How does India Fare on Regulatory Hygiene? Status Check of the Rule-Making Process

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India has set itself an ambitious goal of becoming a $5 trillion economy by 2025. Since 2014, the country has risen from 142 to 63 on the World Bank's Doing Business rankings and is now aspiring to break into the top 50. Yet, India's current regulatory architecture remains insufficient to cope with the demands of a fast-growing, largely informal and diverse enterprise environment. As is commonly known, rule-making in our country is disorganised with new rules added on the fly, without review of existing regulation. Our paper systematically looks at how India performs on the parameters of regulatory hygiene and captures the lack of quality of regulation. We find that public consultations are unmethodical and largely superficial, the potential impact of regulations on enterprises and consumers is rarely measured, language of laws continues to be complex and difficult to understand, parliamentary control over delegated legislation is weak and there is no provision to conduct a periodic fitness check of the rules on the books. The approach of one good law at a time is no longer sufficient. The system should be redesigned such that every rule on the law book meets its objectives in the least harmful manner. We argue that the ambitious goal of becoming a $5 trillion economy by 2025 and entering the ranks of top 50 on World Bank's Doing Business can only be realised once we move up on the governance reforms and institutionalise hygiene in our rulemaking process.

I. Introduction

India has set itself an ambitious goal of becoming a $5 trillion economy by 2025.[1] Since 2014, the country has risen from 142 to 63 on the World

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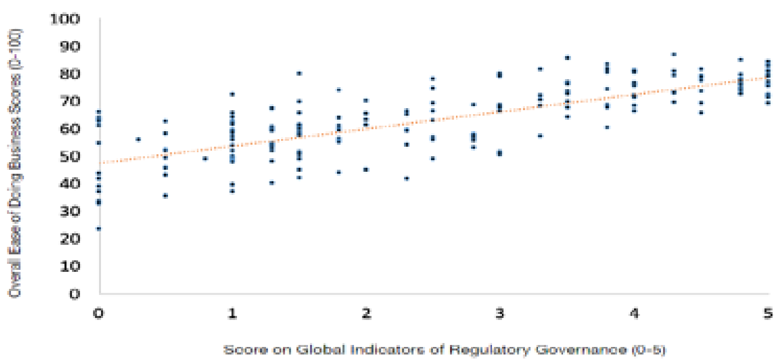
1 Govt. of India, Ministry of Finance, Department of Economic Affairs, Economic Survey 2018-19, Preface at pg. 9, (Vol. 1, July 2019) available at, https://www.indiabudget.gov.in/economicsurvey/doc/vol1chapter/epreface_vol1.pdf last seen on 31/12/2019.

Bank Doing Business rankings, and is now aspiring to break into the top 50. Yet, India's current regulatory architecture remains insufficient to cope with the demands of a fast-growing, largely informal and diverse enterprise environment. The national Ease of Doing Business initiative emphasises on business process restructuring over rule quality, to improve the business environment. It does not look deeply at whether substantive changes have come about or are needed in existing laws and regulations.[2]

The public domain is thick with discussion on different legislative proposals and many organisations are doing the valuable work of assisting the government to rewrite rules for each sector. We argue that while rewriting sector specific rules is necessary, it is not sufficient. Taking the route of one good rule at a time or a one-time exercise of repealing archaic laws will not help us enter the $5 trillion club. Instead, we must aim at redefining the rulemaking process to *consistently* write high-quality rules.

Figure 1: Economies that score high on Global Indicators of Regulatory Governance also score high on the World Bank's Doing Business Index



