealed, and replaced by more recent legislation (i.e., The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999, The Rights of Persons with Disabilities Act, 2016, and The Mental Healthcare Act, 2017) dealing with various aspects of capacity and legal protections. However, the complex and problematic history of legal and mental capacity, and its associated terminology, continues to be reflected in Indian statutes, and their interpretation, to this day.

To take an example, one of the earliest colonial laws, i.e., the Indian Penal Code, 1860, used the term "unsoundness of mind" to create a qualified exception for criminal liability (Section 84). However, the ambiguous language has led to debates over the conflation of legal and medical capacity, leading to a further lack of clarity as to the rights and liabilities of the accused as seen in *Hari Singh Gond v State of Madhya Pradesh* (decided on 29 August 2008). In India, currently, while the Mental Healthcare Act defines capacity in the context of mental healthcare decisions, the aforesaid National Trusts Act and Rights of Persons with Disabilities Act, do not deal with the broader issue, with the latter assuming that all persons possess equal legal capacity.

The above issues affect many other important rights, liabilities, and choices of an individual, such as:

- The right to vote or become a member of Parliament
- The option to undergo a medical termination of pregnancy
- The right to sell, transfer, or bequeath property
- The ability to adopt a child under the Hindu Adoptions and Maintenance Act, 1956
- Rights relating to marriage and divorce under various personal laws.

APPROACH

Any law dealing with capacity or a lack thereof, interacts with issues of equality and dignity. The law, has, in the past, been applied to discriminate against sections of the population, such as persons with disabilities and persons with mental illness, by denying them legal personhood. Conflating the concepts of 'legal' and 'decision-making' capacity raises various ethical issues. Decision-making capacity is a nuanced and complex concept and setting the appropriate legal threshold requires balancing the ethical principles of autonomy against the well-being of the individual.

A legal framework dealing with capacity needs to guard against the potential for abuse of persons with impaired capacity and violation of their rights. Safeguards are also necessary to preclude conflicts of interest with those supporting or acting as proxy for the individual with impaired capacity.

A legal framework dealing with capacity needs to guard against the potential for abuse of persons with impaired capacity and violation of their rights.

SOLUTION

- Conduct a detailed legislative review to protect the right of every person, to represent their interests, make their own choices, and benefit from the protections and privileges afforded under the law.
- On the basis of this review, amend, existing legislation to ensure that outdated and discriminatory terminology is removed, capacity is properly understood and defined in the law, and the legal parameters for determining capacity are clearly spelled out.

Make Punishment Reformatory and Rehabilitative

ATTENTION:
Ministry of Home Affairs
Ministry of Law and Justice

PROBLEM

The British colonial administration enacted the Indian Penal Code ("**IPC**") in 1860 with the vision of providing India with a comprehensive code of crime and punishment. Section 53 of the code originally laid out five kinds of punishments - Death; Transportation; Imprisonment- simple and rigorous; Forfeiture of Property; and Fine. These punishments, tailored to regulate the native Indian population, had significant racist underpinnings and overly relied on deterrence and incapacitation for crime prevention. Further, these punishments were designed to induce fear and exercise control over the subjects, leaving no scope for reformation and rehabilitation.

Believing in the inherent superiority of Englishmen, Indian offenders were viewed as "aboriginal savages, nearly as low in the scale of civilisation as any wild uncultivated people known to ethnologists" thus making them unworthy of reformation. Punishment such as transportation was considered to be fit for the native Indians as they viewed travel beyond the seas with a sense of fear and terror. Transportation was also considered to be suitable for Englishmen as incarceration in Indian prisons would be 'too cruel' for them. Through such differential standards and motivations, punishments were devised to subject the native Indian population to excessive penalisation.

Since independence, the provision has only been amended once in 1955 through which the punishment of transportation was substituted with life imprisonment. The Indian penal system continues to rely solely on deterrence by custodial sentences, even for petty offences which more often than not are excessively punitive. For instance, under section 434, IPC, a person can be punished with imprisonment of up to 1 year for moving a landmark fixed by a public servant and up to 2 years for committing mischief and causing loss or damage to the amount of fifty rupees or upwards under section 427, IPC. Due to such harsh penalisation policies and lack of alternatives in imposable punishments, custodial sanctions are relied upon far too much and too often.

While the United Kingdom has changed its penal structure by incorporating a plethora of alternative non-custodial sanctions, the Indian penal system

continues to carry the alien legacy. With no punishments directed towards reforming the offender, rehabilitation and reintegration have taken a backseat.

APPROACH

Current advancements in the field of criminology and the global movement towards reformative and restorative justice have rendered this continued reliance on the colonial penal system questionable.

There is no evidence to show that harsher punishments like death or custodial sanctions actually deter people from committing crimes but there is evidence that they are expensive and counter-productive. In 2021, a total of Rs. 6727.3 Cr. was spent on maintaining the prisons in the country of which Rs. 2106 Cr. was spent on inmates. Long-term custodial sanctions also make it difficult for an ex-convict to assimilate within society after release, making rehabilitation difficult. Custodial sanctions have harmful long-term effects due to the improper maintenance of prisons. Most Indian prisons are overcrowded with poor sanitation, hygiene and health facilities, and pose the threat of contracting life-threatening diseases such as HIV, Hepatitis B and C and tuberculosis.

Therefore, there is a need to look at efficient evidence-based alternatives to achieve most of the objectives that current punishments aim to achieve while also factoring in their reformative and rehabilitative capabilities.

Alternative sanctions such as community-based sentences, probation, reparative damages and driving disqualifications are not only much less expensive than custodial sanctions but are also sufficiently punitive yet reformative. International organisations such as the UNODC have been advocating for the adoption of alternative punishments to improve the delivery of justice and to move towards the rehabilitation and reintegration of offenders. A similar view was endorsed by the Indian parliamentarians while adopting the Probation of Offenders Act, 1958. It has now become imperative to devise a coherent strategy directed towards revamping the penal system to tackle the issues of over-penalisation and excessive incarceration.

There is a need to look at efficient evidence-based alternatives to achieve most of the objectives that current punishments aim to achieve while also factoring in their reformative and rehabilitative capabilities.

