

The Vidhi Panel on Legal Reforms: How Can Better Laws Achieve Better Governance?

The Vidhi Centre for Legal Policy organised a Panel Discussion on the theme ‘How Can Better Laws Achieve Better Governance?’ The panellists included Justice (Retd.) Ruma Pal (Former Judge, Supreme Court of India), Mr. Sumit Bose (Former Finance Secretary, Government of India) and Mr. Uday Shankar (CEO, Star India). The discussion was moderated by Mr. Rajdeep Sardesai.

Vidhi also released its Briefing Book titled ‘Towards the Rule of Law: 25 Legal Reforms for India’. The Briefing Book outlines key regulatory, statutory and constitutional changes that need to be implemented in order to realise these reforms. The event was organised on 19th July, 2014 at the Multi-Purpose Hall, India International Centre, New Delhi.

MINUTES OF THE PANEL DISCUSSION

6:10 p.m. - Ireena Vittal (Member, Board of Directors, Vidhi Centre for Legal Policy) gives an introduction to the event and speaks about Vidhi.

6:13 p.m. - Arghya Sengupta gives an introduction about Vidhi

- What Vidhi does;
- Rationale for Vidhi’s existence - assist the Government, Parliamentary Standing Committees and public agencies in drafting laws, rules and conceptualising policies;
- Act as an interface between academic research and policy-making;
- Since the present Government has arrived with a huge mandate, suggest to them 25 areas for legal reform.

6:15 p.m. - Arghya gives the presentation on Vidhi’s Briefing Book and specifically outlines the following areas

- Streamlining Judicial Appointments;
 - Making Tribunals Effective;
 - Police Reforms;
 - Media Reforms;
 - Reforming PSU Governance.
- Also mentions the need for ‘actionability’ of reforms - reforms should not just be sound in principle but also implementable in practice.

6:20 p.m. - Arghya invites the panellists on stage to release the Briefing Book. Briefing Book is released on stage.

6:22 p.m. - Rajdeep Sardesai takes over; starts the discussion by introducing the panellists Justice (Retd.) Ruma Pal, Mr. Sumit Bose and Mr. Uday Shankar. Outlines what topic each one is going to speak on.

6:25 p.m. - Justice Ruma Pal starts with Judicial Appointments.

- Speaks in favour of a constituting a Judicial Appointments Commission (JAC);
- Gives a background of the procedure for appointment of judges in India, Article 124 of the Constitution and the Three Judges' Case;
- Mentions that the collegium system was the outcome of decades of 'judicial assault' at the hands of the executive in the form of supersession and punitive transfers. Executive acted arbitrarily and secretly while appointing judges. Greatly eroded the independence of the judiciary;
- Hence, the Supreme Court stretched the interpretation of the Constitution so as to give birth to a 'collegium';
- Even now, secrecy persists in judicial appointments. Appointment procedure is opaque, no 'objective criteria' for appointment of judges, considerations other than merit also exist;
- The Law Commission and Justice M.N. Venkatachaliah, former Chief Justice of India have also suggested the formation of a JAC long ago but these recommendations gather dust;
- The JAC Bill, 2013 in its present form cannot be adopted as law. It confers power to appoint judges to the Legislature which is actually, the Executive in disguise;
- A new procedure for appointment of judges can be established only by a suitable amendment to the Constitution and not just by the enactment of a statute (the JAC Bill). Bottom line: **if something can be done by a statute, it can be just as easily also be undone by amending the same statute.**
- The JAC Bill, 2013 does not lay down objective criteria to be taken into consideration for the appointment of judges. Also, adequate mechanisms need to be devised for making the proceedings of the JAC transparent;
- Currently, we need a dispassionate, independent, autonomous body for the appointment of judges.

- **Justice Ruma Pal then proceeds to speak on Police Reforms.**

- The issues with the Police Act, 1861 and its repressive provisions, 7 National Police Commissions and 2 decisions of the Supreme Court have recommended far-reaching changes in the Act;
- *Prakash Singh v. Union of India* [(2006) 8 SCC 1] - Supreme Court has issued directives for framing a Model Police Act. Needs implementation by the Government;
- Many states re-enacted Police Acts but merely replicated the 1861 one;

6:38 p.m. - Rajdeep Sardesai- Should judicial appointments come under the provisions of the RTI Act, 2005?

Justice Ruma Pal - The proceedings of the proposed JAC should be brought under the purview of the RTI Act. However, the individual opinions of the members of the JAC (as to why they did/did not appoint a judge) should not open to the provisions of the RTI Act.

6:40 p.m. - Sumit Bose takes over.