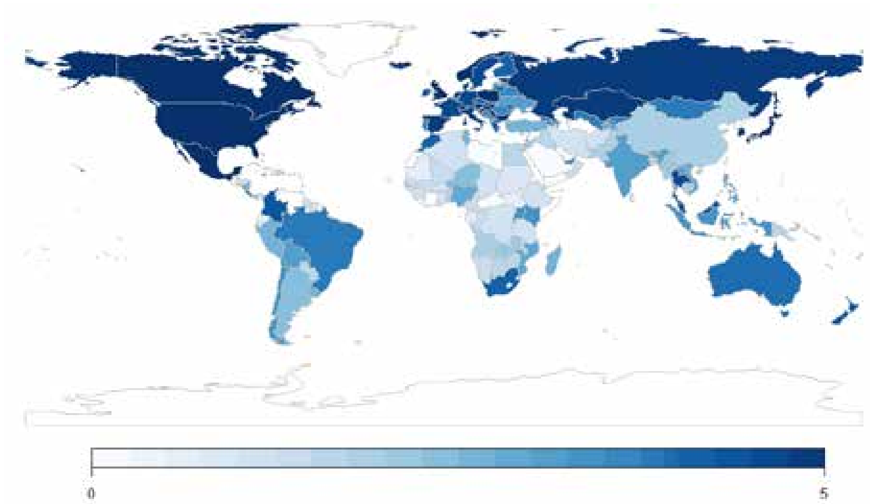
Source: Global Indicators of Regulatory Governance database (http://rulemaking.worldbank.org), World Bank; Doing Business database, World Bank (https://www.doingbusiness.org/en/rankings).

There is a marked correspondence between regulatory hygiene and business environment (Figure 1). Most countries with institutional frameworks that mandate rigorous measurement of regulatory costs and benefits, open public

[2] Centre for Civil Society, Doing Business in Delhi: A study of Initiated and Uninitiated Regulatory Reforms (2018), at pg. 5-8, available at https://www.ccsindia.org/sites/default/files/research/doing_business_in_delhi.pdf last seen on 31/12/2019.

consultations preceding enactment, and periodic fitness check of rules on the books feature in the top 50 of the Doing Business rankings.

Figure 2: The World and Regulatory Governance: Scores of countries on World Bank's Global Indicators of Regulatory Governance (0-5)



Source: Global Indicators of Regulatory Governance database (http://rulemaking.worldbank.org3)

India scored 3.5 out of 5 on the World Bank's Global Indicators of Regulatory Governance (GIRG)—43 out of the top 50 countries in the doing business rankings score substantially higher than India on GIRG (Figure 2). India's response to the fourteen questions on the existence, process and quality standards of ex-ante and ex-post assessment of regulatory impact is NO (Table 1). In contrast, New Zealand, which comes at the top of both Doing Business (rank #1) and the Economic Freedom rankings (rank #3), answers yes to almost all the questions on the list.

[3] World Bank, Global Indicators of Regulatory Governance data base available at http://rulemaking.worldbank.org last seen on 31/12/2019. This data was collected by World Bank from September 2017 to April 2018 and is regularly updated to capture changes and evolutions in practice.

Table 1: World Bank's Global Indicators for Regulatory Governance records how countries fare on 6 parameters. Below we lay out India's response to questions asked under 3 parameters where it fares poorly:

Regulatory Impact Assessment	Do ministries or regulatory agencies conduct an impact assessment of proposed (or not yet adopted) regulations?	No
	Are there criteria used for determining which proposed regulations are subjected to an impact assessment?	No
	Are there any specific regulatory impact assessment guidelines?	No
	Are impact assessments required by law?	No
	Are impact assessments made publicly available?	No
	How is this assessment distributed?	n/a
	When is this assessment distributed?	n/a
	Is there an obligation for regulators to consider alternatives to proposed regulation?	No
	Is there a specialised government body tasked with reviewing and monitoring regulatory impact assessments conducted by other individual agencies or government bodies?	No
	Please provide the name of this government body, and explain its functions	n/a

Public Consultation	Do ministries or regulatory agencies solicit comments on proposed (not yet adopted) regulations from the general public?	Yes, in some ministries/ regulatory agencies only
	How are the comments received?	On the website of the relevant ministry or regulator; through targeted outreach to stakeholders; through email
	Are received comments publicly accessible?	Yes, in some ministries/ regulatory agencies only
	Is the rulemaking body required by law to solicit these comments on proposed regulations?	No
	Is there a specialised government body or department tasked with soliciting and receiving these comments?	No
	Do ministries or regulatory agencies report on the results of the consultation on proposed regulations?	Yes, in some ministries/ regulatory agencies only
	How does the government report on the results of the consultation?	Prepares one consolidated response.
	Where does the government report on the results of the consultation?	On the website of the relevant ministry or regulator.
	Is reporting on the results of the consultation required by law?	No

Ex-post Review	Do ministries or regulatory agencies conduct ex-post reviews?	No
	Are there any criteria for which regulations are subject to ex-post reviews?	No
	What specific approaches are used by your government?	n/a
	Are ex-post reviews required by law?	No

The process through which rules are drafted and enacted and the legal authorisation that rules provide to state action have a bearing on enterprise and every-day living.[4] High quality rules thereby necessitate the establishment of hygiene checks in the rule-making process.