SOLUTION

- Review the Indian Penal Code to identify offences with excessive and disproportionate punishments.
- Identify suitable alternative non-custodial punishments like community service orders, probation, orders for compensation and disqualification from rights orders in line with international human rights standards, and in accordance with a shift from deterrence to rehabilitation.
- Amend section 53 to incorporate alternative punishments and carry out commensurate amendments throughout the code.

Facilitate Access to Court Decisions

ATTENTION:
Supreme Court of India
High Courts

PROBLEM

Accessibility of court decisions is crucial for an open, fair, and transparent judiciary. It promotes legal awareness and enhances litigants' faith in the judicial system, predicated on a greater understanding of judicial processes and reasoning. The Indian judiciary is taking steps to increase access to its judgments and orders through the e-Courts initiative. However, there are still several barriers to accessing court decisions, many of them inherited from the colonial judicial system.

The Indian Law Reports Act, 1875, created a distinction between reportable and non-reportable judgements and allowed only judgements with precedential value to be published in authorised law reports. Recently, the Repealing and Amending Act, 2016, repealed the 1875 Act on grounds of redundancy. Despite this, courts continue to retain the distinction between reportable and non-reportable judgements, thereby limiting the availability of non-reportable judgements in the public domain. Even when decisions are publicly available, they might not be accessible to all because of linguistic barriers. According to the 2011 Census, only about 10% of Indians can speak English, yet court decisions in the higher judiciary continue to be rendered in English.

Article 348(1) of the Constitution requires the language of proceedings in the Supreme Court and the High Courts to be English. However, section 7 of the Official Languages Act, 1963 provides that the Governor, with the President's consent, can authorise the use of Hindi or the State's official language in court judgments and decrees. So far only Bihar, Madhya Pradesh, Rajasthan, and Uttar Pradesh have resorted to this provision. Similar efforts by non-Hindi speaking States like Gujarat, Karnataka, Tamil Nadu and West Bengal, were shot down by the Supreme Court in 2012 and 2016. The reasons for this have not been disclosed to the public.

A combined reading of the Official Languages Act and various High Court rules reveals that even when regional languages are authorised, litigants do not necessarily have access to court decisions in those languages. The High Court rules of Bihar, Madhya Pradesh, and Rajasthan do not require translations of English judgements and orders to be provided to

the litigants; courts merely have the discretion to use regional languages should they wish to. Recently however, the Supreme Court has made efforts to make its judgements available in 12 regional languages. While this will help non-English speaking lawyers immensely, a litigant is much more likely to benefit from the translation of daily orders into vernacular languages which allows them to stay abreast of developments in their case. Currently, the Supreme Court registry also lacks the resources to translate all judgements within the desired case categories.

APPROACH

A litigant and rights-centric approach is required when making policy decisions regarding the accessibility of courts. The constitutional rights of equality (Article 14), information (Article 19) and access to justice (Article 21) require court decisions to be accessible in language and form. Both international and domestic best practices can show courts how this can be done.

Hong Kong, a former British colony, is taking systematic steps towards making its courts bilingual. Landmark decisions are primarily being translated for the general awareness of the citizenry. Closer home, the Allahabad High Court Translation of Judgments and Orders Rules, 2020 provides for Hindi translation of court decisions on request. While the High Courts, owing to the limited number of State Official languages, may be in a better position to undertake widespread translation, the Supreme Court may fare better by focusing its resources on translating only its seminal decisions.

A litigant and rights-centric approach is required when making policy decisions regarding the accessibility of courts.

SOLUTION

- Allow the use of official State languages in the High Courts under section 7 of the Official Languages Act, 1963. Respective High Courts to frame rules along the lines of the Allahabad High Court Translation of Judgments and Orders Rules, 2020.
- Issue a notification highlighting the repeal of the Indian Law Reports Act, 1875 and the need to remove the distinction between reportable and non-reportable judgements in practice.
- Redirect resources towards publishing landmark decisions of the Supreme Court in regional languages. A Translation Committee should frame guidelines on the process of translation, as well as the criteria for selection of judgments for translation.

Make Courts Non-Hierarchical

ATTENTION:
Supreme Court of India
High Courts

PROBLEM

Colonial justice systems were concerned not only with the act of imposing the sovereign's justice upon imperial subjects, but with the ways in which this foreign authority could be symbolically perceived, accepted and absorbed by native populations. The iconology in courtrooms, in particular, sought to preserve notions of the judicial system which cast judges and lawyers as the hands of the colonial rulers, surrounded by mystique and far removed from the ordinary supplicant seeking 'justice'.

Today, these courtrooms continue to act as sites of contestation, grappling with newer postcolonial ideals. However, the judiciary as an institution has been unable to let go of certain colonial-era conventions which have become embedded in our legal traditions, and expressed in courtroom language, dress code and architecture.

Pleadings are drafted "praying for" justice to be handed down by "Your Lordship" or "Your Ladyship", continuing to elevate judges to an exalted position meting out justice to the litigant-subject. This is in sharp contrast to the notion of justice as an inherent, equal right to be demanded by litigants, who are placed at the centre of a litigant-friendly judicial system.

The Black Coat and Gown required to be worn by judges and lawyers according to section 41(9)(gg) of the Advocates Act, 1961, drawn from British historical traditions, is unsuited to regional climate variations. Although this has been a matter of much debate, the dress code continues to be strictly adhered to for the most part, with only a few modifications permitted with regard to video-conferencing hearings conducted during the COVID-19 pandemic.

Further, in some courts, judges continue to be preceded by mace-bearing ushers in full regalia, in a throwback to a colonial display of ceremonial power. These visually striking images only serve to further remove the court and court actors from the realm of easy accessibility for litigants.

The courtroom is the first point of contact for most ordinary litigants, who often come into the system already intimidated by the grandeur and obscurity of the law. The imposing physical structure of the building and deliberate arrangements within the space is a result of colonial attitudes towards justice as an expression of the imposition of authority, rather than justice as a participatory, inclusive activity. Colonial power hierarchies

continue to be reproduced through a deliberate manipulation of temporal and spatial dynamics. This manifests in the form of commonly-accepted aspects of court design which emphasises the "intricate subdivision" of adversarial space, such as an ornate and elevated dais, isolated witness stands, restricted sightlines, and shrinking space for participants other than lawyers within the courtroom.

