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The Faults in India's Law-Making Process

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A scorching legislative pace has been hailed by the union government as a sign of firm action. But favouring speed over process affects the quality of the laws that are inserted into the statute books and dilutes their impact on the ground.

Halfway through its five-year term, the current Lok Sabha has passed more than 100 laws. To put that number in context, its predecessor, the 16th Lok Sabha, had during its entire term passed 133 laws, which itself was 15% more than the number passed by the 15th Lok Sabha. While this scorching legislative pace has been hailed by the union government as a sign of firm action, favouring speed over process affects the quality of the laws that are inserted into the statute books and dilutes their impact on the ground.

Laws can be powerful instruments of change. But badly made ones do not work as intended and well-intentioned ones are ineffective. A law once made often stays on the statute books for a long time since changing a law takes time and effort, even when the legislation is ineffective or counterproductive[1].Therefore, each law passed by Parliament should be as free from defects as possible

Three examples illustrate this problem of union government legislation.

The 1979 Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act for the welfare of migrant labour has been a failure, most recently evidenced by images of migrant labourers trying to get back to their homes at the onset of the Covid-19 pandemic in 2020.

It took *two decades* for the union government to pass a more stringent law than the ineffective 1993 act to end manual cleaning of human excreta from insanitary latrines and sewers; even after repeatedly being prodded by petitions and by the Supreme Court.

In 2012, the union government amended the income tax law, with retrospective effect, to tax profits made when assets located in India changed hands abroad through a transfer of shares of a foreign company. Tax authorities subsequently demanded thousands of crores in unpaid tax from Vodafone and Cairn, two companies that had completed such transactions before 2012. Both firms took the government to international arbitration and won. (Cairn even moved foreign courts to seize Indian sovereign assets abroad to enforce the award.)

In last year's Monsoon Session, the government finally rolled back the 2012 enactment.

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The problem with poorly drafted laws was summed up last year by the chief justice of India, N.V. Ramana: "We see legislations with a lot of gaps, lot of ambiguities in making laws. There is no clarity in [the] laws. We don't know what [is] the purpose of the laws, which is creating [a] lot of litigation, inconvenient, and loss to the government as well as inconvenience to the public."

Strengthening procedures

For the last 70 years, we have not had an iron-clad law-making process. What exists by way of a process is either bent to accommodate the government's need for urgency or bypassed with political consensus.

What we need is a robust law-making process in which three broad principles make up the foundation:

1. Before bringing a bill to Parliament, the government should consult all stakeholders. It should put a draft out for public comments and use these inputs for strengthening its proposal.

2. Every government bill that reaches the legislature should go through detailed scrutiny by a parliamentary subject committee. Only after that examination should legislators discuss and pass the bill.

3. After Parliament has approved a law, it should periodically assess its functioning. Such an evaluation would inform the legislature whether the law was working or required changes.

The first principle is exclusively in the hands of the government. The second is supposed to be the domain of the legislature, but the executive controls the legislative agenda and often pushes through laws. The third principle is not institutionalised and is split between the executive, legislature, and other constitutional bodies.

Consultations

In 2014, the central government formulated a pre-legislative consultation policy that ministries were expected to follow before submitting a legislative proposal to the union cabinet for approval. The policy specifies that a draft bill be placed in the public domain for 30 days for comments. The justification for its enactment, financial implications, and estimation of its impact should accompany the draft. The policy also prescribes that the ministry publishes the comments received on the draft on its website.

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The purpose behind this process is to push ministries to use public feedback and consultations to address stakeholder concerns and build a consensus before they bring a bill to Parliament for enactment. This would facilitate a smoother legislative journey and a stronger piece of legislation.

But the catch is that unlike in some other countries this pre-legislative consultation process is not binding on the ministries. As a result, the majority of legislative proposals bought before Parliament do not go through a consultative process. Researchers have pointed out that since pre-legislative consultation policy was introduced, "227 of the 301 bills introduced in Parliament have been presented without any prior consultation. Of the 74 placed in public domain for comment, at least 40 did not adhere to the 30-day deadline." Indeed, it was a welcome aberration when the labour ministry published a draft of the Social Security Code on its website and revised it based on comments and consultations with stakeholders before introducing the bill in Parliament.

Scrutiny

In practice, bills goes through varying levels of scrutiny in legislature. When a bill is introduced in a house of Parliament the presiding officer can refer it to the appropriate parliamentary committee which oversees the ministry piloting the bill. Very often though, the minister introducing the bill impresses upon the presiding officer to not refer it to committee. This could be contentious, as when in 2020 the three farm bills were not referred to a committee, leading to acrimonious scenes in Parliament and the disruption of sittings.

> MPs are not experts in every subject that comes up for debate. Mandatory scrutiny of proposed legislation by parliamentary committees is one way to solve this problem.

In 1993, when Parliament set up its departmentally related standing committees, Vice-President K.R. Narayanan maintained that “the main purpose, of course, is to ensure the accountability of Government to Parliament through more detailed consideration of measures in these committees. The purpose is not to weaken or criticize the administration but to strengthen it by investing in with more meaningful parliamentary support.” This is questioned by the executive, which sometimes views referring bills to committees as a ploy to delay its legislative agenda.