This paper documents the poor hygiene of India's rule making process to uncover the gaps and shed light on the areas of improvement.

II. How does India fare on Regulatory Hygiene?

Rule-making in India is often disorganised with new rules added on the fly, without review of existing regulation, transparent consultations, or due consideration for costs and benefits, compliance burden, or regulatory coherence. Regulation, in India, takes different forms: ordinances; statutes by the parliament or state legislatures; rules, circulars, general orders, guidelines, schemes and press-releases by different executive agencies including independent regulators; and decisions/orders by the courts.[5] Take the example of School education: In Delhi, elementary education is governed by the state-level Delhi School Education Act & Rules, 1973 and the central Right of Children to Free and Compulsory Education (RTE) Act in addition to over 2,000 pages of executive orders, rules and guidelines.[6]

Below, we look closely and systematically at how India performs on parameters of regulatory hygiene. These include: regulatory impact assessment, public consultations, language of drafting laws, ex-post reviews and control over delegated legislation. We have not covered parameters where India's performance meets global standards such as on ensuring public access to laws and regulations.

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4 Waldron Jeremy, The Rule of Law, The Stanford Encyclopedia of Philosophy Archive, Edward N. Zalta (22 June, 2016) available at https://plato.stanford.edu/archives/fall2016/entries/rule-of-law/ last seen on 31/12/2019.

5 Rulemaking power in India is distributed between the legislature, judiciary, and executive, and between the centre and states respectively.

6 Dixit S.N. and Kuldeep Singh Yadav, Dixit's School Manual(7th Edn., 2015).

III. Regulatory impact assessment: Missing mechanism despite several committee recommendations

Regulatory impact assessment (RIA) is 'a systemic approach to critically assess the positive and negative effects of proposed and existing regulations and non-regulatory alternatives',[7] applied before a law is drafted and passed. An RIA identifies the problem that requires government action, defines regulatory objectives, examines alternative approaches (including non-legislative alternatives), and assesses the cost and benefit on the economy, environment and society.

According to GIRG, 86 out of 186 countries globally conduct complete or partial RIAs. While the scope and method of RIAs vary significantly, most countries have a criterion to determine to identify regulations for which RIA must be conducted. Institutionally, a majority of countries (54 out of 86) have a special body for reviewing and commenting on the quality of impact assessment.[8]

Status check of India's progress: Government of India and state governments neither map nor measure the potential impact of regulations under consideration on entrepreneurs, enterprises or consumers. While countries like the United States, United Kingdom and Malaysia mandate RIAs for all proposed laws and have specialised government bodies tasked with monitoring these, India has not instituted any provisions to conduct them. India's response to all 10 questions posed by GIRG on the existence, process and quality standards of ex-ante RIAs is 'NO'. In the absence of RIA practices, the government relies on anecdotes or special interest lobbying, often resulting in reactive rather than responsive regulatory responses.

Typical case: The Narcotic Drugs and Psychotropic Substances Act has been amended thrice since its enactment in 1985—in 1989, 2001 and 2014. A reading of parliamentary debate surrounding the amendments shows that the members argued for harsh punishment, but all without presentation of data on whether the punishments have been successful in deterring drug users or traffickers. In response to the question raised in 2017, in the Lok Sabha, the Minister of Home Affairs reported having no data on the scale and spread of drug users.[9] In the absence of evidence on either side of the debate, members rely on opinions and stories to make a case. What is the scale of the problem? What are the causes? What is the theory of change and what are the assumptions that guide it? These are some of the questions that the government must be pushed to answer before introducing new statues or amendments to existing ones.

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7 OECD, Regulatory Impact Analysis, available at https://www.oecd.org/regreform/regulatory-policy/ria.htm last seen on 31/12/2019.

8 World Bank, Global Indicators of Regulatory Governance, available at http://rulemaking.worldbank.org last seen on 31/12/2019.