APPROACH

Combating the colonial psyche embedded in the Indian judiciary requires a conscious move towards a litigant-centric, 21st century judiciary which embraces the fact that justice cannot be made separate from the communities that seek to access it.

A similar reconciliatory approach towards court design in particular is being taken in other jurisdictions. For instance, Magistrate Courts in Australia have sought to collaborate with indigenous communities to construct indigenous sentencing courts which borrow from local materials and display local symbolism. New Zealand's Supreme Court is constructed to resemble the cone of a kauri tree, eschewing established traditions which dictate the general physical structure of court buildings.

Indian courts ought to develop uniquely Indian iconologies of justice, customised to reflect regional symbolism. A State-level exercise, involving a committee at each High Court, may study and make recommendations to evolve newer postcolonial practices. Examples of such practices are suggested below.

Indian courts ought to develop uniquely Indian iconologies of justice, customised to reflect regional symbolism.

SOLUTION

- Address judges by a more acceptable, all-gender inclusive term which allows for respect to be shown to the office that they hold while not placing them at an insurmountable distance from other stakeholders in the justice system.
- Allow for relaxation in the strict Dress Code in accordance with traditional dress practices (as the Bar Council is currently exploring) and to account for variations in region, climate (for instance, the Black Coat is no longer mandatory for lawyers during summers in courts other than the Supreme Court and High Courts under Rule IV, Chapter IV of the Bar Council of India Rules), and traditional dress practices, Introduce a non-feudal uniform code for ushers and court attendants.
- Rethink principles of court design to ensure spatial dynamics in the courtroom do not intimidate and reinforce power hierarchies .
- Retrofit existing court buildings to include local iconographies integrated with the requirements of universal design principles for accessibility, adaptability, user-friendliness, safety and comfort.

Adopt Plain Language Drafting

ATTENTION:
Ministry of Law and Justice
State Law Departments

PROBLEM

Modelled on the Interpretation Act, 1889 of England, the General Clauses Act, 1897 ("**Act**") is an 'interpretation statute' serving two purposes:

- Internal, as a labour-saving device for drafters – by laying down provisions commonly found across laws, it saves drafters the effort of having to repeat these rules again and again. Section 6 of the Act lays down the effects of repealing a statute. It also states that repealing a statute does not affect a right that has already accrued under it.
- External, as an interpretive aid for the legal fraternity, reducing ambiguity when laws are being interpreted. For instance, section 11 of the Act states that generally, whenever distances are mentioned in legislation, they are to be measured in a straight line on a horizontal plane.

In 1974, the Law Commission recommended changes to align the Act with the evolving landscape of drafting and interpreting statutes. This did not result in amendments, and no substantive revision of the Act has been undertaken in the 125 years of it having been in force.

The Act does not contain boilerplate provisions which are relevant in today's landscape, forcing drafters to repeat these across every statute. To lift the corporate veil, a provision on offences by companies is now found in every statute with criminal penalties (e.g., section 43 of the Aadhaar Act, 2016). Even those boilerplates which are found in the Act have become irrelevant, as their standard formulation has changed. Despite section 6 of the Act, statutes which repeal other laws contain elaborate savings clauses (e.g., section 75 of the Major Port Authorities Act, 2021).

Had the Act served its external purpose, judgements would have relied on it to interpret ambiguous laws. However, instances of courts relying on the Act as an interpretive aid are few and far between. As an interpretation statute, its relevance has dwindled.

Lastly, laws in India continue to be drafted in complex English mixed with archaic legalese. A colonial legacy, this is intended primarily to obfuscate and exploit.

APPROACH

The Act should be recast as a drafting handbook for 21st century Indian lawmakers. It must be the

instrument that gives India simple, accessible, rational, and actionable laws ("**SARAL**") not only in English, but also in all official languages listed in the Eighth Schedule of the Constitution.

A three-pronged approach, focusing on updation, consolidation, and reorientation should be used to tackle the problem.

On several occasions, courts have filled in gaps left by the Act. In *Indian National Congress v Institute of Social Welfare*, the Supreme Court held that section 21 (which states that the power to issue an order includes the power to amend/rescind it) has no application to quasi-judicial decisions. The text of such provisions should be updated to reflect their judicial interpretation.

Unlike most other interpretation statutes across the world, the Act does not contain any provision on the internal/external aids which may be used to interpret laws. In India, it is now trite law that external aids (such as parliamentary history) may be used to interpret laws. A chapter on aids to interpretation should be included in the revised Act.

The Act should be recast as a drafting handbook for 21st century Indian lawmakers.

The Act is outdated in several other aspects.

Section 13 states that words importing the masculine gender also includes females. As a result, even gender-neutral laws in India exclusively use masculine pronouns. The English Interpretation Act, 1978, which replaced its 1889 predecessor, now states that female pronouns shall be taken to include males. The provision in the revised Act can state that words importing any gender shall be taken to include all other genders, paving the way for gender-inclusive drafting in India.

Any boilerplate provision which does not feature in the Act but is used across all statutes may be brought under the Act. Examples include offences by companies, protection of actions taken in good faith, laying of rules and regulations before Parliament, and incorporation of a statutory entity.

To shed its colonial legacy, the Act can be reoriented to operationalise plain language drafting in India. This can be done through recommendatory guidelines (as far as possible, no Latin expressions should be used in laws) and binding precepts (every law must be accompanied by a SARAL Memorandum, affirming that it has been drafted in plain language, and justifying any departures).

SOLUTION

- Enact a new Standard Interpretation Manual and Plain Language Expression (SIMPLE) Act, 2022 with chapters on standard boilerplate provisions, updated rules of construction, relevant aids to interpretation, and provisions to operationalise plain language drafting.
- Simultaneously, repeal the existing Act and all similar State General Clauses Acts.

