

RULE OF LAW AND ECONOMIC GROWTH

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SPEAKERS:

1. Shri Montek Singh Ahluwalia, Former Deputy Chairman, Planning Commission of India
2. Dr. Arvind Virmani, Chairman, Foundation for Economic Growth and Welfare
3. Shri Pradeep S Mehta, Founder Secretary General, Consumer Unit and Trust Society

CHAIR: Shri R. N. Bhaskar, Senior Growth Journalist

ABSTRACT:

On the seventh day of the Indian democracy at work conference, esteemed panelists held a discussion which primarily highlighted the importance of a robust rule of law for economic growth of the country. In a rapidly emerging economy like India, fair and efficient settlements of disputes is critical for building mutual trust especially because lack of confidence restricts investments which ultimately jeopardises India's economic growth. This session called attention to the fact that Rule of Law and economic growth are strongly intertwined and mutually reinforcing. The session mentioned various elements which help to strengthen the judiciary such as protection of individual property rights, fair and equitable contract enforcement, enforcement of just labour laws and more. The speakers pointed out the need for equitable access of opportunity to all sections of the society so that an enabling environment for business and commerce can be created. The conversation on Rule of law and Economic growth raised the need for immediate attention to enhance the 'ease of doing business' by adjusting judicial requirements.

PRESENTATIONS BY THE PANELISTS

Shri R. N. Bhaskar, Senior Growth Journalist

Shri R.N. Bhaskar, as the chair of the session, commenced by stressing the importance of the subject at hand. He stated that without law one cannot have an organised society, or trade and business or economic growth. He lamented that although the judiciary is the cornerstone of any society, Indian judicial system is currently bogged down by about 25-40 percent of vacancy at every level of decision making in law enforcement. He noted that there is an element of design to this shortcoming since it is not an isolated occurrence but a recurring issue. When functionaries operate at such low strength, things inevitably slow down. Flagging India's low judge-to-population ratio at sanctioned strength, he opined that the functioning of the judiciary at a fraction of its strength is a major chokepoint.

Shri Bhaskar then moved on to narrate a story from which he began his pursuit of judiciary and law and order, one of the lessons that encouraged him to delve deeper into law, judiciary and economics together was that "Evidence cannot live beyond a fortnight". He asserted that it was interesting to him that the first lawyers who were appointed in Rome ensured speedy adjudication and dispensation of justice. The next anecdote that he shared was when he met a German documentary maker who told Shri Bhaskar that India had too much poverty, too many people and too little education and thus it was sitting on explosive material and for this we needed strong institutions or else there would be organised crime. Shri Bhaskar said that if we look at the last 20 years, organised crime is what India had allowed to take place. He then concluded reemphasizing on the relationship between growth of nations, economics, law and rule of law and invited the panelists one by one to share their views.

Shri Montek Singh Ahluwalia, Former Deputy Chairman, Planning Commission of India

Shri Ahluwalia began his address by noting that the deficiencies in the legal system on the economic side are effectively preventing reforms from the government and that no economic growth can take place without the preservation of life and liberty by the law. In smaller societies, transactions may happen based on social trust but as an economy becomes more sophisticated, this trust weakens. While accepting the fact Indians are proud of the independence of the judicial system, it is also highly dysfunctional and arbitrary in nature, which is deterring foreign investments into the country.

Shri Ahluwalia shared an anecdote which involved his lawyer friend. The lawyer friend said that the judicial system is often criticized but it is important to note that the courts merely interpret the law. If the law has been drafted badly, then the judiciary does not deserve to be the sole system to be blamed. If a law is bad, it must be replaced with a better one.

He noted that the remedy to the problems lies in several different areas. Firstly, the capacity of the judicial system is weak and the judiciary is particularly understaffed, as also noted by Shri Bhaskar. It is furthermore important to attract the best talent to the judgeship. Shri Ahluwalia stated that it was a simple economic problem. The best lawyers join corporates because they are remunerated well while the only incentive to join the bench is the prestige that comes along with it; therefore, better incentives need to be provided. Additionally, he questioned why the retirement age of judges is low while in the USA they can serve until the end of their lifetime. Every government is and has been conscious about these but they have done nothing, and one possible reason that he stated was that nobody in the government knows who should bring reforms for the judiciary. The assumption is that the reform would have to come from within the judiciary.

Shri Ahluwalia also questioned the judiciary's own interpretation of its powers. While the legislature may pass laws and bring policies that are bad, these need to be challenged by civil society and be addressed in the legislature. With the advent of PILs (Public Interest Litigation), these are now challenged in courts, It is not the role of the judiciary to determine whether or not a policy/law is good, but whether it is constitutional. Shri Ahluwalia provided the example of the Telecom scam and the 2G scam where the judiciary overturned over a 100 executive decisions as "unfair" and inconsistent with the "natural law". The investors may have gotten licenses in good faith, but when the court decision led to their cancellation, there was no recourse for the investors. Shri Ahluwalia further pointed out that investors would not want to invest in a country where they are subjected to such high uncertainty and judicial resolution can take decades.