9 Lok Sabha Website, available at https://loksabha.nic.in/ last seen on 16/8/2019.

Several committees have echoed this need for institutionalising RIA (Table 2). Despite the multiple recommendations and an existing policy on pre-legislative impact assessment and consultation,[10] government agencies do not conduct RIAs.[11]

Table 2: Committee recommendations on introducing Impact Assessment

2011 →	Planning Commission Report of the Working Group on Business Regulatory Framework: 'It is recommended that Regulatory Impact Analysis (RIA) has to be adopted for improving the quality of business regulatory governance in India.'
2013 →	Committee for Reforming the Regulatory Environment for Doing Business in India Regulatory impact assessment of every proposed regulation should precede the public consultation process.
2013 →	Financial Sector Legislative Reforms Commission 'An analysis of the costs and benefits of the proposed regulation... is required because every regulatory intervention imposes certain costs on regulated entities and the system as a whole.'
2015 →	Expert Committee on Prior Permissions and Regulatory Mechanism 'There is a need for a standing institutional mechanism within government for an Independent Regulatory Impact Assessment on an ongoing basis...'
2015 →	Tax Administration and Reforms Commission 'Administrative decisions and tax policy making are both based on nil analysis by international standards. No "impact assessment" is carried out before introducing major legislative changes.'

IV. Pre-legislative public consultation: Superficial and unmethodical in the absence of a mandate

Engaging citizens in the rulemaking process improves the quality by accounting for experiences of regulated entities in the rules.[12] Inclusive rulemak-

[10] Based on the decision taken in the meeting of the Cabinet of Secretaries (Cos), held on 10 January, 2014 (under the chairmanship of the Cabinet Secretary), available at http://legislative.gov.in/sites/default/files/plcp.pdf last seen on 31/12/2019.

[11] Institutionalising Regulatory Impact Assessment in India, at pg. 7 available at https://cuts-ccier.org/pdf/BP-Institutionalising_Regulatory_Impact_Assessment_in_India.pdf (2018) last seen on 31/12/2019.

[12] Delia Rodrigo and Pedro Andres Amo, OECD, Background document on Public Consultation, available at https://www.oecd.org/mena/governance/36785341.pdf last accessed (16 August, 2019), pg. 1-2.

ing also improves compliance with rules[13] and is positively correlated with economic growth.[14]

Consultative laws are more likely to be: 1) efficient and effective, as obstacles to the laws or implementation gaps are noted and resolved at an early stage; 2) practical, as they benefit from the lived experiences of those affected by it; and 3) accepted by the public, as conflicts are negotiated and reflect the values and priorities of the public.[15]

Status check of India's progress: The nine questions raised by GIRG on public consultations reveal its various stages: putting out the draft regulation in the public domain, soliciting comments on the draft regulation, making the comments publicly available, incorporating the comments in the draft, justifying the ones not incorporated and reporting on the results of the consultation. In India, without a mandate for public consultation, the practice of soliciting comments and reporting on the results of the consultation remains unmethodical and superficial.[16]

While India publishes proposed central regulations on a unified website[17], only select ministries solicit comments from the general public and report on the results of consultation. It is not binding on the government to make the comments received by the drafting body public or report on how the comments are integrated into the revised drafts.[18]

The Ministry of Law and Justice issued a circular in January 2014[19] necessitating all departments and ministries put out draft legislation along with the rationale for it in public for at least 30 days and take steps to ensure that it reaches a wider public. The order also asked ministries to submit financial implications and impact assessment of the proposed legislation. This pre-legislative consultation policy, however, allows ministries to opt-out if they think the exercise is not 'feasible or desirable'. Even where independent regulators show some fidelity

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13 *Id*. at pg. 1.

14 World Bank Group, Global Indicators of Regulatory Governance: Trends in participatory rulemaking, available at https://bit.ly/2RYjQ15, pg. 5 last accessed (16 August, 2019).

15 Dipika Jain, Law-Making by and for the People: A Case for Pre-legislative Processes in India, *Statute Law Review*, hmz005, https://doi.org/10.1093/slr/hmz005.

16 Ministry of Corporate Affairs, GOI, Report of the committee for Reforming e Regulatory Environment for Doing Business in India, available at https://www.mca.gov.in/Ministry/annual_reports/DamodaranCommitteeReport.pdf (2018).