Protect Traditional Cultural Expressions

ATTENTION:
Department For Promotion of Industry and Internal Trade, Ministry of Commerce and Industry

PROBLEM

Traditional Cultural Expressions ("**TCEs**") are forms of self-expression that embody the religious and cultural values of tribes or indigenous communities and are communicated by them through music, dance, artwork, names, signs, symbols, ceremonies and handicrafts. For example, Warli paintings, which are one of the oldest art forms from western India, fall under the bracket of TCEs. In the past few years, fashion brands worldwide have been plagiarising or publishing designs inspired by Indian TCEs. Closer home in the country, cinema has also been accused of plagiarising performances from Indian TCEs.

Even in evident cases of plagiarism or appropriation, indigenous communities or tribes are unable to avail protection for their TCEs under the Copyright Act, 1957 ("**Copyright Act**") and Geographical Indications of Goods (Registration and Protection) Act, 1999 ("**GI Act**"). The GI Act only covers goods, not intangible TCEs such as folklore, music or performances. Second, a GI can only prevent people from falsely claiming that they have sourced a good from a particular location or tribe, but it cannot stop people from selling products closely inspired by TCEs. Third, it cannot prevent people from making disparaging use of TCEs.

On the other hand, the Copyright Act, which is better suited to protect all forms of creative works, does not account for TCEs. The Copyright Act includes requirements such as the 'originality' of the copyrightable work, the identification of specific 'authors' and a limited time frame for protecting creative works. Many TCEs are unable to comply with these requirements.

These requirements are a part of copyright law as copyright started in the west to provide monopolies and exclusive rights to individuals for their creations. In Europe, copyright law developed with the invention of the printing press and the industrial revolution, and legal protection of TCEs was not a practical or emotional consideration then. This monopolistic and commercial approach toward copyright protection was brought into India with the pre-independence Indian Copyright Act, 1914, and it remains in the Copyright Act till date.

APPROACH

TCEs belong to a community of people and not a specific individual. The need to protect TCEs is not rooted in pure economic gain or privatisation under commercial law, but under human rights law as well, as it is tied with the identity of indigenous people. Therefore, the protection offered to TCEs should not merely confer a monopoly but also protect the TCEs from misappropriation and misuse.

Additionally, for commercial uses of TCEs, a share of the revenue should be distributed to the respective tribe or community. This form of protection can be provided through the Copyright Act, which can prevent TCEs from being plagiarised or appropriated without compensation. It can also prevent TCEs from being used in a disparaging manner.

While the Copyright Act or the current binding international conventions are not sufficient to protect TCEs in India, the Model Provision for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 1982 ("**Model Provisions**"), an initiative taken jointly by the United Nations Educational, Scientific and Cultural Organisation and the World Intellectual Property Organisation addresses issues surrounding copyright protection of TCEs. Section 1 of the Model Provisions permits governments to adapt existing copyright laws, such as the Copyright Act, for TCE protection.

The protection offered to TCEs should not merely confer a monopoly but also protect the TCEs from misappropriation and misuse.

SOLUTION

- Amend the definition of authorship and the scope of copyrightable works, under the Copyright Act to include all works that are "created and maintained in a collective context by indigenous peoples and local communities or nations", "distinctively associated with cultural heritage or social identity of the (source community)" and "transmitted from generation to generation, whether consecutively or not". This will vest tribes or indigenous communities with the exclusive right to decide how their TCEs are used and even prevent them from being used disparagingly.
- Exempt TCEs from time limitations under the Copyright Act.
- Create funds into which royalties on behalf of tribes or indigenous communities can be paid to be used for their development and welfare. This draws from section 10 of the Model Provisions, which mentions the need for a system of collecting royalties on behalf of the tribes or communities. Such a system can be similar to 'Domaine Public Payant', which is a royalty deposited in a government treasury by a person, who has commercially used a TCE.

Decentralise Forest Management

ATTENTION:
Ministry of Environment, Forest and Climate Change

PROBLEM

Currently, one of the primary laws regulating forest use in India is the Indian Forest Act, 1927 ("**IFA**"). It has its origins in an 1865 legislation, which was aimed at consolidating State ownership of forest resources to maximise revenue by extracting timber. The IFA legitimised this absolute State ownership, stemming from the colonial belief that "natives" were incapable of managing forests. As the preamble suggests, the objective of the IFA was to consolidate the law relating to forests, the transit of forest produce and the duty leviable on timber and other forest produce, instead of conserving forests..

The continuity of the IFA post-independence has condoned the treatment of forests as economic resources rather than natural ecosystems. The IFA absolutely restricts the rights of Scheduled Tribes and other traditional forest dwellers in 'reserved forests', including rights over forest produce which is instead State property. It alienates them from the traditionally held rights which provided local communities with more effective and independent control. Perhaps the most draconian aspect of the IFA is that it empowers the Forest Department to summarily punish any person who breaches its provisions and to commence prosecution for petty crimes (trespassing, pasturing cattle).

This alienation from forest land is compounded by the lack of clarity regarding the legal position of forest lands themselves. The IFA does not define the term 'forests' and despite various Supreme Court judgements in this regard, the ambit of the Act does not encompass different forest lands. For instance, 'deemed forests' are not afforded legal recognition under the IFA, even though they are covered under the Forest Conservation Act ("**FCA**"), 1980. These are forest tracts which, though not notified as forests by state governments, are recorded as 'forests' in the government record.

Finally, wild animals are currently included in the definition of 'forest-produce' under section 2(4) of the IFA, further entrenching the anthropocentric nature of the Act by treating wildlife as an economic resource.

Therefore, the provisions of the IFA are completely at odds with the traditional practices of local forest communities that have lived in close interaction with the forests. After protracted advocacy, the

Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 ("**Forest Rights Act**") was enacted as a means of redressing this 'historical injustice'. The Forest Rights Act vests individual and community rights to own, occupy and manage forest lands and resources in traditional forest-dwellers, in a step towards reversing their exclusion. While the objectives of the IFA and the Forest Rights Act are in conflict with each other, the authorities that administer both laws are the same.
This clash of statutory regimes and entrenched bureaucratic control has proved to be an obstacle in the implementation of realising traditional forest rights.