Dr. Arvind Virmani, Chairman, Foundation for Economic Growth and Welfare

Dr. Arvind Virmani began his address by emphasising how it is important to understand the relation between economics and law, for the general public. He started with explaining how Douglas North, who won an economics Nobel prize for his work on institutions, defined institutions as "the formal and informal laws and rules of the society." This according to Dr. Virmani was a very interesting formulation as people tend to think of institutions as a physical organisation rather than in terms of laws and rules. In his opinion, this was particularly important to understand as laws and rules are fundamental to competitive markets. He then gave two examples to elaborate on his argument, first was of the guild system in the Medieval times which was a way to trade across geographies, one had to trade among people who were the part of the guild and thus there was a barrier. Dr. Virmani said that this was essentially an oligopoly where one couldn't have competitive markets and there was a difficulty to trade. Therefore, the fundamental aspect of modern economy came in by the existence of formal contract laws. Second example he gave was of joint stock companies, he stated that earlier one could only depend on their family to raise capital, the fundamental changes that came about were the laws

that started the joint stock companies. The law then protected people and the company could raise money through various sources. Another point that Dr. Virmani brought up was regarding regulations, for which he explained as to how law has to mediate between legal and illegal activities and the dichotomy between the two. The two grey areas dealt in by regulations are - one, the traditional area which has to do with positive and negative externalities. The second is modern regulation that has to deal with asymmetric information and moral hazard. Emphasising on the grey areas, Dr. Virmani mentioned that a regulator is particularly needed in three sectors, namely, the financial sector, education and health. He also added how social media today has two aspects that are network externality and information control, so need of the hour is sophisticated regulators who know how to keep actions in check.

Shri Pradeep S Mehta, Founder Secretary General, Consumer Unit and Trust Society

Shri Pradeep Mehta began by describing the objective of CUTS as an organization that looks not at how decisions have been arrived at by the judiciary in some cases but what would have been the best alternative that would not inflict damage onto the economy. Taking the example of the cases noted by Shri Ahluwalia, Shri Mehta noted that they had spillover effects on the economy and on international relations.

Shri Mehta differed with the main diagnosis of the judicial system as being understaffed, but in his opinion, the biggest problems are the high amount of adjournment of cases and that there was no proper case-management rule. He also pointed out that Indian courts follow the archaic system of holidays like winter holidays which are not followed even in the UK.

Responding to the point regarding the quality of judges raised by Shri Ahluwalia, Shri Mehta quoted Late Shri Arun Jaitley's statement in the Parliament that with liberalization, good lawyers are attracted by the high earnings from working for the corporate sector and have little incentive

to be a part of the ‘bench’. He further noted that there is quite some friction between the government and the judiciary. One instance is where the Supreme Court struck down the National Judicial Appointment Commission Act which he opined was good and would have brought more transparency into the system of appointment of Judiciary than the present collegium system. On Dr. Virmani’s point about institutions, Shri Mehta shared that even Chanakya had commented on the Guild issue saying that people of the same trade should not be travelling together. He referred to the chapter authored by Madhav Khosla and Anath Padmanabhan on “The Supreme Court and India’s Judicial System” in the book “Rethinking Public Institutions in India”. With regard to the judicial system, he said that the infrastructure needs to be improved and better technology needs to be adopted, which the recent pandemic has led to, with hearing cases online.

Shri Mehta pointed out that in terms of Contract Enforcement on the Ease of Doing Business framework of the World Bank, India performs very badly. He noted that the Government or the executive do not have any real powers to change this. Government is only ‘nudging’ the judges, which works only upto a certain extent.

To address the problem of delays, the Government of India amended the Specific Relief Act in order to allow setting up of expert committees in the event that the judges aren’t able to arrive at a decision. There is a provision in the civil procedure court as well but it has not been looked at.

He concluded by saying that the judges should be conscious about the economic implications of their judgements and not be oblivious to them.