- Points out that not only appointments to the judiciary but also appointments to other bodies such as the UPSC, public sector enterprises and to the post of the CAG are shrouded in secrecy;
- Also says that police reforms involve a larger question of 'ownership'. Cites the Preamble to the Tamil Nadu Police (Reforms) Act, 2013 which reads thus - "A Bill to provide for a law to carry out the directions of the Hon'ble Supreme Court in Prakash Singh case regarding police reforms...." Hence, the law is driven by the Supreme Court and not by the will of the Government;
- Police reforms also require adequate funds. Finance Commissions have not adequately talked about funds for police reforms except touching upon the aspect of police housing.

6:45 p.m. - Sumit Bose then starts addressing the issue of reforms in **PSU Governance**.

- As on 31st March 2014, total investment in Central PSUs has risen to almost Rs. 8.5 lakh crores. This is indicative of the amount of wealth housed in PSUs;
- Mentions the S.K. Roongta Committee Report which suggests creation of a single holding structure for all future CPSEs that will decide where to invest and also, manage the investments;
- Under the current structure, PSUs are 'state' under Article 12 of the Constitution. They are open to the undue influence of the executive;
- The way they are governed have made PSUs risk averse. Also, there is no succession planning involved in their governance;
- 2 main challenges that PSU governance in India faces - firstly, since they are protected from the threat of bankruptcy and takeover, complacency creeps in; secondly, there is no proper mechanism for questioning of their actions;
- Disinvestment in PSUs is the partial solution of the PSU problem;
- Cites Nandini Gupta of the Kelley School of Business who says that partial privatisation of state owned enterprises has a positive impact on profitability, productivity and investment. This can galvanise sleepy PSUs into action;
- Also important is to manage a sick enterprise and to quickly close it down. Among the 1100 state PSUs in India, only 6 are listed;
- Echoed Vidhi's suggestion -Government should consider repealing all statutes establishing non-banking PSUs and transferring its shareholding in those PSUs to companies incorporated under the Companies Act, 2013. The Government's shareholdings in all these companies could then be transferred to a common parent company.

6:50 p.m. - Uday Shankar takes over with the issue of **Media Regulation**.

- The issue is not just whether to regulate or not. There is the larger issue of who should regulate;
- Is the media not being regulated currently? TV media is the subject of regulation by the Ministry of Information and Broadcasting (MIB), the Ministry of Home Affairs (MHA), the Ministry of Telecommunications, the Telecom Regulatory Authority of India (TRAI), the Press Council of India (PCI), the Advertising Standards Council of India (ASCI), the Ministry of Consumer Affairs and other bodies such as National Commission for Scheduled Castes, National Commission for Women, etc., in some measure or the other;

- Evidently, there is enough regulation of the media. Hence, the problem does not revolve around only regulation;
- The core issues with regard to the media currently are:
 - ✓ Competence of the media;
 - ✓ Integrity of media persons;
 - ✓ Overall health of media houses. Less than 3% of the media houses break even. If they are so bankrupt, how can the overall health be improved only through regulation?

Rajdeep Sardesai- Would a statutorily constituted body serve the purpose of regulating the media?

Uday Shankar-A statutorily constituted body would help. A statute would grant legitimacy to this body and remove the influence of the executive, legislature and judiciary from these bodies.

Rajdeep Sardesai-There is also the issue of ownership in the media industry. Since 2004, there has been a tremendous increase in the number of news channels but ownership of many of these channels remains opaque and unclear;

Uday Shankar - There has been widespread circumvention of norms across the board. From big corporate houses to local news channels, everyone has been flouting norms. Hence, there is the pressing need for **transparency** and **norms of behaviour** for media houses.

An external agency/body, like the Ofcom (Office of Communications) in the UK, regulating the media would create hostility towards itself. It would create the impression that everyone wants to control the media.

7:05 p.m. - The discussion was thrown open to the audience.

Rajdeep Sardesai to Justice Ruma Pal - Would an institution such as the JAC have averted something like the Gopal Subramaniam controversy?

Justice Ruma Pal - Yes, the JAC would have averted such a controversy. The JAC would be a single body controlling the entire process of judicial appointments. There would be no bifurcation of opinions between the executive and the judiciary. They would come out with a single, unified decision about judicial appointments. Also, the JAC should make decisions on the basis of **consensus** and **not majority**.

Rajdeep Sardesai to Mr. P.K. Malhotra (Union Law and Legislative Secretary) - What is the Government's view on the proposed JAC?

P.K. Malhotra (in his personal capacity) - The need for a JAC stems from the judicial overreach currently evident in the process of appointment of judges. Hence, the Government is of the view that the time is ripe for the constitution of a JAC.

Rajdeep Sardesai to Mr. T.R. Andhyarujina (former Solicitor General of India) - On the need for transparency in the appointments procedure.

T.R. Andhyarujina-The procedure for judicial appointments has been extremely difficult throughout the world.