APPROACH

The top-down anthropocentric approach to manage natural resources that is expressed in the IFA and the FCA has not acted as a safeguard against resource overuse or diversion of forests for industrial projects. Instead, the growing evidence for the conservation of forest lands has been in favour of a decentralised, bottom-up approach where the communities are directly involved in decision-making. This approach bridges the gap between the government and those being governed, increasing the likelihood of compliance and self-monitoring.

Consequently, it is imperative that the IFA and the FCA be aligned with the Forest Rights Act and the Panchayat (Extension to Scheduled Areas) Act 1996 which advocates for a participatory management approach.

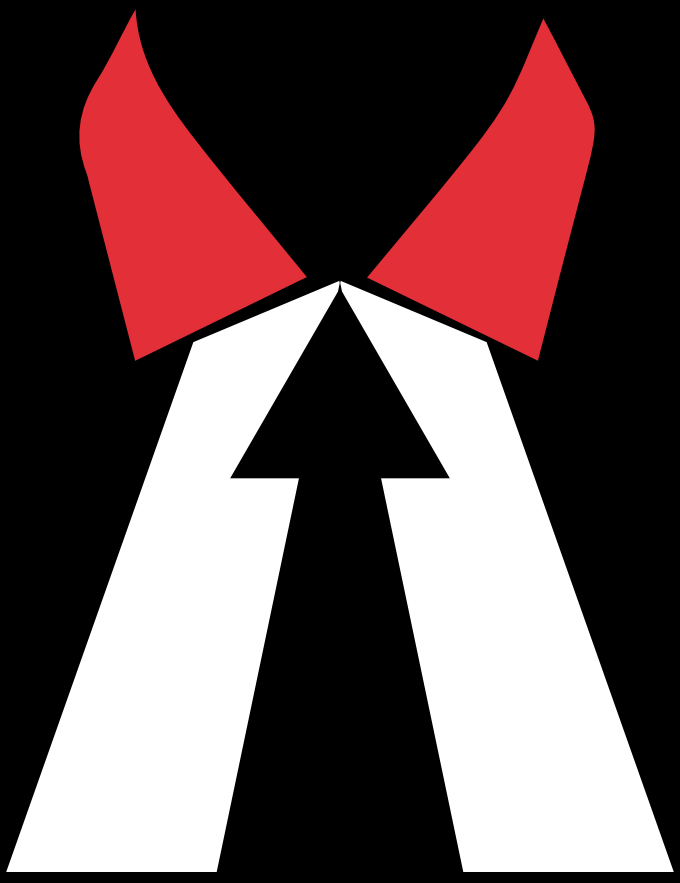
It is also critical that a model forest governance law be entrenched in the socio-economic and cultural context of the present day. This includes taking a holistic view of forests as an ecosystem to ensure their overall sustainable management. A transition in the forest-related agenda of the government is reflected in the central policies over the years. While the First National Forest Policy, 1894 focused on promoting agriculture, pastures and timber production, the third one took a protectionist view of forests in 1988. These need to be reflected in the legislative framework of the country.

The growing evidence for the conservation of forest lands has been in favour of a decentralised, bottom-up approach where the communities are directly involved in decision-making.

SOLUTION

- Reorient the IFA to democratise decision-making on the lines of the Forest Rights Act and the Panchayat (Extension of Scheduled Areas) Act. For instance, the Gram Sabha or the Panchayat should be consulted before notifying reserved forests or reserved trees in protected areas or declaring forests no longer reserved.
- Specifically define 'forests' to include 'deemed forests' and 'forest patches necessary to maintain functional connectivity with other forest'.
- Realign the IFA with wildlife and biodiversity conservation laws to ensure special protection of wildlife movement corridors. The Act should explicitly impose an obligation on the State to act as a trustee of these natural resources for use of the public.

Upgrade the Law



62

Revamp the Law Commission of India

64

Facilitate Online Registration of Documents

66

Repurpose Usurious Lending Laws

68

Harmonise State Primary Education Laws with the Right to Education

70

Modernise the Sale of Goods Act, 1930

Revamp the Law Commission of India

ATTENTION:
Ministry of Law & Justice

PROBLEM

As it stands, the Law Commission of India ("**Commission**") is tasked with reforming laws and promoting the rule of law in India. It suggests legal reforms based on the references received from the Central Government and/or the Supreme Court and High Courts.
The Commission was originally a colonial era body which was created with the colonial interests of codifying Indian law in line with the laws in England. Macaulay, the first Law Commissioner, had remarked, that "knowledge of the 'Shastras and Hedaya would be useless' once his code was in place." Following independence, and in response to calls to revamp the colonial legal system which India had inherited, a new Law Commission was set up in 1955. The objective was clear – decolonise our laws.

Taking stock, it is evident that the Commission has failed to meet this objective. Its primary work has been to suggest hyper-technical legal reforms whose connection with the ordinary citizen is remote. It has focused on areas such as arbitration law, civil procedure, commercial courts, bilateral treaties etc. This approach is an attempt to replicate the model of the Law Commissions in the United Kingdom.

Consequently, Governments have not taken a congenial approach to the Commission – both in terms of their inclination for implementation and more recently, their attitude towards appointments.

Of the 277 Reports submitted by the Commission, only 92 have been implemented by the Government (33%). Compared to other countries, this is a poor track record. In the United Kingdom, almost 2/3rds of the reports of the Law Commission have been implemented in whole or in part. Notably, whenever the Indian Commission has made recommendations geared towards decolonizing the Indian legal system, the Government has been quick to implement them, or be seen as implementing them.

The 21st Commission completed its tenure in August 2018. The 22nd Commission was notified only in February 2020, and its chairman and members have been appointed in November 2022. The Commission has been defunct for over four years.

It is time to revamp the Commission.

APPROACH

The Law Commission should be replaced with a new empowered body, the Swatantra Kanoon Aayog. The core institutional objective of this body should be to decolonise India's legal system. This will require intervention in the areas of colonial laws and lawmaking, and the colonial administration of justice.