Dr. Jayaprakash Narayan, General Secretary, Foundation for Democratic Reforms

Referring to the report by CUTS on the economic impact of the Supreme Court’s decision on liquor and the argument made therein that the Supreme Court should have consulted the expert committee, Dr. Jayaprakash Narayan asserted that the judiciary has no business deciding on

policies. Saying that the judiciary's technical expertise would suffice for making decisions would be a tragic thing for both democracy and the economy. On the 2G Spectrum case and the Coal scam that was referred to by Shri Ahluwalia, Dr. Narayan opined that the two cases are fundamentally different. While the 2G Spectrum case involved arbitrary and illegitimate exercise of power, in the coal case, there were serious possible consequences such as bank defaults. Referring to the 99th amendment issue raised by Shri Mehta, Dr. Narayan said that he had worked extensively on the National Judicial Appointment Commission with Justice Venkatachaliah, Justice JS Verma and Justice Krishna Iyer but said that they would have to live with the court's judgement for at least another decade. This was because the public opinion is that the judiciary is wonderful, politicians are bad and the bureaucrats are worse.

PANEL DISCUSSION AND COMMENTS

The panel discussion started with Shri Ahluwalia responding to Dr. Narayan's agreement with him on the role of judiciary being limited to the interpretation of the law and pronounce decisions based on constitutionality. He said that the term constitutionality was very broad. The courts also make decisions based on "fairness" and the natural law. The question, he said, was how to make the courts' decision making process faster and less disruptive.

Taking forward the panel discussion, Shri Bhaskar raised the question as to why our country was facing such a situation? He agreed with the argument that the number of judges is low and speedy judgement is not being dispensed, however, he wanted the panelists to analyse why this happens and a solution for this. He then added a hypothetical anecdote as to if you were staying in the slum and your daughter was teased by some people and you go tell them that this is not the right thing to do so they laugh at you, what would you do, would you go to the police or the local messiah of the area? It is in that decision, in his opinion, you realise that your answers for constitutionality come up. According to him, 90 percent of chances are that the people of the slum will go to the local messiah, as he dispenses justice immediately. He opined that in this case the merit of police or illegality becomes irrelevant because the more the messiah protects them

the more obliged they are to him and thus, one votes for the same person despite the number of cases against him. The only way to prevent this is to move the police and judiciary faster. According to him, India has created small protection pockets for policemen, bureaucrats and for judiciary and most importantly the politicians, as a result of which the system had become dysfunctional, the legal became unimportant and illegal became relevant. “One cannot drive out criminalisation from politics if he/she is asked to vote for his/her protector and the problem with the judiciary begins here.”

Responding to the issue raised by Shri Bhaskar, Dr. Virmani said that everyone agrees that one of the basic roles is constitutionality of laws and rules made by the system but in his view there are two others, when lawmakers are corrupt it is the role of judiciary to intervene but only for corruption not for making economic and social decisions in our country and second is the reform of the criminal justice system. He raised the question as to “why is it that our courts are more interested in reforming the economic reforms than reforming the criminal justice system at whose head they sit?” He opined that if institutions don’t focus on the system it will always be a “free for all” kind of situation. One has to go to the root of it and reform the rules and procedure.

On Dr. Narayan’s comment about the CUTS report’s argument, Shri Mehta clarified that the report was referring to the expert committee that was already put in place but the judiciary did not even consider it. He further said that you cannot stop the drunken driving problem ex-ante and enforceability was the problem, since the drivers could use other intoxicants too. He said that most disputes are ubiquitously settled by the strongman in the community and even the police sometimes act as arbitrators and adjudicators. Shri Mehta then briefly commented on the examples cited by fellow panelists during the course of the session. He mentioned that in the case of drunken driving, Article 21 of preservation of life and liberty was fundamental to the court's decision. When it came to the 2G scam, the remedy, in his opinion, was to impose harsher penalties, as was done in the Sahara case against Subrata Roy.

Another pressing issue raised by the Chair was related to the adjudication and dispute resolution mechanism for foreign investors. On the comment by Shri Bhaskar on the cancellation of

Bilateral Investment Treaties (BIT) by India, Shri Ahluwalia said that the case for the rule of law should not be based on foreign investment, but equally so for domestic investors. Foreign investors have extra protection through things such as the BITs, which the domestic investors lack. If the government says that whatever happens, it will not accept a ruling against it, then that gives a very bad impression to both domestic and foreign investors. Shri Mehta added to the discussion that the first dispute vis-a-vis BITs was raised by Australia on the Whitefield case. The 2012 decision by the Supreme Court led to the churning of the government. He said that the existing BITs such as the Netherlands and Singapore ones are still valid since they are non-cancellable. He said that India can attract investment without BITs since we have a large demand market. The Specific Relief Act was amended only to tackle the issue we are facing with respect to the Doing Business ranking. Article 142(1) allows courts to set up special benches. Dr. Virmani added another dimension to the argument and mentioned that many of the disputes arise because our laws are too exhaustive and many disputes can be solved if areas of law can be rationalised and simplified.