17 Lok Sabha website, Government of India, available at https://loksabha.nic.in/ last accessed (16 August, 2019).

18 https://bit.ly/36FadIQ (pg. 52-53).

19 Based on the decision taken in the meeting of the Cabinet of Secretaries (Cos), held on 10 January, 2014 (under the chairmanship of the Cabinet Secretary), available at http://legislative.gov.in/sites/default/files/plcp.pdf.

to the process, there is a lack of consistency in the comments window.[20] Thus, the government and its agencies are free to choose if consultations are required, the platform for consultations and whether the draft is to be revised based on public feedback.

Typical case 1: Several important laws or amendments in the 16th Lok Sabha alone were passed without any public consultation. The Lokpal and Lokayuktas (Amendment) Bill, 2016 was introduced and passed by Parliament in less than a day. The Amendment diluted the original intent of the Lokpal Act by removing the statutory condition on public servants to disclose the assets of their spouses and children. Similarly, the Aadhar and other Laws (Amendment) Bill, 2018 was introduced in the Parliament without any prior consultation with stakeholders.

Typical case 2: In May 2017, the government invited objections to the Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules 2017—that prohibited the sale of cattle for slaughter—for 30 days from 'all persons likely to be affected'. Despite inviting applications, the Bill once passed received widespread disapproval from different stakeholder groups including farmers, slaughterhouses, and leather businesses. Finally, the rules were replaced with Prevention of Cruelty to Animals in Animal Markets Rules, 2018. While the government claimed to have received comments from 13 representations and having examined and incorporated them, there is no information on who sent in comments and how these were incorporated, if at all. Several other laws such as National Food Security Bill 2013, Personal Data Protection Bill 2018, Right of Persons with Disabilities (RPWD) Act 2016 have been criticised for holding consultations but not incorporating the feedback (or giving a rationale for not incorporating).

V. Language of drafting laws: Complex and inaccessible to the majority

The process of drafting laws is influenced by the sentence length, structure and choice of words which contribute to increasing or decreasing the complexity of such laws. Intelligible rules increase accessibility and lay the basis for successful enforcement. On the contrary, poorly drafted laws often generate conflicts and lead to varied judicial interpretation.

The Administrative Conference of the United States (ACUS) finds that plain language advances two purposes: clearly communicating the requirement rules to the intended audience, and clearly indicating the reasons behind imposing a particular rule. While the former will primarily benefit the regulated parties,

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[20] Richard M. Rossow, Regulatory transparency and Predictability, available at https://www.csis.org/analysis/next-economic-hurdle-regulatory-transparency-and-predictability last accessed (28th September, 2016).

the latter is likely to facilitate judicial review. The study reveals several benefits of writing in plain language: increased public interest and participation in rule-making, increased compliance and less costly enforcement, strengthened rule of law and better protection of individual rights.[21] Another study that collates projects and surveys on plain rule-writing in different parts of the world, highlights that a coherent and concise rule is likely to reduce the rise of middlemen and compliance costs by communicating effectively with those it regulates.[22]

Some countries, institute procedural checks within the rule making process to ensure that executive agencies adopt the principles of plain language in rule-writing. In the United States, for instance, the Plain Language Writing Act, 2010 mandates federal executive agencies to draft all public facing documents in plain language.[23] Similarly, in Sweden a specialised body is tasked with facilitating the plain language project in all state agencies.[24] Introducing laws, forming specialised bodies and clearly laying out principles of plain English has been instrumental in placing checks to avoid complicated laws.

Status check of India's progress: India has remained untouched by the plain English movement that has been initiated in several other parts of the world.[25] Apart from a few instances such as the Financial Sector Legislative Reform Commission (FSLRC)[26] that adopted 'plain and simple' technique of drafting Indian Financial Code, most laws remain difficult to understand and out of reach for a majority of the population.

Typical case: A study that selected a corpus of 300 sentences from 11 Indian Acts through systematic random sampling finds that the average sentence length is 71 words with the longest sentence having 404 words.[27] Another study that reviewed nine statues impacting vulnerable groups, found Indian laws to be

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21 Administrative conference of the United States, Plain language in regulatory drafting, available at last seen on 16/8/2019.

22 Joseph Kimble, Writing for Dollars, Writing to Please, available at http://www.editor-software.com/Downloads/Kimble_Writing_for_Dollars_plain_English.pdf last seen on 31/12/2019.