The Aayog should recommend Simple, Accessible, Rational, Actionable Laws (SARAL) which are suited to 21st century India and can be understood, used, and relied on by the common citizen.

The Aayog should recommend reforms geared towards making India's justice system citizen-centric by reducing barriers to access, minimising delay, and ensuring judicial accountability. It should also attempt to shift adjudication from courts to Lok Adalats or Nagrik Nyayalayas, which adopt a localized procedure of adjudication, as well as promote mediated settlements as an alternative.

SOLUTION

The following changes are needed to make the Aayog a fully functional body engaged in the Indianisation of the legal system. It will work towards making laws suited to local Indian conditions and needs rather than relying on colonial best practices. With the necessary government support, it will further the cause of SARAL lawmaking in India.

☞ **Broad-base the composition of the Aayog:** The current composition of the Commission includes 2 retired High Court judges, 3 professors of law, and 1 practising advocate. Until the legal profession in India is itself decolonised, the new institutional objective of such a body cannot be achieved solely by relying on the legal fraternity. To that effect, the membership of the Aayog must be diversified to include eminent citizens from a wide range of fields, including economists, historians, sociologists, grassroots workers etc. who can provide diverse perspectives towards the goal of decolonizing our legal system.

☞ **Make its recommendations accessible:** All reports of the Aayog must be accompanied by media explainers published in English, Hindi and also in all Eighth Schedule languages. This will make its recommendations accessible to a wider audience.

☞ **Make its functioning transparent:** The Law Minister must prepare and present a report before the Parliament annually, on (a) the Aayog's proposals implemented (in whole or in part) during the year by the Government; (b) proposals not implemented, including plans for dealing with them in the future.

☞ **Ensure timely appointments:** Finally, the executive must make timely appointments to the Aayog so that it does not become defunct.

The Law Commission should be replaced with a new empowered body, the Swatantra Kanoon Aayog.

Facilitate Online Registration of Documents

ATTENTION:
Ministry of Rural Development

PROBLEM

The Registration Act, 1908 ("**Act**") was enacted to consolidate the law relating to the registration of documents that were scattered across several enactments. The system of registration can be traced back to 1793 in British India. It seeks to provide a record of genuine titles to prevent fraud, ensure certainty of title, and facilitate transparency in land records. If documents required to be registered under the Act are not registered, they are inadmissible as evidence of any transaction affecting property.

The Act envisages a physical mode of registration, including the presentation of physical documents and the physical appearance of parties and witnesses. It does not account for technological advancements since its enactment, such as legal recognition of electronic records and signatures, computerisation of land records, biometric authentication, and online payments. The reliance on physical processes impacts the execution of documents mandated to be registered under section 17 of the Act, which is relevant to commercial transactions, including real estate and financing transactions. Most of these documents are now permissible in the electronic format and may be executed by electronic signatures under the Information Technology Act, 2000.

Since registration is an important formality for the legal execution of such documents, the Act not being equipped to facilitate end-to-end digital execution hinders the ease of doing business. Further, the reliance on physical documentation and processes is also not conducive to the implementation of Central Government initiatives relating to the computerisation of land records.

APPROACH

The registration process should be revisited to allow remote online registration, considering technological advancements and the need to facilitate ease of doing business. Procedures which require relevant parties to appear physically at the registration office, submit physical copies of documents, and rely on the usage of physical fingerprints and photographs makes the registration process inefficient for a digital economy.

Globally, countries like United Kingdom, Canada, Australia, South Africa, Estonia, certain states

of the United States of America have either implemented or are exploring possible ways to digitise the formalities for execution of certain documents, including the registration and notarisation process.

Remote online registration will require introducing processes to allow parties to digitally submit relevant documents, electronic verification of the identity of the parties, including live capturing of photos, online communication of queries/ comments by the Registrar and responses by parties, online issuance of digital registration certificates and maintaining digital backup of such documentation.

While some States like Maharashtra, Karnataka, Madhya Pradesh have amended the Act to allow for electronic registration, there is no uniform approach across the country. Therefore, the Act must expressly provide for remote online registration to ensure its adoption throughout the country. Considering the digital divide in India, physical registration should not be completely replaced, and parties should be provided with the option of remote online registration. Despite allowing for physical registration, registration offices should be mandated to maintain digitised copies of documents in prescribed standardised data format, which will be useful to create a computerised integrated system of such records.

Given that registration is a concurrent list subject which empowers State Governments to make state-specific amendments, the central Act should establish minimum standards for remote online registration to ensure that registration is carried out in a safe and secure manner. Establishing this baseline framework will also help in having standardised data and processes across registration offices which would facilitate the creation of an integrated registered documents record management system for India.

SOLUTION

The following amendments are needed to update the Act:

- Amend sections 28, 29, 32, 34 and 35 of the Act to allow online submission of documents and amend sections 36 to 39 to allow the remote online appearance of requisite parties and witnesses.
- Introduce a new provision for the electronic verification/authentication of parties which could include biometric authentication techniques.
- Amend the Act to allow Registrars to use electronic seals (section 16), keep books in an electronic format (sections 16 and 16A), and issue electronic registration certificates (section 60).
- Introduce a new provision to incorporate minimum standards for remote online registration, including standards for identity authentication techniques, security, storage, and format of electronic records.
- Adopt other legislative interventions like remote notarisation and issue clarifications on the stamping of electronic instruments to supplement an online registration system.

The registration process should be revisited to allow remote online registration, considering technological advancements and the need to facilitate ease of doing business.

Repurpose Usurious Lending Laws

ATTENTION:
Ministry of Finance

PROBLEM

The Usurious Loans Act, 1918 ("**ULA**") was enacted to empower courts to deal with extortionate loans of money or kind. Under the ULA, judges may go behind the credit bond and undo or mitigate credit terms that they find to be extortionate or exploitative.

Extortions and threats continue even in today's age of digital lending, which is compounded by the misuse of borrowers' personal data in the loan recovery process. However, most complaints against digital lending apps are outside the Reserve Bank of India's jurisdiction. This modernisation of the credit industry, coupled with the dramatically different socio-economic realities of the 21st century suggest that the ULA cannot effectively perform its primary function of protecting against extortionate lending.