- Interestingly, the best judges in the Supreme Court of India were appointed when executive primacy prevailed in the appointments' procedure;

- The collegium system arose in response to the abuse of the process during the Emergency. The collegium system worked well for some years but is now mired in controversy;
- The JAC has worked well in the UK where it conducts open, transparent proceedings and is comprised of lay people (quotes the instance of the appointment of Jonathan Sumption). However, it has not worked well in the African countries (particular mention of South Africa);
- The JAC Bill, 2013 has many flaws. It does not mention any 'objective criteria' for the appointment of judges;
- However, the collegium system is certainly not satisfactory any more where seniority seems to be prioritised over merit. The Gopal Subramaniam controversy is an evidence of the same. Hence, the proposed system of constituting a JAC should be given a chance.

Justice Ruma Pal-Secrecy and lack of transparency in the appointments' procedure leads to distrust. Motive is attributed to the procedure even in cases where there may not be any.

7:15 p.m. - 1. Question from an audience member

- Proposal for a 3rd alternative for appointment of judges - constituting an All-India Judicial Service (AIJS); the 116th Report of the Law Commission of India (LCI) has also suggested the formation of an AIJS;
- However, the recommendations of the LCI continue to gather dust. There is no proper implementation of their recommendations and no statutory backing to ensure the same.

Justice Ruma Pal-Agrees with the faulty implementation of LCI's recommendations. Takes note of the fact that the LCI is an extremely competent body and the Supreme Court frequently relies on its reports; vouches for statutory status for the LCI to give teeth to its recommendations.

2. Question from an audience member

- Media's role in the Gopal Subramaniam controversy;
- Ethics in reporting a particular issue;
- Do the media tend to give a particular 'slant' to the story which has a bearing on the formulation of opinion by the people?

Rajdeep Sardesai - In this regard, the question is as to who is going to judge the media? Raises the issue of 'media accountability'.

Uday Shankar - With regard to the issue of leaks, where do you draw the line?

- How do you establish what is 'news' and what are 'leaks'?
- Leaks are acceptable till the time there is adequate plurality in these leaks;
- Leaks should not come from only one end of the spectrum and give a one-sided story.

3. Question from an audience member

- Our system cannot seem to deal with conflicts of interests while chalking out objective criteria for appointment of judges;

- In the debates on reforms in judicial appointments, nobody has spoken of reforms at the Bar from where these judges might eventually be elevated.

Justice Ruma Pal - In response

- The length or duration of practice of an advocate does not ensure that he/she would prove to be a good judge as well;
- Why is the field not thrown open for academics to be appointed as judges of the High Courts?

4. Question from the audience - **Mr.Ritin Rai (Member, Mentor Group, Vidhi Centre for Legal Policy)** - makes some observations:

- In the whole debate about appointments' procedure being subject to RTI or not, some aspects are missed out on;
- Not all information about the appointments' procedure will be put in the public domain, only some elements of the decision-making process will be subject to the RTI regime.

Rajdeep Sardesai - Do/should we aspire for a more 'socially inclusive judiciary'?

Justice Ruma Pal - Yes. The society as a whole must be able to trust the judges. They should not be viewed as a class apart. If that happens, the society will not be able to repose their trust in the outcome of the judicial process.

5. Question from an audience member

- There are various other issues involved with regard to judicial appointments, such as the quality of judges currently presiding in our Supreme Court. They might be in need of proper judicial training. Proceedings in the Courts are prolonged and the judges do not make an effort to expedite disposal of matters.
- Also, why does the collegium take so long in arriving at a decision?

Justice Ruma Pal - The collegium takes long because the executive takes a long time in arriving at a decision. The Intelligence Bureau (IB) Report in reference to a judge goes to the Central Government and then, to the Supreme Court. Both the Central Government and the Supreme Court take a long time to consider the names that come from either the Bar or from the High Courts.

6. Question from an audience member

- Do we honestly believe in the efficacy of a self-regulator?
- Why do news channels openly flout norms (for instance, by showing surrogate advertisements)?

Uday Shankar - In the context of self-regulation

- External regulators such as the ASCI and the MIB have had an adversarial relationship with the news channels. The problem has been that of mindless regulation and hence, self-regulation should be preferred over regulation by external agencies;
- Newspapers can carry all sorts of content (even surrogate advertisements) but TV media is barred from doing the same. Hence, TV media apprehends that regulation is politicised.

7:34 p.m. - **Rajdeep Sardesai** comes back to police reforms.

Uday Shankar - In the context of police reforms

- The political leadership is not interested in addressing the issue of police reforms. Citizens are interested but they are not in a position to fix this problem;
- Central issue - who would control the police;
- When not in power, politicians love the media, hate the police. When in power, they hate the media and love the police.

Sumit Bose - There is enough pressure to bring about reforms in the civil services from both within and outside the services. Pressure from within is evident from the PILs filed in cases like *Prakash Singh* and *TSR Subramanian*.

7:40 p.m. - Discussion closed. Vote of thanks by **Dhvani Mehta** and mementoes to all panellists and moderator.