23 Blake Emerson, Using Plain Language to Draft Regulation, (6th March, 2018), https://www.theregreview.org/2018/03/06/emerson-plain-language-draft-regulations/ last seen on 31/12/2019.

24 Plainlanguage.gov, Plain Language in Sweden, the Results after 30 Years, https://www.plainlanguage.gov/resources/articles/plain-language-in-sweden/, last seen on 31/12/2019.

25 Bibek Debroy and Aparajita Gupta, Old is Not Always Gold: A Case Study on Repealing Statutes, at pg. 3, available at https://niti.gov.in/sites/default/files/2019-07/SOL2.pdf, last seen on 31/12/2019.

26 Report of the Financial Sector Legislative Reforms Commission, Analysis and Recommendations, (Vol. 1, March 2013), available at https://dea.gov.in/sites/default/files/fslrc_report_vol1_1.pdf last seen on 31/12/2019.

27 Jaya Verma, Legal english used in indian law system: A study of syntactic complexity in indian acts, International Journal of Communication, Languages & Literature, (Vol. 1, Issue 1, October-December, 2015) available at https://arseam.com/sites/default/files/published-papers/Paper-7%20%20Issue-1%20full%20paper%2031-57%20%20page%20Oct-Dec-2015%20CLL%20%20%20Dr.%20Jaya%20Verma.pdf, International Journal of Communication, Languages & Literature, (Vol. 1, Issue 1, October-December, 2015) at pg. 31-57.

heavy in legal jargon and use of archaic words such as notwithstanding, herewith, and hereinabove among others.[28] The study also reported other infirmities such as verbose sentences, long marginal notes, and lack of topical organisation.

Complex laws not only present a problem for the regulated entities, but also obstruct any enquiry into the systemic implications of a proposed rule. Opaque bureaucratic language may give rise to middlemen, and increase the expenses borne by small companies to understand and comply with regulations.

VI. Ex-post review: No systematic process for fitness check of rules on the books

An ex-post review is an exercise to manage the stock of regulation and ensure that any rule-set, after enactment, remains valid, cost-effective, efficient and fit for purpose. It assesses if objectives are being met, if there are any side effects of the regulation on business, community or environment and if better alternatives exist.

Status check of India's progress: The GIRG asks four questions on post-legislative reviews, and India's response to all is 'NO'. India has currently over 850 Acts[29] at the central level alone. Many of these laws are redundant or archaic. For example, under the Sarais Act (1867), a 'sarai' has to offer passers-by free drinks of water.[30]

Over the last five years, the government has repealed 1,428 central Acts. There is no clarity of similar repeal efforts in the states. While cleaning regulatory pile-up is necessary, it is a one-time exercise. Unless we put in measures to ensure that every Act is reviewed at a scheduled interval, we will be faced with ad-hoc cleaning exercises every few years. Only with scheduled ex-post reviewed can we gauge the intended and unintended consequences of regulation. Without these there is no learning and further government action is ill-informed.

Typical case: Consider the heap of labour laws in India: there are over 52 central labour laws and 200 state enacted laws and amendments.[31] Former Niti Aayog Chairman, Arvind Panagariya, captured the complexity of this: "when you

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28 Niharika Bapna, Plain Language Drafting: A Study of the Laws of India (2009–17), Statute Law Review (15 November, 2018) available at https://doi.org/10.1093/slr/hmy022 last seen on 31/12/2019.

29 Available on the Legislative Department website, Government of India, available at http://legislative.gov.in/year-of-enactment, last seen on 31/12/2019.

30 Centre for Civil Society, The 100 Laws Project: Compendium of laws to be repealed, at pg. 7, available at https://ccs.in/sites/default/files/100laws.pdf last seen on 31/12/2019.