On Dr. Virmani's comments about technical redorsm, Shri Ahluwalia said, especially in the case of tax reforms, the reports made in consultation with experts need to be publicized, the process must be made more transparent and that the people need to be made involved in the process. He said that any decision would be controversial but dialogue with the public is always good. He welcomed the faceless assessment system, but he said that a lot more is needed when it comes to tax reform (indirect, direct and customs) - both in case of tax rates and administration. He gave the example of the UK where he said that tax rate does not emerge from the revenue department of the authority but from the administration. He said that secrecy is the worst thing in a country and that transparency and 'sunlight' and hearing comments is necessary. On the GST issue, Shri Ahluwalia said that sometimes the government has to make certain compromises to push through some things but once the law has been passed, the government can make attempts to make the other things right too. Dr. Narayan agreed with Shri Ahluwalia about the need for publicization of reports and need for discussion. He said that public involvement and dialogue are very

important. The recent farm laws is a classic example, where due to the absence of prior discussion, there are now issues.

Replying to an audience question on ensuring justice in rural areas, Shri Mehta said that the government has installed Lok Adalats and has made provisions for Gram Panchayat Nyayalays. The need of the hour is to make these courts functional so that petty disputes including land titles could be resolved quickly. Shri Ahluwalia cautioned that here we must not idealize the Panchayat System for decision making for “justice” since the panchayat system is also very political and caste-issues are quite prevalent. Dr. Narayan endorsed Shri Ahluwalia’s point about local courts in rural areas. He said independence is integral to the judicial system. He spoke about the 2009 law that provided for courts to be set up in rural areas, but of the 5-6000 that should have been set up, only 350 have been notified and only 221 are operating. He gave the example of the justice system in Britain where the capacity is quite high and there are small claims courts to fast-track justice. They handle 80-85% cases, and quite fast. He said that the rule is available to do this in India, and it needs to be expanded to urban areas. The only laws that he said are working are ones where markets and thus stakeholders are involved.

Shri Bhaskar later raised three pertinent challenges related to poor justice delivery and mafia taking over to keep the businesses running. Those are: 1) The quality of judges being poor. 2) Corruption because of pockets of protection 3) Money being taken and work not being done. Dr. Virmani drawing from his experience in economic policy reform said that we need to chart clear, consistent and rational goals in the area of legal reform. Shri Mehta added to the discussion citing GST as an example which was drafted through a careful and consultative process. But there are large problems with implementation and also there’s the issue of multiple slabs and the arbitrariness. With regard to the Motor Vehicles Act again he pointed out that it was brought out through a consultative process with the states, and it is an important subject since India loses 3% of GDP to road accidents. With regard to the Farm Laws he said that the government is missing the psychology behind the protests, where the farmers are concerned about “corporatization”.

Dr. Virmani clarified that we need to understand GST in two parts, one was the constitutional amendment which according to him was revolutionary. However, he said that the problem was that by combining 17 laws into one law and GST Council that was set up for arbitrating the problems, the issues of legacy were carried over to the new structure because the decision was made that it would be based on consensus of the GST council. In his opinion, GST had a structural issue and not an issue of implementation wherein the structure itself was flawed. Shri Bhaskar added that big companies are satisfied with the GST and the small businessmen are not. The need to register in every state impacts the growth of small businesses; whereas, big companies are registered everywhere. This, according to the speaker, is a pain point for MSME's which are one-man empires registered in only one state, he raised a fundamental question as to why can't there be one single number or registration ID in the age of computerisation.

Shri Mehta further raised the issue of environment and economy. He said that he was involved in the drafting of the Consumer Protection Act and they inserted clauses related to having a time limit on judgements of 90 days and 120 days if testing is involved but none of these are followed. He added that people are afraid to go to courts and in terms of higher judiciary, they need to have knowledge of the economic impacts of their decisions, and he cited the examples of the adverse effects in case of 2G scam, Coal scam and the Sterlite Copper Case.

In his final remarks, Dr. Virmani made a point with respect to regulation and his understanding of regulation. He said that India has one of the most oppressive control systems which the Western Nations cannot imagine, thus he asserted that the control and regulation he spoke about is different in its nature. To this he added that the objective of regulators is to mediate between the two parties and not favour the consumers but to have orderly development of industry all throughout the country. He also shared that today the bureaucrats that are retiring are being given the jobs of regulators which isn't in tune with modern regulation, according to him what needs to be done with modern regulation is bring in higher professionalism.

CONCLUSION:

Dr. Narayan succinctly listed the main points brought forward in the discussion:

1. There is a need to limit the court's jurisdiction and to take away unnecessary load.
2. Infrastructure and Capacity of courts needs to be improved and technology needs to be adopted.
3. There is a need to attract good talent into the judiciary and systems like commercial courts must be set up.