First, the discretion bestowed on the judge under the ULA is problematic. By allowing courts to determine whether the interest rate is excessive, the ULA offers no real protection to borrowers, especially indigent persons, who depend the most on unorganised borrowing but cannot afford legal representation.

Second, the ULA's inadequacy is evident from its *ex-poste* implementation. Usurious practices are exposed and acted upon only after uptake of credit, leaving borrowers exposed to unfair credit practices unless they take legal recourse. Additionally, usurious lending often also comes with harassment at the recovery leg.

States enjoy legislative competence over money lending laws under Schedule VII of the Constitution of India. The ULA thus empowers States to decide interest rate ceilings while the Constitution allows States to enact other laws that regulate moneylending. In the exercise of this power, we find that most States have enacted money lending laws, but that these limit themselves to interest rate ceilings and licensing as the only mode of credit consumer protection. These do not begin to skim the surface of the kinds of legal and judicial safeguards that are needed to protect consumers of credit from extortionate lending practices.

APPROACH

The ULA regulates credit activities outside the scope of banking regulated by the Reserve Bank of India. Nevertheless, it has been unable to act as an overarching consumer credit law which aims to protect both parties to a credit contract. A forward-looking consumer credit law should not only provide protection from usurious interest rates, but also protect parties from other exploitative aspects incidental to credit disbursement.

The British Moneylenders Act, 1900, on which the ULA is based, has been replaced by the Consumer Credit Act, 1974 as the 1900 law could not keep up with modern lending practices prevalent in the UK in the 1970s. The Consumer Credit Act in the UK and other common law jurisdictions, goes beyond the interest rate focused definition of usury and introduces a rights and licenses-based regime for consumer credit protection.

In India, an operationality and efficacy analysis should be conducted to assess the ability of state money lending laws to protect borrowers from usury. On the basis of this analysis, the ULA may be repealed and a forward-looking model law be formulated for adoption by States.

A forward-looking consumer credit law should not only provide protection from usurious interest rates, but also protect parties from other exploitative aspects incidental to credit disbursement.

SOLUTION

A model, overarching consumer credit law should:

- Define the responsibilities of lenders, responsible lending codes, disclosure requirements and penalties (civil and criminal) for violations.
- Impose stringent conditions for advertisement and solicitation of lending such that a "reasonable picture" of the terms and conditions is published.
- Regulate the role of credit intermediaries and ancillary credit businesses by repurposing existing State licencing bodies, prescribing standards for their conduct and introducing measures such as cancellation/suspension of licences for failure to adhere to such conduct.
- Prescribe methods to stipulate usurious interest rates, either through a maximum leviable interest rate or by defining metrics to determine when they are usurious.

Harmonise State Primary Education Laws with the Right to Education

ATTENTION:
School Education Departments, State Governments

PROBLEM

Several States in India have outdated primary education laws, enacted prior to the enactment of the Right of Children to Free and Compulsory Education Act, 2009 ("**RTE Act**"), such as the the Punjab Primary Education Act, 1960 and the Karnataka Compulsory Primary Education Act, 1961 ("**post-independence PE Acts**"). These laws were based on the Delhi Primary Education Act, 1960, which was intended to serve as a model state education law. However, the Delhi Act itself was modelled on education laws enacted from 1919 onwards, reflecting an outdated approach to primary education.

The history of the Delhi PE Act, 1960 can be traced to British rule in India. In 1870, the Elementary Education Act was passed to provide for 'public Elementary Education in England and Wales'. This led to agitation for similar educational reforms in India, and in 1919, culminated in the Government of India Act, 1919. The portfolio of education was transferred to Indian legislators, and education was identified as a policy priority. By 1930, each province in British India had passed a compulsory education law based on the 1870 Act.

While the Delhi Act, 1960 was passed with the aim of reforming education in independent India, its fundamental approach to education echoed that of the pre-independence primary education Acts. For example, the Delhi Act, 1960 and the Punjab Primary Education Act, 1919 both place precedence mostly on attendance, permitting non-attendance only if a 'reasonable excuse' is present. Such 'reasonable excuse' includes, among others, the lack of neighbourhood schools and the presence of 'physical or mental defect' in children. The provisioning of such exemptions goes against the very principle of ensuring compulsory education. Evidently, primary education is not recognised as a right of the child. Instead, parental responsibility for providing education (i.e., by ensuring attendance) is overemphasised and minimal responsibility is placed on government. Further, regulatory measures for schools are not provided in such legislation, and crucial parameters of quality education such as retention of children and inclusion in education are absent.

Not only does this reflect a lack of systemic reforms in primary education laws, but is also now in direct contravention of the RTE Act. The education realities of India have transformed radically since 1919, when these laws—among the first steps taken towards mandating primary education—marked a significant improvement. At this point, however, this approach to education is dissonant with current education practices. Despite these glaring inconsistencies, such laws continue to be in force.

APPROACH

The RTE Act adopts a rights-based framework for primary education to make it: (a) free for all children enrolled in government-funded schools; (b) a compulsory obligation of the government to provide; and (c) inclusive of children from weaker sections and disadvantaged groups. Further, the periodic National Education Policies ("**NEPs**"), including the recent NEP 2020, indicate a strong intent to rebuild the school education system.

As education lies in the Concurrent List of the Seventh Schedule of the Constitution of India, Central and State laws regulate education in conjunction. It is imperative that state laws move in a progressive direction, in line with developments at the Central level. While data on the implementation of the post-independence PE Acts is not publicly available, excessive inconsistencies between such laws may lead to barriers in implementation. In this respect, coherence of education laws and policies is essential.

To effectively address this problem, State laws must be modernised with the objective of harmonising them with the RTE Act and bringing them in line with the reforms being proposed at the Central level.

SOLUTION

- Initiate an exercise to review the functioning of State primary education laws systematically.
- Identify provisions of existing State primary education laws that continue to be in use, if any, in order to enable an informed decision on the future of such legislation.

It is imperative that State laws move in a progressive direction, in line with developments at the Central level.