31 Rohini Singh, Labour laws in India—A guide to Federal, State and Industry Specific Regulations (December 26, 2018) available at https://www.india-briefing.com/news/labor-laws-india-guide-federal-state-industry-specific-regulations-18133.html/last seen on 31/12/2019.

go from six workers to seven in a firm, the Trade Unions Act kicks in. When you go from nine to ten, the Factories Act kicks in. And when you go from 19 to 20, something else kicks in, as happens again when you go from 49 to 50 and 99 to 100. The biggest killer is the Industrial Disputes Act, which says that if you are a manufacturing firm with 100 workers or more, you cannot dismiss any of them under any circumstances unless you get prior approval from government. This is rarely given and it applies even if you go bankrupt, in which case you still have to pay your workers."[32] The Wage Code Bill, introduced in the Parliament Monsoon Session 2019, is an effort to reduce this complexity. It clubs four different labour laws, two dating back to 1936 and 1948. However, the Code does not consolidate all relevant laws. For example, the Code does not give direction on how the Working Journalist (Fixation of Rates of Wages) Act, 1958, or other laws that do not directly concern wages but have provisions relating to them, are to be implemented once the Wage Code goes live.

VII. Oversight on subordinate legislation: Weak supervision and scrutiny by the Parliament

Most central and state acts subordinate further rulemaking to the executive body. The sub-set of rules, bye-laws, orders, and notifications issued by the different levels of government, drawing their powers from the primary legislation, is called subordinate regulations. For example, the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014 delegates the power to make rules for constitution of the local governing body to the state government. The Competition Act, 2002, on the other hand, delegates the regulatory responsibilities to a Commission governed by the rules made by Central government.

Status check of India's progress: Delegated legislation made by the executive body, be it state or central government, ought not to exceed the scope of the parent legislation. While judicial scrutiny and public consultation ensure this fidelity, parliamentary reviews, at the union level, provide an additional check.[33] The Supreme Court of India has argued that the parliament maintains 'strict vigilance and control'[34] over delegated legislation and thus the court rarely declares subordinate legislation invalid. Research, however, reveals that parliamentary control of delegated legislation is weak.[35]

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32 Prasanna Mohanty, 5 contentious issues holding up India's labour law reforms, (July 11, 2019), available at https://www.businesstoday.in/current/economy-politics/labour-law-reforms-india-contentious-issues-lok-sabha-trade-unions/story/363160.html, last seen on 31/12/2019.

33 PRS, Parliamentary Scrutiny of Executive Rule Making, at pg. 1, available at http://prsindia.org/sites/default/files/parliament_or_policy_pdfs/1370586704_Parliamentary%20Scrutiny%20of%20Executive%20Rule%20Making.pdf, last seen on 31/12/2019.

34 *Lohia Machines Ltd.* v. *Union of India*, 1986 SCC OnLine All 877 : (1987) 28 ELT 234.

35 *Mehra, Ajay K., The Indian Parliament and Democratic Transformation*, (Taylor & Francis, 2017) available at https://bit.ly/2ExMEWF last seen on 31/12/2019.

Typical case: One of the ways in which the parliament controls legislation delegated to the central government is through the Lok Sabha's Committees of Subordinate Legislation and its counterpart in the Rajya Sabha. Between 2008 and 2012, 6,985 legislations were tabled before the Parliament but only 1.4% were scrutinised by the Committees of either house of the Parliament.

The executive body is generally allocated a period of six months to frame the rules. In case of delays in framing the rules, the body is required to append a document with reasons for the delay. Between 2010-12, 1,530 legislations were tabled, of which 32% were delayed. Of these, 82% did not append delay statements. In the case of Madras High Court (Establishment of a Permanent Bench) Order, 2004, rules were tabled in December 2010, a delay of over five years, with no justification.[36]

The effect of weak supervision over subordinate legislation is a dilution of the doctrine of separation of powers. Delegated legislation has the force of the law and if made without scrutiny, can cause harm.

VIII. Conclusion

The year 1991 marked India's transition to a market economy with fewer trade barriers, increased openness to competition, and a restructured role of the government.[37] In the decade following this shift, India has attempted to rewrite rules from the pre-1991 era to drive the expansion of market forces.

Unfortunately, the challenges facing the India of 2019 are uncomfortably similar to the India of 1991. Even in industries with specialised regulators such as SEBI and TRAI, we continue to be marred by price controls, bans, high regulatory burden, excessive power, and arbitrary decision making.[38] While India's aspiration to enter the top 50 on the Doing Business report triggered several reforms, many were superficial.[39] Substantive reforms in the rulemaking process continue to be side-lined in favour of gaming the system by making minor tweaks.