Examination by parliamentary committee is a way to solve a fundamental weakness in the way legislative work is conducted: that MPs are not experts in every subject area that comes up for debate. Mandatory scrutiny of proposed legislation by parliamentary committees is one way to solve this problem. For instance, South Africa's constitution requires pre-legislative scrutiny for certain kinds of laws. In England, the government issues consultation papers before publishing a draft bill. (Another solution is to let MPs hire research staff who can bring them up to speed on complex issues. In India, however, MPs do not have a budget for hiring a team of researchers.)

The rules of parliamentary functioning do not mandate a technical scrutiny of bills by a parliamentary committee. In the last Lok Sabha (2014-19), only 25% of the bills introduced were referred to committees, far fewer than the 71% and 60% examined by committees during 2009-14 and 2004-09, respectively.

Here are some examples of Constitution amendment bills from the last Lok Sabha that have had completely different trajectories. The first is the 2017 Goods and Services Tax amendment. A committee of Rajya Sabha MPs scrutinised the bill. In addition to hearing

expert testimony, the committee also travelled across the country to gather public feedback about the bill. It was then extensively debated in both houses before being passed. The entire exercise took about 18 months.

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In contrast, in 2019, it took just *two days* for the government to get Parliament to pass a constitutional amendment to enable 10% reservation in education and employment for economically weaker sections. Neither did the minister ask for the introduced bill to be examined by a parliamentary committee nor did the presiding officers of either house send it for scrutiny. The Lok Sabha passed it the same day that the government introduced it and the Rajya Sabha the very next day.

Similarly, while Parliament took five years to examine a bill to regulate surrogacy before passing it in the 2021 Winter Session, it took less than two hours in the same session to amend election laws to allow electoral roll data to be linked to Aadhaar. Every bill has technical nuances and should be carefully looked at by a parliamentary committee, more so if an amendment of the Constitution is involved. When laws are passed by simply debating them on the floor of the house, then it indicates that Parliament is shirking from its responsibility of closely scrutinising the legislation before approving them.

In the 2021 Winter Session, though, things looked up a little bit, when Parliament referred six bills to committee. These include a proposal for increasing the age of legal marriage for women to 21 from 18, an amendment to the country's biological diversity law, and one that deals with mediation. The committee process will allow MPs to hear testimony from experts, and stakeholders will get an opportunity to get their voices heard on legislation that the government champions.

Evaluation

This brings us to the last principle of making robust laws: the need for regular evaluation *after* Parliament has passed bills. Is the law functioning as intended, does its framework have gaps, or has it created unintended problems?

> In India, no one institution routinely looks at how legislation works on the ground. Usually, the concerned ministry appoints an expert committee to evaluate the entire or specific parts of a law.

Most developed countries have specialised mechanisms for reviewing laws. Australia and Canada have so-called sunset clauses in some legislation that bring a law to an end after a set number of years. This ensures a review if the government decides to push for enacting the legislation again. Some countries in Europe have review mechanisms baked into the law, that have to be done at regular intervals and in a specified manner.

In India, no one institution routinely looks at how legislation works on the ground. Usually, the concerned ministry appoints an expert committee to evaluate the entire or specific parts of a law. For example, the Insolvency and Bankruptcy Code has been regularly looked at by a committee appointed by the government. Their recommendations have led to amendments to the law.

Parliamentary committees sometimes undertake post-legislative scrutiny, but this examination is episodic. The Comptroller and Auditor General (CAG) occasionally conducts performance audits. For example, it initiated a performance audit of the implementation of the Food Security Act of 2013. It assessed the preparedness of different states on parameters like identification of beneficiaries, computerisation of operations, creating sufficient and scientific storage capacity and doorstep delivery of foodgrains to the fair price shops by the states.

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However, the volume of work that the CAG handles does not allow it to audit the working of every law. In the last decade, the institution audited fewer than five non-financial laws.

Another level of scrutiny is provided by the Law Commission of India, a body constituted by the government for three years with specific terms of reference. A former judge of the Supreme Court usually heads the commission, it also has academic and other experts as members. Their scrutiny is more focused on the legal aspects of laws. In the past, these commissions have reviewed the functioning

of laws and made recommendations for making them more effective. The government uses its reports for amending existing legislation or proposing new ones. But the Law Commission is currently not functional. The government has not appointed a new chairman and members, after the last commission's term ended in 2018.

An end to hasty laws

Twenty years ago, the National Commission to Review the Working of the Constitution, observed that "our legislative enactments betray clear marks of hasty drafting and absence of Parliament scrutiny from the point of view of both the implementers and the affected persons and groups."

What the commission said then is true even now. Both government and Parliament should introspect about our law-making process. Strengthening parliamentary scrutiny of legislation will require more resources at the hands of the MPs, for staff to assist them in studying proposed legislation, and a change in the legislative procedure that would make it mandatory for parliamentary committees to examine the bills.

Footnotes:

1 Many colonial era laws continue on the statute books since successive governments have not been able to replace them. For example, states across the country used the 120-year-old Epidemic Act to impose restrictions for preventing the spread of the Covid virus. The crime of sedition was included in the Indian Penal Code in 1870. Last year, Supreme Court Chief Justice Ramana questioned whether a law that was used to curb the freedom movement is still necessary after 75 years of independence.