Modernise the Sale of Goods Act, 1930

ATTENTION:
Ministry of Law and Justice

PROBLEM

The Sale of Goods Act ("**SGA**") was enacted in 1930 after it became evident that the existing provisions in the Indian Contract Act, 1972, were inadequate in light of developments in mercantile transactions and jurisprudence. The SGA is based on the UK Sale of Goods Act 1893 ("**UK Act**"), where common law principles were codified to govern contracts between merchants and lend certainty to transactions. The SGA is informed by 19th century English mercantile practices. Just as the 1872 law was inadequate in 1930, the SGA is inadequate in the 21st century to keep pace with the rise of e-commerce, and the emergence of consumer protection as a policy concern, among other technological and jurisprudential developments.

Today, the SGA faces two prominent challenges. First, concepts in the SGA such as the transfer of ownership and implied terms regarding the quality of goods, do little to govern contemporary practices appropriately. The advent of technology has increasingly moved the sale of goods online. Buyers, both businesses and consumers, often do not have the opportunity to examine goods or ask questions to the seller. This has created a bargaining power imbalance in buyer-seller relationships, which could not have been envisaged in sales between 19th century merchants. In response, the SGA must perform a regulatory function which involves updating the duties of sellers and the remedies available to buyers. For instance, the UK Act, through a separate regime for the sale of goods to consumers includes a consumer's right to repair and replacement, right to price reduction or final right to reject.

Second, the language of the SGA is complex, dated, and limiting. Globally, initiatives to modernise and uniformise the language of sales law include the Vienna Convention on International Sale of Goods, UNIDROIT Principles of International Commercial Contracts, and European Directives on aspects concerning contracts for the sale of goods. In the UK, the language of the law has been updated in response to market demands, such as a change from 'merchantable quality' to 'satisfactory quality' in implied terms regarding the quality of goods. Further, in the UK, the law has been amended to provide tests to assess the satisfactory quality

of goods, which the SGA does not yet provide explicitly. Courts in other jurisdictions attempting creative interpretation to keep up with the times are assisted by such legislative revisions. However, Indian courts continue to be restricted by the obsolete language of the SGA.

APPROACH

Challenges in sale of goods legislation are not unique to India. The UK Act has been revised multiple times and is itself the cornerstone of legislation in Australia, Canada, Ireland, New Zealand, Scotland, and Singapore, which have been significantly revised to remain market-relevant. For example, in Singapore, amendments have introduced specific provisions regarding consumer and non-consumer cases, in keeping with the need to balance party autonomy and consumer protection.

There can be multiple approaches for the SGA to reflect contemporary market dynamics and nuances. As other jurisdictions have done, party autonomy in commercial sales may be balanced with protectionism for consumers. The SGA now governs various sales models - between two businesses, between a business and a consumer, and between consumers. Certain principles may be required, to some extent, in all these types of sales despite unique models of regulation for each. A modern SGA must take account of principles of commercial certainty, reasonableness, and unconscionability. For example, commercial certainty in transactions can be ensured for sellers by clearly restating certain consumer rights with a defined scope in the SGA.

Further, legal standards under the SGA should be simplified. This helps parties better understand the law regulating their conduct and allows courts to interpret the law contemporaneously.

As in other countries, this overhaul of the SGA can begin through the constitution of a committee that will undertake public consultations, keeping in mind India's unique policy imperatives, such as protecting small traders, promoting consumer confidence, and addressing technological imbalances.

A modern Sale of Goods Act must take account of principles of commercial certainty, reasonableness, and unconscionability.

SOLUTION

The reform of the SGA should incorporate the following dimensions:

- Restate the law to incorporate jurisprudential developments over the past century.
- Balance the need to facilitate commercial transactions with the requirement to regulate consumer transactions by creating a separate regime for the latter.
- Adopt plain language drafting to improve accessibility.

Ministry Index

MINISTRY OF HEALTH AND FAMILY WELFARE

42 | Create a Central Drugs Regulator

MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE

58 | Decentralise Forest Management

MINISTRY OF LAW AND JUSTICE

16 | Invigorate Democracy through Peaceful Assembly

18 | Abolish Criminal Prohibitions on Sedition

46 | Eliminate Discriminatory Language on Impaired Capacity

48 | Make Punishment Reformatory and Rehabilitative

54 | Adopt Plain Language Drafting

62 | Revamp the Law Commission of India

70 | Modernise the Sale of Goods Act, 1930

MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT

20 | Reduce Biases in Policing Habitual Offenders

MINISTRY OF COMMUNICATIONS

22 | Restrain Surveillance with Privacy Protection

MINISTRY OF FINANCE

66 | Repurpose Usurious Lending Laws

MINISTRY OF RURAL DEVELOPMENT

64 | Facilitate Online Registration of Documents

MINISTRY OF HOME AFFAIRS

16 | Invigorate Democracy through Peaceful Assembly

18 | Abolish Criminal Prohibitions on Sedition

36 | Make Policing Citizen-Centric

38 | Establish Legislative Oversight of the Intelligence Bureau

40 | Make the Office of the Governor Independent

48 | Make Punishment Reformatory and Rehabilitative

MINISTRY OF COMMERCE AND INDUSTRY

56 | Protect Traditional Cultural Expressions

State Department Index

REVENUE DEPARTMENTS

32 | Empower Local Governments to Administer Land

34 | Reimagine the Role of the District Collector

LAW DEPARTMENTS

54 | Adopt Plain Language Drafting

SOCIAL WELFARE DEPARTMENTS

28 | Abolish Beggary Laws

HOME DEPARTMENTS

24 | Eliminate Caste-based Discrimination in Prisons

HEALTH AND FAMILY WELFARE DEPARTMENT, TAMIL NADU GOVERNMENT

26 | Humanise Public Health Delivery

SCHOOL EDUCATION DEPARTMENTS

68 | Harmonise State Primary Education Laws with the Right to Education

Courts Index

SUPREME COURT OF INDIA

50 | Facilitate Access to Court Decisions

52 | Make Courts Non-Hierarchical

HIGH COURTS OF INDIA

50 | Facilitate Access to Court Decisions

52 | Make Courts Non-Hierarchical

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