Budget 2019 highlighted a vision of "India of 2030" where the government is proactive, responsible and perceived as friendly by the people. Our paper documents the gaps in India's rulemaking process. Without addressing these gaps, we

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36 *Ibid*.

37 Needed dismantling of data 'Licence-Permit Raj' to boost research and innovation in India, Current Science, pg. 1-2 (Vol. 105, Issues 9, 10) November, 2013 available at https://www.currentscience.ac.in/Volumes/105/09/1207.pdf last seen on 31/12/2019.

38 Shubho Roy, Ajay Shah, B.N. Srikrishna, Somasekhar Sundaresan, Building State capacity for regulation in India, at pg. 6-9, available at https://www.nipfp.org.in/media/medialibrary/2018/08/WP_237_2018_ociIwuT.pdf last seen on 31/12/2019.

39 Centre for Civil Society, Doing Business in Delhi: A study of Initiated and Uninitiated Regulatory Reforms (2018), at pg. 5-8, available at https://www.ccsindia.org/sites/default/files/research/doing_business_in_delhi.pdf last seen on 31/12/2019.

cannot realise the vision of a responsible government. Several parliamentary committees have also advanced similar suggestions for regulatory reform. These are either adopted superficially or wholly ignored.

The Ministry of Corporate Affairs in 2012 constituted the Damodaran Committee[40] to reform the regulatory environment. Noting the heavy burden of archaic and conflicting laws weighing down enterprises in India, the committee recommended an overhaul of the rulemaking process and suggested ways to clear the past 'stock' of laws. The Committee's recommendations included:

1. Review of all regulations that impact the ease of doing business,
2. A two-step public consultation process on all proposed regulations,
3. Setting up a regulatory review committee within each body that writes regulation to weed out irrelevant laws, and
4. Ex-ante and ex-post regulatory impact assessment of regulations.

Following this, in 2014, the Ministry of Law and Justice introduced the pre-legislative consultation policy.[41] It directed governments to publish the essential elements of legislation in the public domain along with impact assessment of the proposed legislation on environment, rights and livelihoods of people. However, just as most regulations do not consider state capacity to enforce, the policy directive also suffers the same fate—it does not evaluate whether the departments have the resources to conduct impact assessment. Further, it does not mandate the departments to publicly consult or conduct an RIA leaving it up to their good nature and will to adopt these practices. Not surprisingly, the directive has met with little success.

In a first for India, the Department of Industrial Policy & Promotion in February 2018[42] convened a Better Regulation Advisory Group to assess the regulatory burden and conduct impact assessment for selected sectors. The group was to report its findings within two weeks. At the time of writing this paper, the findings were not published.

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[40] Ministry of Corporate Affairs, GOI, Report of the committee for Reforming e Regulatory Environment for Doing Business in India, available at https://www.mca.gov.in/Ministry/annual_reports/DamodaranCommitteeReport.pdf (2018).

[41] Decisions taken in the meeting of the Committee of Secretaries (CoS) held on 10th January, 2014 under the Chairmanship of Cabinet Secretary on the Pre-legislative Consultation Policy (PLCP) (including principal and subordinate legislation, available at http://legislative.gov.in/sites/default/files/plcp.pdf last seen on 31/12/2019.

[42] Better Regulatory Advisory Group Convened, available at https://pib.gov.in/PressReleasePage.aspx?PRID=1519359 last seen on 31/12/2019.

While any movement in the direction of "better regulation" is welcome, we need more than an advisory committee. We need to change the rules of the game and the incentives of the players forever. Research points out that developing high quality institutions precedes economic growth and is critical in creating an enabling environment for private enterprises.[43] Our aspiration to enter the ranks of top 50 on World Bank's Doing Business index will only come once we move up on the governance reforms—that is, institutionalise ex ante and ex-post impact assessment, mandate methodical public consultations, introduce checks for drafting laws in plain language and improve parliamentary scrutiny of subordinate legislation.

[43] Hossein Jalilian, Colin Kirkpatrick, David Parker, THE IMPACT OF REGULATION ON ECONOMIC GROWTH IN DEVELOPING COUNTRIES: A CROSS-COUNTRY ANALYSIS, available at https://dspace.lib.cranfield.ac.uk/bitstream/handle/1826/1455/Impact%20of%20regulation-Economic%20growth-March06.pdf?sequence=1&isAllowed=y (March 20, 2006).